

171 FERC ¶ 61,034
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

Calpine Corporation, Dynegy Inc., Eastern
Generation, LLC, Homer City Generation,
L.P., NRG Power Marketing LLC, GenOn
Energy Management, LLC, Carroll County
Energy LLC, C.P. Crane LLC, Essential
Power, LLC, Essential Power OPP, LLC,
Essential Power Rock Springs, LLC,
Lakewood Cogeneration, L.P., GDF SUEZ
Energy Marketing NA, Inc., Oregon Clean
Energy, LLC and Panda Power Generation
Infrastructure Fund, LLC

Docket Nos. EL16-49-001

v.

PJM Interconnection, L.L.C.

PJM Interconnection, L.L.C.
PJM Interconnection, L.L.C.

EL18-178-001
ER18-1314-002
(Consolidated)

ORDER ON REHEARING AND CLARIFICATION

(Issued April 16, 2020)

1. This order addresses requests for rehearing and clarification of the Commission's order issued in this proceeding on June 29, 2018, which (i) rejected proposed tariff revisions filed by PJM Interconnection, L.L.C. (PJM) pursuant to section 205 of the Federal Power Act (FPA);¹ (ii) granted in part, and denied in part, the complaint filed by Calpine Corporation and additional generation entities (collectively, Calpine) against

¹ 16 U.S.C. § 824d.

PJM; and (iii) instituted a proceeding under section 206 of the FPA² regarding PJM's Open Access Transmission Tariff (Tariff) Minimum Offer Price Rule (MOPR) and the MOPR's failure to address the price distorting impact of resources receiving out-of-market support in PJM's capacity market.³ PSEG Companies (PSEG),⁴ PJM, the Organization of PJM States, Inc. (OPSI), Old Dominion Electric Cooperative (ODEC), New Jersey Board of Public Utilities (New Jersey Board), Maryland Public Service Commission (Maryland Commission), Joint Consumer Advocates,⁵ PJM Industrial Customer Coalition (PJM-ICC), People of the State of Illinois (Illinois AG), Illinois Commerce Commission (Illinois Commission), FirstEnergy Service Company (FirstEnergy), Exelon Corporation (Exelon), Dominion Energy Services, Inc. (Dominion), Clean Energy Associations,⁶ Clean Energy Advocates,⁷ and American Public Power Association, American Municipal Power and the Public Power Association of New Jersey (collectively, Public Power Entities) filed requests for rehearing or clarification of the June 2018 Order. For the reasons discussed below, we deny the requests for rehearing, and grant the requests for clarification.⁸

² 16 U.S.C. § 824e (2018).

³ *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (June 2018 Order).

⁴ PSEG Companies include the Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC.

⁵ Joint Consumer Advocates consist of: Office of the People's Counsel for the District of Columbia, Citizens Utility Board, Maryland Office of People's Counsel, Kentucky Office of the Attorney General, and Office of Rate Intervention.

⁶ Clean Energy Associations consist of: Advanced Energy Economy, American Council on Renewable Energy, American Wind Energy Association, and Solar Energy Industries.

⁷ Clean Energy Advocates consist of: Earthjustice, Natural Resources Defense Council, Sierra Club, Sustainable FERC Project, and Environmental Defense Fund.

⁸ On April 16, 2020, Commissioner Bernard L. McNamee issued a memorandum to the file documenting his decision not to recuse himself from these dockets, based on memoranda dated April 13, 2020, December 13, 2019, October 11, 2019, January 28, 2019, and January 2, 2019, (and attachments thereto, including email communications dated June 17 and September 17, 2019) from the Designated Agency Ethics Official and Associate General Counsel for General and Administrative Law in the Office of General Counsel.

I. June 2018 Order

2. On March 21, 2016, Calpine filed a complaint in Docket No. EL16-49-000 (Calpine Complaint) asserting that PJM's MOPR is unjust and unreasonable because it does not address the impact of subsidized resources on the capacity market. Calpine proposed interim Tariff revisions for immediate implementation that would extend the MOPR to a limited set of existing resources and asked the Commission to direct PJM to conduct a stakeholder process to develop and submit a long-term solution.⁹ Subsequently, on April 9, 2018, PJM proposed revisions to the Tariff in Docket No. ER18-1314-000 (April 2018 Filing), aimed at addressing the price impacts of state out-of-market support for capacity resources. PJM proposed two mutually exclusive alternatives. The first, referred to as Capacity Repricing, involved a two-stage annual auction, with capacity commitments first determined in stage one of the auction and the clearing price set separately in stage two. The second, referred to as MOPR-Ex, would have extended PJM's MOPR to include both new and existing resources, subject to certain proposed exemptions.¹⁰

3. The June 2018 Order rejected PJM's Capacity Repricing proposal, finding that "it is unjust and unreasonable to separate the determination of price and quantity for the sole purpose of facilitating the market participation of resources that receive out-of-market support."¹¹ The Commission also rejected PJM's MOPR-Ex proposal as unjust and unreasonable and unduly discriminatory. The Commission found that PJM failed to provide a "valid reason for the disparity among resources" that receive out-of-market support through Renewable Portfolio Standards (RPS) programs, which were exempt from the MOPR-Ex proposal, and other state-sponsored resources, which were not.¹²

4. Next, although the Commission rejected PJM's April 2018 Filing, it found based on the record of that proceeding and also the Calpine Complaint proceeding that PJM's existing MOPR failed to protect the wholesale capacity market against price distortions from out-of-market support for uneconomic resources. The Commission stated that the Tariff "allows resources receiving out-of-market support to significantly affect capacity prices in a manner that will cause unjust and unreasonable and unduly discriminatory rates in PJM regardless of the intent motivating the support."¹³ The Commission further

⁹ June 2018 Order, 163 FERC ¶ 61,236 at P 3.

¹⁰ *Id.* P 4.

¹¹ *Id.* P 64.

¹² *Id.* P 100.

¹³ *Id.* P 156.

stated that out-of-market support by states has 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.”¹⁴ The Commission explained that out-of-market support permits new and existing resources to submit low or zero price offers into the capacity market, resulting in price distortions and cost shifts while retaining uneconomic resources.¹⁵

5. In the June 2018 Order, although the Commission found PJM’s Tariff unjust and unreasonable, the Commission stated that it could not make a final determination regarding a just and reasonable replacement rate based on the record presented. The Commission thus initiated a *sua sponte* FPA section 206¹⁶ paper hearing proceeding to allow parties to submit additional arguments and evidence regarding the replacement rate.¹⁷ The Commission posited that the replacement rate should expand the MOPR to cover out-of-market support for all new and existing resources, regardless of type, with few to no exemptions.¹⁸ The June 2018 Order also sought comment on the potential use of a resource-specific Fixed Resource Requirement (FRR) Alternative as a method of accommodating resources that receive out-of-market support while protecting the integrity of the PJM capacity market for competitive resources and load.¹⁹ The order on the paper hearing establishing the replacement rate was issued on December 19, 2019.²⁰

II. Requests for Rehearing and Clarification

6. On July 30, 2018, PSEG, OPSI, New Jersey Board, Maryland Commission, Illinois AG, Illinois Commission, Exelon, Clean Energy Associations, Clean Energy Advocates, and Public Power Entities submitted requests for rehearing. PJM, Dominion, and PJM-ICC submitted requests for rehearing and clarification. ODEC and FirstEnergy

¹⁴ *Id.*

¹⁵ *Id.* PP 150, 153-155.

¹⁶ 16 U.S.C. § 824e.

¹⁷ June 2018 Order, 163 FERC ¶ 61,236 at PP 8, 149, 157, 164-72.

¹⁸ *Id.* P 158.

¹⁹ *Id.* PP 160-61.

²⁰ *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) (December 2019 Order). Requests for rehearing and clarification of the December 2019 Order will be addressed in a separate order.

filed requests for clarification or, in the alternative, rehearing. Joint Consumer Advocates submitted a request for rehearing or, in the alternative, extension of time.

7. The requests for rehearing and clarification in this proceeding generally raise issues concerning the Commission's finding, pursuant to FPA section 206, that PJM's then-existing Tariff was unjust and unreasonable, including arguments that: (1) the June 2018 Order lacked sufficient evidentiary and economic support; (2) the Commission failed to justify its departure from Commission precedent; (3) the June 2018 Order exceeded the Commission's jurisdiction; (4) the June 2018 Order requires clarification as to its undue discrimination finding and scope of out-of-market support; (5) the June 2018 Order established an unreasonable hearing schedule, among other procedural arguments; and (6) the June 2018 Order outlined a replacement rate that has not been shown to be just and reasonable or otherwise requires clarification. Parties ask the Commission to reverse its section 206 finding and either retain the status quo²¹ or direct PJM to work with stakeholders on how to address state programs.²² As to PJM's April 2018 Filing, parties do not seek rehearing of the Commission's rejection of the April 2018 Filing, but rather raise concerns with the language the Commission used to reject Capacity Repricing,²³ as discussed further below.

A. Substantive Matters

1. Support for Section 206 Determination that PJM's Existing Tariff is Unjust and Unreasonable

a. Requests for Rehearing and Clarification

8. Parties argue that the Commission failed to meet its burden under section 206 of the FPA to demonstrate that PJM's then-existing Tariff was unjust and unreasonable because the June 2018 Order lacked sufficient evidentiary support.²⁴ Parties argue that

²¹ PSEG Rehearing Request at 4.

²² Dominion Rehearing and Clarification Request at 2; *see also* Public Power Entities Rehearing Request at 6.

²³ PJM Clarification and Rehearing Request at 8-9; Clean Energy Advocates Rehearing Request at 53; Illinois Rehearing Request at 17.

²⁴ Public Power Entities Rehearing Request at 6-15; PJM-ICC Rehearing and Clarification Request at 10-11; Clean Energy Associations Rehearing Request at 19; Clean Energy Advocates Rehearing Request at 21-22; OPSI Rehearing Request at 4-5; New Jersey Board Rehearing Request at 2-6; OPSI Rehearing Request at 307; Maryland Commission Rehearing Request at 4, 15-18; Exelon Rehearing Request at 12-13; Dominion Rehearing and Clarification Request at 6, 7-13; PJM-ICC Rehearing and

the Commission failed to show that the existing rate is “entirely outside of the zone of reasonableness” before imposing a new rate.²⁵ By contrast, PJM agrees with the Commission’s finding that Tariff changes are needed, which PJM asserts is “amply supported by the record.”²⁶

i. Scope of Section 206 Finding and Identity of State Programs Causing Impacts

9. Clean Energy Advocates, Clean Energy Associations, and Public Power Entities argue that by postponing the task of defining the scope of the Commission’s section 206 finding to a subsequent paper hearing proceeding, the Commission violated its FPA section 206 duty to order a replacement rate only *after* finding that the existing Tariff was unlawful.²⁷ Clean Energy Associations state that the fact that the Commission finds PJM’s existing MOPR unjust and unreasonable, but requests comment on the appropriate scope of out-of-market support to be mitigated, suggests that the Commission has not clearly identified a problem with the existing MOPR.²⁸ Clean Energy Advocates assert that the scope of the Commission’s authority to establish a replacement rate under section 206 of the FPA must be guided by the scope of the finding that the existing rate is unjust and unreasonable; i.e., the scope of the replacement rate should be tailored to the severity of the FPA violation.²⁹ By not conclusively finding which out-of-market mechanisms

Clarification Request at 2, 8, 10-16; PSEG Rehearing Request at 2, 4, 6-11; Clean Energy Associations Rehearing Request at 3, 11-20; Joint Consumer Advocates Rehearing and Extension Request at 2, 3, 7-14; Illinois AG Rehearing Request at 3, 4, 5-9; Clean Energy Advocates Rehearing Request at 2-4, 7-8, 19-23, 35-48; Illinois Commission Rehearing Request at 3, 6-11.

²⁵ Clean Energy Associations Rehearing Request at 14 (quoting *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 114 n.2 (D.C. Cir. 2017)); *see also* Joint Consumer Advocates Rehearing and Extension Request at 7.

²⁶ PJM Clarification and Rehearing Request at 3-4 (citing June 2018 Order, 163 FERC ¶ 61,236 at PP 5-6, 150-156).

²⁷ Clean Energy Advocates Rehearing Request at 19, 21-22.

²⁸ Clean Energy Associations Rehearing Request at 20; Public Power Entities Rehearing Request at 9.

²⁹ Clean Energy Advocates Rehearing Request at 22 (citing *Colo. Office of Consumer Counsel v. FERC*, 490 F.3d 954, 956 (D.C. Cir. 2007)).

render the Tariff unjust and unreasonable, Public Power Entities contend that the Commission did not meet its section 206 burden.³⁰

10. Parties similarly argue that the Commission failed to define or explain what constitutes a subsidy, what qualifies as “meaningful” out-of-market support or what state programs cause price suppression.³¹ PJM-ICC states that the Commission failed to draw the line separating subsidies that threaten the market from subsidies that do not, and suggests that it would be difficult to draw that line given that nearly all resources receive some kind of state, federal, or local support.³² Parties also claim that the Commission failed to explain how the state programs singled out in the June 2018 Order threaten the integrity of the market, while state support in other forms, such as rate-basing existing coal resources, does not.³³

ii. Price Suppression

11. Parties argue that the Commission failed to demonstrate that PJM’s existing MOPR is unjust and unreasonable because the Commission failed to cite evidence showing that state out-of-market support is causing price suppression.³⁴ Parties contend that the Commission did not quantify the impact of state subsidies on capacity markets, or the amount of out-of-market support that harms the market, alleging that the June 2018 Order contained no quantitative evidence linking state programs to auction clearing

³⁰ Public Power Entities Rehearing Request at 8-9.

³¹ Clean Energy Advocates Rehearing Request at 20 (stating that the Commission sought comment on defining terms); Clean Energy Associations Rehearing Request at 18-19; Dominion Rehearing and Clarification Request at 8-10.

³² PJM-ICC Rehearing and Clarification Request at 21.

³³ Clean Energy Advocates Rehearing Request at 43-45.

³⁴ New Jersey Board Rehearing Request at 4 n.17 (no evidence that New Jersey support for resources causes price suppression or that the Zero Emission Credit (ZEC) program resulted in suppressed prices); Illinois Commission Rehearing Request at 3, 6-8; Exelon Rehearing Request at 12; *see also* OPSI Rehearing Request at 5-6; Maryland Commission Rehearing Request at 15 (no data supporting conclusions that state subsidies undermine capacity market); Public Power Entities Rehearing Request at 13; Clean Energy Advocates Rehearing Request at 37, 46-48; Joint Consumer Advocates Rehearing and Extension Request at 7-9.

prices.³⁵ Exelon argues that the Commission has not demonstrated that out-of-market payments actually impact prices because the June 2018 Order did not explain what the Commission would consider a “significant” impact on prices or evidence showing the cumulative impact of state subsidies on capacity prices has increased.³⁶

12. Clean Energy Associations state that, while the Commission may rely on either theory or specific evidence to support a section 206 unjust and unreasonable finding, it must still have record evidence to support both, which they assert that the June 2018 Order does not.³⁷ Public Power Entities argue that the Commission may rely on economic theory but should only do so where empirical evidence is difficult to find, not here where the Commission should have been able to develop an empirical record of the relationship between out-of-market support and capacity auction results.³⁸ Similarly, parties contend that if state subsidies are causing price suppression, evidence should be available to substantiate it, especially since some state subsidies have long been in existence.³⁹

13. Some parties assert that potential price suppression caused by future subsidies does not render the current Tariff unjust and unreasonable.⁴⁰ Similarly, parties allege that, rather than actual data or proof demonstrating that current capacity prices are unjust

³⁵ Maryland Commission Rehearing Request at 18; Public Power Entities Rehearing Request at 11-14; Dominion Rehearing and Clarification Request at 8-10; Illinois Commission Rehearing Request at 8; Clean Energy Associations Rehearing Request at 11, 18-19 (citing June 2018 Order, 163 FERC ¶ 61,236 at P 149); PJM-ICC Rehearing and Clarification Request at 15 (the Commission failed to quantify or explain the “level [of out-of-market support] sufficient to significantly impact” the market (citing June 2018 Order, 163 FERC ¶ 61,236 at P 156)).

³⁶ Exelon Rehearing Request at 12.

³⁷ Clean Energy Associations Rehearing Request at 11 (citing *Nat’l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006)).

³⁸ Public Power Entities Rehearing Request at 13-14 (citing *Emera Me. v. FERC*, 854 F.3d 662, 671 (D.C. Cir. 2017); *see also* Dominion Rehearing Request at 8 (recognizing that the Commission may rely on theory but cannot divorce its decision-making from the facts).

³⁹ New Jersey Board Rehearing Request at 6; Clean Energy Advocates Rehearing Request at 41-43; Illinois Commission at 7; Illinois AG Rehearing Request at 8.

⁴⁰ PJM-ICC Rehearing and Clarification Request at 14.

and unreasonable, the June 2018 Order relies instead on speculation about future harm to the capacity market.⁴¹

14. Parties argue that the Commission's reliance on the affidavit submitted by PJM economist, Dr. Anthony Giacomoni, is not sufficient evidence to justify the Commission's findings in the June 2018 Order that all out-of-market support leads to below-cost offers⁴² or that state out-of-market support impacts clearing prices.⁴³ Dominion states the affidavit does not analyze whether, and if so how, market participants change their behavior in response to out-of-market payments.⁴⁴ According to Dominion, the affidavit also acknowledges that "[w]hether REC revenues make an individual project economic will depend on many factors," and that there are situations "where REC revenues may have little impact."⁴⁵ Similarly, Joint Consumer Advocates contend that any state subsidy or policy that impacts a large number of generation facilities in the market will necessarily have a rate impact, but that fact, in itself, does not mean that the resulting capacity market prices are unjust and unreasonable.⁴⁶ Because

⁴¹ Illinois Commission Rehearing Request at 7-9; PJM-ICC Rehearing and Clarification Request at 14 (the June 2018 Order "draws a series of sweeping conclusions that are not tied to current conditions in PJM's capacity market, not supported by footnote citations or record evidence, and thus not supported by substantial evidence"; Commission only relied on future projection of impact); Dominion Rehearing and Clarification Request at 8-10, 11-13 (no evidence of present day harm, only speculative future outcomes); PSEG Rehearing Request at 9-10.

⁴² Dominion Rehearing and Clarification Request at 10-11.

⁴³ Public Power Entities Rehearing Request at 13; Exelon Rehearing Request at 13 (also arguing that the affidavit does not address the integrity of the capacity market's price signals); New Jersey Board Rehearing Request at 5; Clean Energy Associations Rehearing Request at 12.

⁴⁴ Dominion Rehearing and Clarification Request at 10 (stating that Dr. Giacomoni prefaced his testimony that "my affidavit does not attempt to calculate whether each resource that receives a state subsidy would enter service, or would remain in service, without the subsidy").

⁴⁵ *Id.* at 11 (citing Giacomoni Aff. ¶ 22); *see also* Joint Consumer Advocates Rehearing and Extension Request at 10-11 (affidavit recognizes that not all resources depend on state subsidies to be economic, and the size of the subsidy does not itself dictate whether a resource would be otherwise economic) (citing Giacomoni Aff. ¶¶ 30, 36).

⁴⁶ Joint Consumer Advocates Rehearing and Extension Request at 9-10.

the affidavit from Dr. Giacomoni only analyzes the impacts from ZECs, Clean Energy Associations argue that the Commission should not have extrapolated this analysis to the impacts of a broader set of state policies.⁴⁷

iii. Contradictory Evidence

15. Parties argue that the June 2018 Order is not based on sufficient evidence because the record demonstrates that PJM's capacity market is currently robust and functioning well. Parties point out that PJM's capacity market has resulted in a capacity surplus, well in excess of the level required to ensure reliability, and that new entry has grown each year.⁴⁸ Specifically, parties state that approximately 40 GWs of natural gas-fired generation is under development in PJM, equivalent to nearly a quarter of the installed capacity in the region.⁴⁹ This demonstrates, parties contend, that the capacity auction continues to attract new entry,⁵⁰ which should push prices down.⁵¹

⁴⁷ Clean Energy Associations Rehearing Request at 12 (citing June 2018 Order, 163 FERC ¶ 61,236 at P 152).

⁴⁸ Maryland Commission Rehearing Request at 15-18 (stating that the 2018 auction achieved a reserve margin of 22%, above the target reserve margin of 15.8%); OPSI Rehearing Request at 6-7; Illinois Commission Rehearing Request at 10 (there is 66,000 MWs of capacity under development in PJM); Exelon Rehearing Request at 9; PSEG Rehearing Request at 4, 8-11; Dominion Rehearing and Clarification Request at 15; Clean Energy Associations Rehearing Request at 17, 35; Illinois AG Rehearing Request at 3, 4, 6-9; PJM-ICC Rehearing and Clarification Request at 11-13, 15-16; Clean Energy Associations Rehearing Request at 3, 14-18; New Jersey Board Rehearing Request at 4-5.

⁴⁹ PJM-ICC Rehearing and Clarification Request at 12; PSEG Rehearing Request at 2, 9; Exelon Rehearing Request at 10; Clean Energy Associations Rehearing Request at 17; Clean Energy Advocates Rehearing Request at 40; Illinois AG Rehearing Request at 8-9; Illinois Commission Rehearing Request at 10 (new entry shows that resources are able to cover their costs in the current market).

⁵⁰ Joint Consumer Rehearing and Extension Request at 8 (capacity market attracts new entry with 1,401 MW of new generation clearing the most recent auction); Exelon Rehearing Request at 10; OPSI Rehearing Request at 6-7 (citing Monitoring Analytics, LLC, *State of the Market Report for PJM-2013* (2014), *State of the Market Report for PJM-2017* (2017), *Quarterly State of the Market Report for PJM-2018* (2018)).

⁵¹ Illinois AG Rehearing Request at 9.

16. Likewise, parties argue that the Commission made no showing that state subsidies are resulting in prices that fail to incentivize an adequate supply of capacity resources, pointing to evidence that the capacity auction for the 2021/2022 delivery year cleared with a 22% reserve margin.⁵² Parties further note that the North American Electric Reliability Corp. (NERC) has determined that the current reserve margin is more than double what is needed,⁵³ the latest planning reserve margin for summer 2018 is 28.7%,⁵⁴ suggesting that PJM will not face a near-term shortfall, and that 165.1 GWs of unforced capacity cleared PJM's most recent auction.⁵⁵ Exelon contends that, because the Commission failed to show that there is a resource adequacy concern, the Commission cannot mandate MOPR reforms under the theory that prices are too low and investors have insufficient confidence in the market.⁵⁶ Similarly, PJM-ICC asserts that, if the

⁵² Public Power Entities Rehearing Request at 14-15; PJM-ICC Rehearing and Clarification Request at 11; Illinois Commission Rehearing Request at 10; PSEG Rehearing Request at 19; Joint Consumer Advocates Rehearing and Extension Request at 8 (citing PJM 2021/2022 RPM Base Residual Action Results at 1, <https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2021-2022/2021-2022-base-residual-auction-report.ashx>).

⁵³ PJM-ICC Rehearing and Clarification Request at 11-12 (citing North American Electric Reliability Corporation, *2018 Summer Reliability Assessment*, at 24, https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_SRA_05252018_Final.pdf); Dominion Rehearing and Clarification Request at 15; PSEG Rehearing Request at 2, 9.

⁵⁴ Clean Energy Associates Rehearing Request at 17 (citing PJM, *2017 PJM Reserve Requirement Study*, at 8 (Mar. 9, 2018), <https://www.pjm.com/-/media/committees-groups/committees/pc/20171012/20171012-item-03a-2017-pjm-reserve-requirement-study.ashx>); Clean Energy Advocates Rehearing Request at 39-40.

⁵⁵ Dominion Rehearing and Clarification Request at 15-16; *see also* Exelon Protest, Docket No. ER18-1314-000, at 33 (filed May 7, 2018).

⁵⁶ Exelon Rehearing Request at 14; *see also* Clean Energy Advocates Rehearing Request at 40-41 (recent informal Platts poll suggests that investors think PJM is the best place to earn a targeted rate of return on new generation).

June 2018 Order finds that the capacity market is already failing, that finding is contradicted by the record evidence demonstrating large reserve margins.⁵⁷

17. Parties also argue that, contrary to Calpine's complaint that capacity prices are low, the evidence demonstrates that auction clearing prices are high. Joint Consumer Advocates state that the clearing price for the 2021/2022 delivery year was \$140/MW-day, the third largest in the capacity auction's history, and up from the previous year's price of \$76.53/MW-day.⁵⁸ The Illinois AG similarly argues that the Commission did not address the fact that the clearing price for the Commonwealth Edison Locational Delivery Area (ComEd LDA) exceeded the rest of the PJM area's clearing price by as much as 100% for delivery years starting in 2019/2020, despite the Illinois ZEC program providing support for nuclear generators in the ComEd LDA.⁵⁹

iv. Effect of Subsidies on Price

18. Parties contend that the Commission failed to consider evidence indicating that state subsidies should not have a significant effect on capacity prices.⁶⁰ Specifically, Clean Energy Advocates argue that the Commission did not respond to arguments by the Institute for Policy Integrity that state RPS programs could result in either little to no change in prices or even result in price increases because renewable resources have limited participation in the capacity market, those that participate affect prices only when the "resource is marginal or would not have entered the market but for state support," and that state climate policies may actually result in higher capacity market prices because such policies may cause conventional generators, which are more frequently marginal, to offer higher as a result of decreased energy revenues due to competition from renewable resources.⁶¹ Parties further argue that renewable energy credits (RECs) are generally

⁵⁷ PJM-ICC Rehearing and Clarification Request at 15-16; *see also* PJM-ICC Rehearing and Clarification Request at 12-13 (claiming that PJM and the IMM have indicated that the capacity market is functioning properly); Joint Consumer Advocates Rehearing and Extension Request at 7.

⁵⁸ Joint Consumer Advocates Rehearing and Extension Request at 7-8.

⁵⁹ Illinois AG Rehearing Request at 7-8.

⁶⁰ Joint Consumer Advocates Rehearing and Extension Request at 11-12; Clean Energy Advocates Rehearing Request at 38-39, 41-46; Clean Energy Associations Rehearing Request at 13-16; Illinois AG Rehearing Request at 8.

⁶¹ Clean Energy Advocates Rehearing Request at 38; *see also* Illinois AG Rehearing Request at 8 (variable resources make up a limited contribution to the capacity market); Clean Energy Associations Rehearing Request at 14-16.

competitively procured, which drives down their price and results in efficient market outcomes.⁶²

19. Clean Energy Advocates also contend that the increase in state RPS targets, on which the Commission relied to support its finding that the existing Tariff is unjust and unreasonable, will not necessarily result in greater capacity market participation by state-supported resources because RPS targets may be met in other ways and/or be subject to state spending caps, and RPS resources may choose not to participate in the capacity market. Clean Energy Associations argue that, even if RPS resources do participate in the market, there is no evidence their participation in the capacity market is materially aided by state subsidies, required by a state program providing the subsidy, or aimed at influencing wholesale prices.⁶³ Parties also argue that not all RPS resources depend on state support.⁶⁴

20. In addition, Clean Energy Advocates and Clean Energy Associations assert that the Commission failed to address analysis showing that participation of subsidized resources is known well in advance of the capacity auction and that the market therefore generally adjusts to this participation without major impacts.⁶⁵ Joint Consumer Advocates argue that subsidies should not impact the clearing price, explaining that there has been substantial entry and exit in the PJM capacity market, as well as increasing offers at prices close to clearing prices, which indicates the supply curve is becoming generally more sloped over time. Joint Consumer Advocates assert that new entry generally offers at low prices regardless of whether such resources receive state policy support.⁶⁶

⁶² Clean Energy Associations Rehearing Request at 13; *see also* Clean Energy Advocates Rehearing Request at 45-46.

⁶³ Clean Energy Associations Rehearing Request at 13-15; *see also* Clean Energy Advocates Rehearing Request at 38, 45-47.

⁶⁴ Clean Energy Associations Rehearing Request at 13.

⁶⁵ *Id.* at 16 (citing evidence that capacity markets readily absorb subsidized resources without significant impact); *see also* Joint Consumer Advocates Rehearing and Extension Request at 11-12 (citing the Wilson Affidavit as contradictory evidence that subsidized resources impair market integrity and investor confidence).

⁶⁶ Joint Consumer Advocates Rehearing and Extension Request at 11-12; *see also* Clean Energy Advocates Rehearing Request at 25 (asserting that zero dollar offers are common and often enabled by factors beyond subsidies).

21. The Illinois AG argues that REC and RPS programs cannot reasonably be considered to be unduly suppressing capacity prices because they have been incorporated into the PJM capacity market since its inception. Similarly, Clean Energy Advocates state that the Commission failed to address evidence that government policies have long provided substantial support to certain types of capacity resources and argue there is no reason to believe that historic policy actions would have less impact on market prices than the Commission contends they do today.⁶⁷

v. Uncertainty

22. Some parties take issue with the June 2018 Order's statement that the price distortions caused by out-of-market payments "create significant uncertainty, which may further compromise the market, because investors cannot predict whether their capital will be competing against resources that are offering into the market based on actual costs or on state subsidies."⁶⁸ Several parties agree with Commissioner Glick's dissent⁶⁹ that the uncertainty created by state policies is not different or worse than other uncertainty attendant to the electricity industry.⁷⁰ Parties assert that the June 2018 Order and the changing market rules contribute more to investor uncertainty than resources receiving out-of-market support.⁷¹ In focusing on the need to avoid uncertainty with regard to whether resources are offering based on actual costs or subsidies, Public Power Entities argue that the Commission fails to account for the interest of investors in existing resources who may have relied on the current MOPR.⁷² Joint Consumer Advocates contend that the Commission should balance investor interests against those of consumers, such as how the proposed revisions may increase consumer costs, asserting

⁶⁷ Clean Energy Advocates Rehearing Request at 41-43.

⁶⁸ Dominion Rehearing and Clarification Request at 10 (quoting June 2018 Order, 163 FERC ¶ 61,236 at P 150).

⁶⁹ June 2018 Order, 163 FERC ¶ 61,236, Glick Dissent at 11-12.

⁷⁰ Exelon Rehearing Request at 13; PJM-ICC Rehearing and Clarification Request at 14; PSEG Rehearing Request at 10-11; Dominion Rehearing Request at 10.

⁷¹ PJM-ICC Rehearing and Clarification Request at 20-21, New Jersey Board Rehearing Request at 9; Joint Consumer Advocates Rehearing and Extension Request at 12-13.

⁷² Public Power Entities Rehearing Request at 21-23 (citing *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 102 (3rd Cir. 2014) (*NJBPU*) ("It is more than mildly disturbing" that FERC would endorse a state-mandate exemption "only to later pull the rug out from under those who were persuaded that the exemption was somehow real.")).

that the Commission did not attempt to consider costs of finding PJM's existing Tariff unjust and unreasonable.⁷³

b. Commission Determination

i. Scope of Section 206 Finding and Identity of State Programs Causing Impacts

23. We disagree that the Commission failed to meet its FPA section 206 burden to demonstrate that PJM's existing Tariff is unjust and unreasonable and therefore deny rehearing requests on this point. As an initial matter, the Commission did not err by first finding the Tariff unjust and unreasonable because the capacity market rules do not account for out-of-market support, and then instituting a paper hearing to determine the scope of out-of-market support to be mitigated. In the June 2018 Order, the Commission expressly found that PJM's existing Tariff is 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."⁷⁴ The June 2018 Order explained that the price distortions resulting from this out-of-market support "compromise the capacity market's integrity" and create investor uncertainty because "investors cannot predict whether their capital will be competing against resources that are offering into the market based on actual costs or on state subsidies."⁷⁵ Thus the Commission met its initial burden under FPA section 206. The fact that the Commission may need additional information to determine the exact scope of the replacement rate does not prevent the Commission from finding that the existing Tariff is unjust and unreasonable. Section 206 does not require that the Commission simultaneously find a tariff unjust and unreasonable and establish the replacement rate.⁷⁶ By the same token, the Commission need not know the exact parameters of the

⁷³ Joint Consumer Advocates at 13.

⁷⁴ June 2018 Order, 163 FERC ¶ 61,236 at P 150.

⁷⁵ *Id.*

⁷⁶ See, e.g., *Emera Me. v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017) (describing section 206 mandate as a "two-step procedure that requires FERC to make an explicit finding that the existing rate is unlawful before setting a new rate"); cf., e.g., *W. Res., Inc. v. FERC*, 9 F.3d 1568, 1579-80 (D.C. Cir. 1993) (applying the same reasoning under the Natural Gas Act); *Kern River Gas Transmission Co.*, 129 FERC ¶ 61,240 (2009) (finding rates unjust and unreasonable in earlier filing and determining the replacement rate, and effective date of the replacement rate when acting on the compliance filing), *aff'd sub nom. Aera Energy LLC v. FERC*, 789 F.3d 184, 191 (D.C. Cir. 2015).

replacement rate, or exactly how to fix the Tariff, prior to finding the Tariff unjust and unreasonable.⁷⁷

24. While parties assert that the Commission did not explain what constitutes meaningful out-of-market support or define or explain what types of out-of-market support cause price suppression, we disagree. The June 2018 Order points to evidence provided by Calpine and PJM that out-of-market support for resources other than natural gas-fired resources has increased and is projected to further increase in coming years.⁷⁸ Further, as discussed below, all out-of-market support gives resources the ability to suppress prices, and therefore we need not list every type of out-of-market support affecting the capacity market.⁷⁹ Further, with respect to arguments that the Commission failed to explain how the state programs identified in the June 2018 Order threaten the integrity of the market, while state support in other forms does not, we find that this argument is rendered moot by the December 2019 Order that established the scope of the replacement rate.

ii. Price Suppression

25. We reject arguments that the June 2018 Order is not based on substantial evidence and deny rehearing on that point. We find that the June 2018 Order is grounded on record evidence and economic theory, and the substantial evidence standard was met.⁸⁰

⁷⁷ See, e.g., *Indep. Energy Producers Ass'n v. Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,069, at P 38 (2006) (finding CAISO's must offer obligation no longer just and reasonable and establishing paper hearing procedures to determine just and reasonable replacement rate); *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079, at P 1 (2006) (finding that PJM's existing capacity construct is unjust and unreasonable, providing guidance on the establishment of a just and reasonable replacement, and establishing further procedures).

⁷⁸ June 2018 Order, 163 FERC ¶ 61,236 at PP 150-152.

⁷⁹ See *infra* P 27 & nn.85-88 (listing authorities); see also PJM, 2018 Filing, Docket No. ER18-1314-000, at 3-4 (filed Apr. 9, 2018) (stating that the existing Tariff has no means to address increased out-of-market support for certain resources which leads to market harm); PJM, Answer, Docket No. EL16-49-000, at 2 (filed Apr. 11, 2016) (stating that when offers are submitted by a subsidized resource, it is supportable to find the existing Tariff unjust and unreasonable).

⁸⁰ Substantial evidence "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011); see *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C.

The parties argue that the Commission did not cite evidence that particular out-of-market payments are causing price suppression, provide evidence that out-of-market support has eroded investor confidence in market price signals, or quantify the alleged impact of out-of-market support on the capacity markets. Parties assert that if out-of-market support was in fact distorting capacity market prices, there should be evidence of it, particularly because some types of state programs have been in effect since the beginning of the capacity market.⁸¹ These rehearing arguments rest on the faulty assumption that, in order for the Commission to sufficiently support its section 206 finding that PJM's existing Tariff is unjust and unreasonable, the Commission is required to analyze the results of previous capacity auctions and demonstrate that that state subsidies have had a significant price suppressive effect. Rather, to support its section 206 finding, it was appropriate for the Commission to rely on record evidence and basic economic theory to conclude that PJM's existing Tariff does not account for and mitigate the price suppressive impact of state subsidies.

26. As noted above, the Commission relied on the record evidence of out-of-market support that showed that states have enacted programs to provide out-of-market support to resources not covered under the existing PJM MOPR. The June 2018 Order based its finding on those facts and projected growth in out-of-market support,⁸² as well as economic reasoning regarding how that out-of-market support produces market distortions. Specifically, the order finds that resources that are able to offer below cost due to out-of-market support will likely do so, thus displacing more economically efficient competitive resources that do not receive similar support.⁸³ The June 2018 Order thus found that the Tariff is unjust and unreasonable because it does not account for and mitigate these effects.⁸⁴

27. Reviewing courts have repeatedly affirmed the Commission's ability to make judgments based on economic theory, provided the Commission "applie[s] the relevant economic principles in a reasonable manner and adequately explain[s] its reasoning."⁸⁵

Cir. 2008) (substantial evidence "requires more than a scintilla, but can be satisfied by less than a preponderance of evidence").

⁸¹ See, e.g., Public Power Entities Rehearing Request at 13-14; New Jersey Board Rehearing Request at 6; Illinois Commission Rehearing Request at 7-8.

⁸² June 2018 Order, 163 FERC ¶ 61,236 at PP 151-153.

⁸³ *Id.* PP 153-154.

⁸⁴ *Id.* PP 153-155.

⁸⁵ *Cent. Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 109 (2d Cir. 2015) (*Cent. Hudson*); see, e.g., *NextEra Energy Res., LLC v. FERC*, 898 F.3d 14, 23 (D.C. Cir.

As the United States Court of the Appeals for the District of Columbia Circuit has stated, “[p]rice suppression is not a scientific determination, but rather an economic construct. We permit the Commission to base its market predictions on basic economic theory, given that it explained and applied the relevant economic principles in a reasonable manner.”⁸⁶ Reviewing courts have also recognized that the requirement for the Commission to support its findings with substantial evidence “does not necessarily mean empirical evidence.”⁸⁷ And, courts typically defer to the Commission’s reasoning when the Commission relies on substantial evidence to make “a predictive judgment in an area in which it has expertise, such as power markets.”⁸⁸

28. The June 2018 Order comfortably fits within the confines of the foregoing precedent. Acting within its area of expertise, the Commission reasonably applied basic economic principles and adequately explained how out-of-market support to certain resources may permit those resources to offer below their costs in a manner that suppresses the market clearing price. The Commission explained that the record demonstrates that states are increasingly supporting older resources for which a competitive offer may be significantly higher than a price-taker offer would indicate.⁸⁹ The June 2018 Order further found that price suppression stemming from state out-of-market support to resources, regardless of type, is indistinguishable from price

2018) (*NextEra*) (dismissing argument that the Commission did not quantify price suppression resulting from MOPR exemption, deferring to Commission’s predictive judgment); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 531 (D.C. Cir. 2010) (*Sacramento Mun. Util. Dist.*) (Commission may make findings “based on ‘generic factual predictions’ derived from economic research and theory”).

⁸⁶ *NextEra*, 898 F.3d at 23 (internal quotations and citations omitted).

⁸⁷ *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 65, 76 (D.C. Cir. 2014) (*S.C. Pub. Serv. Auth.*) (“[A]t least in circumstances where it would be difficult or even impossible to marshal empirical evidence, the Commission is free to act based upon reasonable predictions rooted in basic economic principles.”).

⁸⁸ *NextEra*, 898 F.3d at 23 (citing *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 260 (D.C. Cir. 2007)); see *Wis. Pub. Power Inc.*, 493 F.3d at 260-61 (“It is well-established that an ‘agency’s predictive judgments about areas that are within the agency’s field of discretion and expertise are entitled to *particularly deferential review*, as long as they are reasonable.”) (quoting *Earthlink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006)) (emphasis in original).

⁸⁹ June 2018 Order, 163 FERC ¶ 61,236 at PP 153-154.

suppression triggered through the exercise of buyer-side market power.⁹⁰ 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. That economic theory is the precise basis for the existing MOPR rules in the PJM Tariff. The June 2018 Order found that the existing Tariff is unjust and unreasonable because it fails to account for and mitigate these market effects across a broader set of resources.⁹¹ In reaching this determination, it was not necessary for the Commission to demonstrate that subsidized resources have actually suppressed the capacity market clearing price: it is irrefutable that out-of-market subsidies permit and encourage price suppression that injures non-subsidized competitors.⁹²

29. The historical existence of subsidy programs does not mean that the Commission is required to demonstrate a particular subsidized resource has offered below cost, or invalidate the Commission's reliance on an economic rationale to support the June 2018 Order's findings.⁹³ Given the dynamic nature and multiple variables inherent in PJM's multi-state capacity market, it is difficult, if not impossible, to build an evidentiary record

⁹⁰ *Id.* P 155.

⁹¹ *Id.* P 150.

⁹² See *New England Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 294 (D.C. Cir. 2014) (*NEPGA*) ("capacity offered into the market through below-cost bids can suppress prices even when no actor has the intent to do so"); *NJBPU*, 744 F.3d at 100 (affirming FERC's decision to eliminate the state mandate exemption based on reasoning that "below-cost entry suppresses capacity prices" and that subsidized entry "has the effect of disrupting the competitive price signals"); *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 141 (2011 PJM MOPR Order) ("The Commission has previously found, and we reiterate here, that uneconomic entry can produce unjust and unreasonable wholesale rates by artificially depressing capacity prices."), *reh'g denied*, 137 FERC ¶ 61,145, at P 3 (2011) (2011 PJM MOPR Rehearing Order), *aff'd sub nom. NJBPU*, 744 F.3d 74; see also *NextEra*, 898 F.3d at 23 (rejecting arguments "that FERC acted unreasonably because it failed to quantify the price suppression resulting from the [MOPR] exemption" at issue in that case, but deferring to the Commission's determination that the level of price suppression permitted by the exemption was acceptable).

⁹³ See, e.g., Public Power Entities Rehearing Request at 13-14; Dominion Rehearing Request at 8; Illinois Commission Rehearing Request at 7-8; Clean Energy Advocates Rehearing Request at 41-43.

by pinpointing instances of “but for” relatively low offers due specifically to subsidies, and thus the Commission appropriately relied on economic theory.⁹⁴ Further, the findings in the June 2018 Order are not based solely on the past participation or impact of subsidized resources. Rather, the June 2018 Order emphasized the significant and continued growth of out-of-market support.⁹⁵ As this growth continues, more subsidized resources will have the ability to offer below their costs and suppress prices.⁹⁶ The forward nature of the capacity market necessitates that the Commission proactively work to ensure the market is adequately protected against the distortive impacts of state subsidies.⁹⁷

30. Similarly, while the June 2018 Order does not find that any particular capacity auction has produced unjust and unreasonable results, the Commission need not wait to address price distortions from subsidized resources until it finds that the capacity auction has produced unjust and unreasonable results. The Commission is not required to wait until harm has been fully realized to find the Tariff unjust and unreasonable; it can act based on factual predictions supported by economic analysis to prevent harm from impacting the market,⁹⁸ which is what the Commission did here.

⁹⁴ *S.C. Pub. Serv. Auth.*, 762 F.3d at 76; *Cent. Hudson*, 783 F.3d at 109.

⁹⁵ June 2018 Order, 163 FERC ¶ 61,236 at PP 150-152.

⁹⁶ *Id.* PP 150-156.

⁹⁷ In any event, we disagree that the existence of long-standing subsidies vitiates the June 2018 Order’s finding that subsidies create the ability to distort capacity market prices. Clean Energy Advocates state that prior policy actions would have the same impact on market prices as current ones. Indeed, we acknowledge that out-of-market support in various forms has existed for some time. But, market rules have also previously been adapted to account for these programs. For example, recognizing the impact of state subsidies to natural gas-fired resources, in 2011, the Commission accepted PJM’s request to eliminate the state-mandate exemption from the MOPR to ensure that new gas-fired resources offered competitively. 2011 PJM MOPR Order, 135 FERC ¶ 61,022 at PP 139, 141; *see also ISO New England, Inc.*, 135 FERC ¶ 61,029, at P 14 (2011) (2011 ISO-NE MOPR Order); *Consol. Edison Co. of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139, at P 2, *order on reh’g, clarification, & compliance*, 152 FERC ¶ 61,110 (2015).

⁹⁸ *S.C. Pub. Serv. Auth.*, 762 F.3d at 65 (“Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall; nor need they do so for predictions that competition will normally lead to lower prices.”) (quoting *Assoc. Gas Distribs. v. FERC*, 824 F.2d 981, 1008-09 (D.C. Cir. 1987)); *see also Sacramento Mun. Util. Dist.*, 616 F.3d at 531 (explaining that no case law “prevents

31. We disagree with the parties who argue that the Commission's reliance on the affidavit by Dr. Giacomoni concerning out-of-market support to certain nuclear, wind, and solar resources is insufficient to find PJM's existing Tariff unjust and unreasonable. These parties argue that this evidence is not sufficient to demonstrate that all out-of-market support leads to below cost offers or that such support impacts clearing prices because the Giacomoni affidavit only describes the increase in out-of-market support and converts state payments into \$/MWh quantities, without linking those payments to actual evidence of price suppression.⁹⁹ However, as discussed above, the Commission did not rely solely on Dr. Giacomoni's affidavit. It permissibly based its findings on record evidence, including the Giacomoni affidavit and evidence regarding the existence of new state subsidy programs, that out-of-market support is increasing, and the economic prediction that such out-of-market support impacts capacity market prices.¹⁰⁰

32. The parties further note that Dr. Giacomoni's affidavit states that the size of the subsidy alone does not dictate whether the resource would otherwise be economic and that there may be cases where out-of-market support has little impact on the resource's economics.¹⁰¹ As explained above, however, it is unquestionable that out-of-market subsidies allow resources to offer lower than they otherwise would and therefore suppress prices. While there may be cases where out-of-market support is so small as to not meaningfully impact a resource's economics, we reiterate that resources in that situation can demonstrate that their offers are competitive through a Competitive Exemption or Unit-Specific Exemption to avoid mitigation, as discussed in the December Order.¹⁰² Further, the statement the parties highlight must be considered in context. Dr. Giacomoni's salient point was that, while subsidies may impact the economics of each resource differently, "it is also quite plausible to conclude that, at these subsidy levels, many resources do depend on those revenues, in combination with PJM market revenues, to be economic."¹⁰³

the Commission from making findings based on generic factual predictions derived from economic research and theory") (internal quotations omitted).

⁹⁹ See Exelon Rehearing Request at 13; Public Power Entities Rehearing Request at 13; New Jersey Board Rehearing Request at 5; Clean Energy Associations Rehearing Request at 12.

¹⁰⁰ June 2018 Order, 163 FERC 61,236 at P 151.

¹⁰¹ See Giacomoni Aff. ¶¶ 22, 30, 36.

¹⁰² See December 2019 Order, 169 FERC ¶ 61,239 at PP 161-162, 214-216.

¹⁰³ Giacomoni Aff. ¶ 36.

33. In addition, the affidavit from Adam J. Keech provides data and analyses showing that even the injection of small quantities of subsidized offers would disproportionately reduce the clearing price paid to all resources.¹⁰⁴ He also includes simulated capacity auctions showing that repricing two plants that cannot currently clear at competitive offers to zero dollars would reduce capacity revenues received by every seller in the unconstrained portion of PJM by two percent.¹⁰⁵ This further underscores the link between the magnitude of state programs, which undoubtedly enable resources to bid lower than they otherwise would have, and impacts on the PJM capacity market.

34. We disagree with parties' argument that the Commission should not have extrapolated Dr. Giacomoni's analysis on ZECs to RPS programs.¹⁰⁶ The Commission rested its conclusions regarding subsidies causing price distortions on the economic theory that resources receiving subsidies will be able to offer below their costs. No extrapolation was needed. Further, the June 2018 Order found that "we no longer can assume that there is any substantive difference among the types of resources participating in PJM's capacity market with the benefit of out-of-market support."¹⁰⁷ Parties have not offered any reason why, when offered out-of-market payments, some resources would choose to lower their offers and others would not.

iii. Contradictory Evidence

35. We affirm the June 2018 Order and deny requests for rehearing that assert that the Commission erred by failing to consider contradictory record evidence. Parties suggest that certain indicia of market health—like new entry and resource development, a high reserve margin, and the recent clearing price—indicate that the PJM capacity market is a robust and well-functioning capacity market under the existing Tariff and thus the Commission erred in finding the Tariff unjust and unreasonable. On the contrary, these arguments do not discredit the validity of the June 2018 Order's findings that subsidies may allow resources to offer lower than they otherwise would, thereby suppressing capacity prices and sending incorrect price signals to investors determining whether to

¹⁰⁴ Keech Affidavit ¶¶ 6-9 & attach. 1. The Clean Energy Advocates imply that the Keech Affidavit is insufficient evidence of the price-suppressive potential of existing resources because his analysis pertains only to existing nuclear power plants. Clean Energy Advocates Rehearing Request at 47. However, the analyses in Attachment 1 are not resource specific.

¹⁰⁵ *Id.* PP 10-15 & attach. 2.

¹⁰⁶ *See, e.g.*, Clean Energy Associations Rehearing Request at 12 (citing June 2018 Order, 163 FERC ¶ 61,236 at P 152).

¹⁰⁷ June 2018 Order, 163 FERC 62,136 at P 155.

build new generation. As explained above, PJM's capacity market is forward looking, and the current status of the market is not dispositive as to whether the Tariff ensures resource adequacy at just and reasonable rates going forward.¹⁰⁸ Similarly, adequate reserve margins today do not necessarily mean that such conditions will continue into the future. The concern with price suppression is a long-run, not a short-run, concern. In the near term, existing plants with sunk costs 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.¹⁰⁹

36. 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.¹¹⁰ 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.

¹⁰⁸ Parties point to the Market Monitor's State of the Market reports as evidence that the PJM Market is functioning well. Yet, while noting the results of the capacity market were competitive in 2017, the 2017 State of the Market also explains that "[t]he subsidy model is inconsistent with the PJM market design and inconsistent with the market paradigm and constitutes a significant threat to both" and that subsidies threaten the "competitiveness of PJM markets overall." Monitoring Analytics, LLC, *State of the Market Report-2017*, at 1 (Mar. 8, 2018). In addition, the Market Monitor recommends expanding the MOPR to all existing and new resources "in order to protect competition in the capacity market from external subsidies." *Id.* at 237.

¹⁰⁹ See June 2018 Order, 163 FERC ¶ 61,236 at P 150; *see also PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112, at P 14 (2004) (recognizing that mitigation resulting in lower market prices "conflict[s] with the longer term goal of attracting and retaining necessary infrastructure to assure long-term reliability in such markets").

¹¹⁰ See PJM, April 2018 Filing, Docket No. ER18-1314-000, at 36-37 (filed April 9, 2018) (explaining that new entry has been incentivized by low natural gas prices and improvements in technology leading to more efficient generation and that excess capacity does not justify permitting subsidized resources to set clearing prices).

37. We disagree that evidence showing that the clearing price in the ComEd LDA was higher than the rest of RTO clearing price even with the adoption of the Illinois ZEC program,¹¹¹ or that the 2018 capacity auction produced the third highest clearing price to date, shows that subsidies are not capable of suppressing clearing prices. These studies do not show what the clearing price in the ComEd LDA would have been without the subsidy or demonstrate that the price was not suppressed. The June 2018 Order found that subsidized resources would offer below their costs, all other things being equal,¹¹² and price differentials among auctions do not disprove that finding. Subsidized resources may well be offering below their costs as a result of subsidies, but the price may still increase auction-to-auction due to other factors. Moreover, the June 2018 Order did not base its findings on the fact that prices were currently suppressed. None of the factors cited by parties undermine the record evidence relied upon by the Commission or the well-established economic theory that out-of-market support distorts capacity market prices.¹¹³

iv. Effect of Subsidies on Price

38. We disagree with assertions that evidence suggests that state programs supporting renewable resources should not have a significant effect on capacity prices.¹¹⁴ As an initial matter, we reiterate that any state-subsidized resource is able to reduce its offer and thus has the ability to impact the supply curve. This impact exists regardless of the degree to which renewable resources participate in the market or whether some RECs are competitively procured; thus, such arguments do not undermine the June 2018 Order. Parties ask the Commission to find that renewable resources warrant special treatment

¹¹¹ See, e.g., Illinois AG Rehearing Request at 7 (citing PJM Interconnection, L.L.C., 2021/2022 Base Residual Auction Results, <https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2021-2022/2021-2022-base-residual-auction-report.ashx>). The rest of RTO clearing price refers to the clearing price for the unconstrained areas in PJM.

¹¹² June 2018 Order, 163 FERC ¶ 61,236 at PP 2, 153-155.

¹¹³ See *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016) (Commission need only articulate “a rational connection between the facts found and the choice[s] made”) (internal quotations and citation omitted); *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003) (“The question we must answer . . . is not whether record evidence supports [petitioner’s] version of events, but whether it supports FERC’s.”).

¹¹⁴ See, e.g., Joint Consumer Advocates Rehearing and Extension Request at 11-12; Clean Energy Advocates Rehearing Request at 38-39, 41-46; Clean Energy Associations Rehearing Request at 13-16; Illinois AG Rehearing Request at 8.

because they may represent a smaller portion of the supply curve than other fuel types, but we disagree that this distinction warrants disparate treatment. As the June 2018 Order found, we no longer can assume that there is any substantive difference among resources participating in PJM's capacity market with the benefit of out-of-market support. If renewable resources can demonstrate that their offers are competitive, they may do so through a Competitive Exemption or Unit-Specific Exemption, as discussed in the December Order, in order to avoid mitigation of their offers.¹¹⁵

39. Clean Energy Advocates argue that competition from renewable resources in the energy market may increase capacity market offers from conventional generators that are frequently the marginal resources, presumably by lowering the energy and ancillary services offset to their capacity market revenues. However, even if true, our focus here is on ensuring that the capacity market price is reflective of competitive offers. Further, that point ignores that a relatively higher offer for those conventional generators based on subsidized competition increases the likelihood that those generators will not clear the auction and therefore, will not receive a capacity supply obligation.

40. Clean Energy Advocates also argue that increasing RPS targets do not directly correlate to an increased capacity market participation by state-supported resources, but this argument is beside the point. The June 2018 Order found that, given the increasing out-of-market support provided by states to certain resources, PJM's Tariff was no longer just and reasonable because it failed to protect the market against price distortions caused by these resources. This is true regardless of whether all state RPS targets are fully realized through capacity resources. We further disagree with Clean Energy Advocates' argument that the June 2018 Order failed to address analysis showing that participation of subsidized resources is known well in advance of the auction. Whether market participants are aware of subsidies has nothing to do with the Commission's finding that subsidized resources are themselves able to offer below their costs and therefore distort market outcomes.

41. We also disagree with Joint Consumer Advocates that continued entry and exit in the market demonstrates an ability for the market to absorb subsidized resources without price impacts. As the June 2018 Order explained, subsidies affect which resources enter and exit the market, and, therefore distort the market results.¹¹⁶ Similarly, we disagree with Joint Consumer Advocates that if the supply curve is becoming more gently sloped, subsidies will not impact capacity prices. A reduction in the slope of the supply curve may mitigate the ability of any one entity to significantly affect the price, but it does not eliminate that ability.

¹¹⁵ See December 2019 Order, 169 FERC ¶ 61,239 at PP 161-162, 214-216.

¹¹⁶ See, e.g., June 2018 Order, 163 FERC ¶ 61,236 at P 151.

42. With respect to arguments that zero-dollar offers are common and driven by a number of factors, or that new entrants generally submit low offers, we disagree that this is meaningful to our finding. Suppliers may offer as a price-taker for a number of reasons, one of which is subsidies. Similarly, competitive new entrants may currently be offering below Net CONE¹¹⁷ if they are subsidized or their costs are low, but this does not negate the need for an expanded MOPR going forward. In fact, it underscores the importance of ensuring that all resources are offering competitively such that subsidized new entrants cannot clear the market using an unreasonably low offer and displace more economic, unsubsidized resources. As the June 2018 Order explained and we reiterate here, “there is an important difference between a resource that offers low as a result of competition in the market and one that offers low because a state subsidy gives it the luxury of doing so.”¹¹⁸

v. Uncertainty

43. Parties argue that uncertainty created by out-of-market support is no different than any other uncertainty attendant to the electric industry or uncertainty caused by changing market rules. Public Power Entities also assert that the Commission failed to account for the interests of investors in existing resources who may have relied on the existing MOPR. While we agree with the general premise that any number of factors can cause uncertainty, not all uncertainty renders PJM’s Tariff unjust and unreasonable. In balancing competing interests, the Commission is required to ensure that wholesale rates are just and reasonable and to ensure reliability by generating accurate price signals in the long run.¹¹⁹ Thus, the June 2018 Order reasonably focused on those factors that impair capacity market price signals, including investor uncertainty caused by subsidies. The Commission also considered the countervailing costs to consumers, contrary to Joint Consumer Advocates’ suggestion that the Commission failed to balance investor uncertainty interests against those of consumers.¹²⁰

¹¹⁷ Net Cost of New Entry (Net CONE) is the nominal levelized cost of a reference resource minus the net energy and ancillary service revenue offset.

¹¹⁸ June 2018 Order, 163 FERC ¶ 61,236 at P 153.

¹¹⁹ See *NJBPU*, 744 F.3d at 109 (recognizing the Commission’s discretion to balance competing interests).

¹²⁰ June 2018 Order, 163 FERC ¶ 61,236 at P 159; see *NJBPU*, 744 F.3d at 97 (quoting *Conn. Dept. of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) (*Connecticut PUC*)) (finding that states “are free to make their own decisions regarding how to satisfy their capacity needs, but they will appropriately bear the costs of [those] decision[s]”) (internal quotations omitted).

2. Economic Justification

a. Requests for Rehearing and Clarification

44. Several parties argue that the Commission's justification for finding PJM's existing Tariff unjust and unreasonable is flawed as it does not consider resource attributes that should be compensated and the costs of negative externalities. The Illinois Commission takes issue with the Commission's statement that subsidies make the market "less grounded in fundamental principles of supply and demand,"¹²¹ asserting that PJM's capacity market is not a "free market in the classical sense," but rather an administrative mechanism to achieve resource adequacy. The Illinois Commission argues that the Commission targeted state laws that address consumer demand for environmental and public health needs that PJM's administratively determined demand curve does not consider.¹²² The Illinois Commission states that state laws addressing these environmental externalities compensate valuable attributes that would not otherwise be compensated in PJM's markets, and address market failures when the principles of supply and demand do not produce socially optimal results.¹²³ Exelon and Clean Energy Advocates similarly argue that an efficient market must account for the costs of pollution.¹²⁴ Exelon states that the Commission erred in assuming that an efficient market should not be affected by state environmental attribute payments and that offers should be based solely on production costs to be competitive.¹²⁵ This is a problem, Exelon insists, because permitting resources to pollute without bearing the pollution costs

¹²¹ June 2018 Order, 163 FERC ¶ 61,236 at P 2.

¹²² Illinois Commission Rehearing Request at 9, 15-16; *see also* Joint Consumer Advocates Rehearing and Extension Request at 19 (if out-of-market support is eliminated, the market will select resources based only on the financial expenditures needed to bring the resource to the market, which ignores environmental externalities).

¹²³ Illinois Commission Rehearing Request at 9, 12-14.

¹²⁴ Exelon Rehearing Request at 2, 4, 5-8; Clean Energy Advocates Rehearing Request at 8, 32-34 ("It is Economics 101 that policies that address market failures *enhance* competition, *increase* efficiency, and result in a *more accurate* reflection of true costs and benefits in market outcomes.") (emphasis in original); *see also* PSEG Rehearing Request at 14 (arguing that thwarting state policies designed to value clean air and fuel diversity "will impose real costs on the citizens of the states that seek to promote them").

¹²⁵ Exelon Rehearing Request at 5.

allows these resources to submit bids lower than they should, when bearing the pollution costs might otherwise cause them to exit.¹²⁶

45. Further, the Illinois Commission contends that the Commission mischaracterized state laws, and particularly the Illinois Zero Emission Standard Law, by stating that the capacity market has become “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.”¹²⁷ The Illinois Commission opines that the Illinois ZEC legislation’s purpose is to achieve state environmental objectives and reduce air pollutants, not arbitrary support for certain generators.¹²⁸

46. Public Power Entities take issue with the June 2018 Order’s suggestion that resources are only “economic” if they clear the market without subsidies, and argue that paying resources a capacity price that does not reflect the actual amount of capacity in the market is a form of price support for “economic” resources.¹²⁹ Public Power Entities also contend that even if state subsidies permit resources to offer lower than they might otherwise, any downward pressure on clearing prices is appropriate and expected with sufficient supply. If supplies dip, Clean Energy Advocates argue, the market will respond with higher prices, sending a signal to increase supply.¹³⁰ “This basic market function will continue to operate even if, hypothetically, a large percentage of capacity resources in the market were to receive state support,” Clean Energy Advocates contend.¹³¹ Clean Energy Advocates conclude, therefore, that the presence of state-sponsored capacity would not prevent future new entry, to the extent new entry was necessary for resource adequacy, because the price would simply rise.¹³²

¹²⁶ *Id.* at 6-7.

¹²⁷ *Id.* at 12 (citing June 2018 Order, 163 FERC ¶ 61,236 at P 1).

¹²⁸ *Id.* at 14.

¹²⁹ *Id.* at 16-17.

¹³⁰ Clean Energy Advocates Rehearing Request at 41.

¹³¹ *Id.*

¹³² *Id.*

b. Commission Determination

47. We disagree with the Illinois Commission that PJM's capacity market is not based on economic supply and demand principles. PJM's capacity market is a competitive market design grounded in the principles of supply and demand. The express purpose of the June 2018 Order is to protect the competitiveness of the market from the influence of out-of-market support and ensure resource adequacy at just and reasonable rates. Regardless of the purpose of out-of-market support, the fact remains that such subsidies are out-of-market payments that allow supported resources to offer below cost and suppress prices. Illinois Commission's argument that the Commission has mischaracterized state laws as being for the purpose of supporting entry or continued operation of preferred generation resources is therefore irrelevant. The intent of the subsidy is immaterial—what matters is that out-of-market payments convey the ability to offer below cost.¹³³

48. Parties' arguments that an efficient market would price environmental externalities are not relevant to the findings of the June 2018 Order. The purpose of a capacity market is to ensure resource adequacy at just and reasonable rates, not to mitigate the negative externalities associated with the production of electricity. The Illinois Commission states that the purpose of its ZEC legislation is to promote environmental and clean air goals. Regardless of what laudable intentions may motivate a state to provide subsidies for certain resources, state out-of-market support still has the effect of keeping otherwise uneconomic resources in operation, and supports uneconomic entry of new resources.¹³⁴ By reordering the supply curve, this out-of-market support can have significant impacts by suppressing capacity prices and depriving non-subsidized resources of a capacity obligation.

49. We reject Public Power Entities' argument that non-subsidized resources in a competitive market are somehow receiving unjust and unreasonable price support. We reiterate, the Commission has an obligation to ensure just and reasonable rates in the capacity market and has found, as explained herein, that out-of-market support from state policies undermines those rates.¹³⁵ It is illogical to suggest that a competitive price outcome is analogous to an out-of-market payment designed to achieve state policy objectives unrelated to the capacity market.

¹³³ See June 2018 Order, 163 FERC ¶ 61,236 at PP 155, 156.

¹³⁴ *Id.* PP 150, 155.

¹³⁵ 2011 MOPR Rehearing Order, 137 FERC ¶ 61,145 at P 3, *aff'd sub nom. NJBPU*, 744 F.3d at 101; *see infra* n.189.

50. We further disagree with parties who essentially argue that the market will continue to send accurate price signals for entry and exit decisions, even with a large number of subsidized resources. These parties argue that downward pressure on prices as a result of subsidies is consistent with the excess supply. In the long run, subsidies will discourage unsubsidized investment as older, unsubsidized resources retire prematurely. In addition, subsidized existing resources “which should consider retiring based on their costs, are able to displace resources that can meet PJM’s capacity needs at a lower overall cost.”¹³⁶ As the Commission found in the June 2018 Order, these “price distortions compromise the capacity market’s integrity” and “create significant uncertainty, which may further compromise the market, because investors cannot predict whether their capital will be competing against resources that are offering into the market based on actual costs or on state subsidies.”¹³⁷

3. Prior Precedent

a. Requests for Rehearing and Clarification

51. Some parties contend that the June 2018 Order did not provide a reasoned explanation for departing from past rulings restricting application of the MOPR to new, natural gas-fired resources.¹³⁸ Clean Energy Advocates argue that the Commission mischaracterized prior MOPR precedent in asserting that the Commission has previously recognized that resources receiving out-of-market support are capable of suppressing market prices, regardless of intent.¹³⁹ According to Clean Energy Advocates, prior orders in ISO-New England¹⁴⁰ and PJM¹⁴¹ extending the MOPR beyond mitigating buyer-side

¹³⁶ *Id.* P 154.

¹³⁷ June 2018 Order, 163 FERC ¶ 61,236 at P 150.

¹³⁸ Public Power Entities Rehearing Request at 10-17; Clean Energy Associations Rehearing Request at 3, 22-25; Clean Energy Advocates Rehearing Request at 26-29; Illinois AG Rehearing Request at 3, 4-5, 11-12.

¹³⁹ Clean Energy Advocates Rehearing Request at 26-27 (citing June 2018 Order, 163 FERC ¶ 61,236 at P 155 (“The Commission has previously recognized that resources receiving out-of-market support are capable of suppressing market prices, regardless of intent.”)).

¹⁴⁰ 2011 ISO-NE MOPR Order, 135 FERC ¶ 61,029 at P 170 (finding that out-of-market support suppresses capacity market prices regardless of intent).

¹⁴¹ 2011 PJM MOPR Order, 135 FERC ¶ 61,022 at P 139 (accepting PJM’s proposal to eliminate the state-mandate exemption).

market power to reach resources supported by state programs emerged in the context of states pursuing programs that the Supreme Court would ultimately find impermissibly interfered with wholesale market rates.¹⁴² Parties argue that the Commission—at least prior to the CASPR Order,¹⁴³ and as recently as 2016 in representations to the D.C. Circuit—affirmed that the MOPR’s purpose is to address buyer-side market power and that extending the MOPR based on out-of-market support is a departure from the MOPR’s history and purpose.¹⁴⁴

52. Public Power Entities, Clean Energy Associations, Clean Energy Advocates, and the Illinois AG assert that the Commission did not provide a reasoned explanation for departing from prior precedent exempting state-supported renewable resources from mitigation.¹⁴⁵ In particular, these parties assert that, although the Commission concluded in the June 2018 Order that “we no longer can assume that there is any substantive difference among the types of resources participating in PJM’s capacity market with the benefit of out-of-market support,”¹⁴⁶ the June 2018 Order did not explain why its previous reasons¹⁴⁷ for excluding renewable resources from mitigation, specifically their low potential to engage in price suppression and *de minimis* impact on the market, no

¹⁴² Clean Energy Advocates Rehearing Request at 27-28 (citing *Hughes v. Talen Energy Mktg., LLC*, 136 S.Ct. 1288 (2016) (*Hughes*)).

¹⁴³ *ISO New England Inc.*, 162 FERC ¶ 61,205 (2018) (CASPR Order).

¹⁴⁴ Clean Energy Associations Rehearing Request at 23-24; Clean Energy Advocates Rehearing Request at 26-32 (citing the Commission’s brief in *NRG Power Mktg., LLC v. FERC*, Nos. 15-1452, 15-1454, 2016 WL 5405117, at *11, *12 (D.C. Cir. Sept. 27, 2016)).

¹⁴⁵ Public Power Entities Rehearing Request at 10-17; Clean Energy Associations Rehearing Request at 3, 22-25; Illinois AG Rehearing Request at 3, 4-5, 11-12; Clean Energy Advocates Rehearing Request at 26-32.

¹⁴⁶ June 2018 Order, 163 FERC ¶ 61,236 at P 155.

¹⁴⁷ Illinois AG Rehearing Request at 11 (asserting that FERC has said that RECs do not pose price-suppressive threats) (citing 2011 PJM MOPR Order, 135 FERC ¶ 61,022 at P 153); Clean Energy Associations Rehearing Request at 23 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 166 (2013) (2013 PJM MOPR Order) (exempting renewable resources because the “MOPR may be focused on those resources that are most likely to raise price suppression concerns”); *N.Y. Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator*, 153 FERC ¶ 61,022, at PP 2, 47 (2015) (exempting renewable resources from MOPR that have “limited or no incentive and ability to exercise buyer-side market power”)).

longer hold true.¹⁴⁸ Clean Energy Advocates argue that the Commission must be particularly careful to explain its departure from prior precedent exempting renewable resources from market mitigation given the reliance interests on this exemption engendered over the years.¹⁴⁹

53. Public Power Entities argue that the Commission has not explained its departure from its prior rationale that a competitive offer from an existing resource would typically be low regardless of subsidies because, once built, a resource's incremental costs of taking on a capacity obligation can approximate zero.¹⁵⁰ Rejecting the Commission's rationale that out-of-market support could suppress offer prices of older resources that may have higher going-forward costs, Public Power Entities argue that it is not the purpose of the MOPR to adjust every resource's offer to match their exact costs.¹⁵¹ Finally, Public Power Entities argue the Commission did not substantiate its claim that circumstances have changed because the Commission does not explain how the growth of out-of-market programs referenced in the June 2018 Order renders the Tariff unjust and unreasonable, as opposed to other out-of-market support pervading the industry.¹⁵²

54. The Illinois AG suggests that the June 2018 Order frustrates all six "first principles" of capacity markets enunciated in the CASPR order and that the Commission

¹⁴⁸ Clean Energy Associations Rehearing Request at 23-24; Clean Energy Advocates Rehearing Request at 26-32 (citing 2011 PJM MOPR Order, 135 FERC ¶ 61,022 at P 153 ("[W]ind and solar resources are a poor choice if a developer's primary purpose is to suppress capacity market prices. Due to the intermittent energy output of wind and solar resources, the capacity value of these resources is only a fraction of the nameplate capacity. This means that wind and solar resources would need to offer as much as eight times the nameplate capacity of a CT or CC resource in order to achieve the same price suppression effect.")); 2013 PJM MOPR Order, 143 FERC ¶ 61,090 at P 166 (rejecting arguments that the MOPR should apply to all resource types, agreeing "that the MOPR may be focused on those resources that are most likely to raise price suppression concerns").

¹⁴⁹ Clean Energy Advocates Rehearing Request at 19 (citing *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*Fox Television Stations*)).

¹⁵⁰ Public Power Entities Rehearing Request at 5; *see also* Joint Consumer Advocates Rehearing and Extension Request at 11-12; Maryland Commission Rehearing Request at 16.

¹⁵¹ Public Power Entities Rehearing Request at 16.

¹⁵² *Id.* at 10-11, 15-17.

did not explain its departure from these principles, arguing that the Commission's proposed replacement rate will not facilitate competition, send clear price signals, result in least-cost resources possessing attributes sought by the market, or support price transparency, and will unfairly shift risk from investors to consumers and exacerbate existing market power.¹⁵³

b. Commission Determination

55. We disagree with parties that the June 2018 Order contradicts, or is an unexplained departure from, prior precedent. 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.¹⁵⁴ 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.¹⁵⁵ 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 precedent shows that the MOPR has evolved in scope out of necessity in light of changed circumstances.¹⁵⁶

¹⁵³ Illinois AG Rehearing Request at 9-11 (citing *ISO New England Inc.*, 162 FERC ¶ 61,205 (2018)).

¹⁵⁴ *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 34 (2006) (explaining that the MOPR would apply to sellers that "may have incentives to depress market clearing prices below competitive levels").

¹⁵⁵ 2011 PJM MOPR Order, 135 FERC ¶ 61,022 at P 141, *aff'd sub. nom. NJBPU* 744 F.3d at 97-102; *see also* CASPR Order, 162 FERC ¶ 61,205 at P 22 (using the MOPR to mitigate impacts of state policies on the wholesale capacity market); 2011 ISO-NE MOPR Order, 135 FERC ¶ 61,029 at P 14 (recognizing that out-of-market support suppresses capacity market prices).

¹⁵⁶ June 2018 Order, 163 FERC ¶ 61,236 at P 150 n.276; December 2019 Order, 169 FERC ¶ 61,239 at P 39. As Clean Energy Advocates aptly point out, prior orders discussing application of the MOPR to address out-of-market support responded to state actions to subsidize certain resources. *See NJBPU*, 744 F.3d at 87-88, 100 (finding that the Commission reasonably explained its decision to eliminate the state-mandate exemption); 2011 PJM MOPR Order, 135 FERC ¶ 61,022 at P 139. Growing out-of-market support is an explicit basis for the June 2018 Order's finding. It is inconsequential that previous out-of-market support was found federally preempted

56. Although parties point out that the Commission previously found that renewable resources do not warrant mitigation, the record in this proceeding demonstrates that circumstances have changed. Evolution of the Commission’s policy is justified in response to the proliferation of out-of-market support to resources that permit these resources to offer non-competitively and suppress prices.¹⁵⁷ Even though the Commission previously found that renewable resources are not the most “efficient resources to suppress capacity prices,”¹⁵⁸ due to the intermittent energy output of wind and solar resources,¹⁵⁹ the Commission has not found that renewable resources are incapable of suppressing price. Rather, out-of-market support gives renewable resources the ability to suppress capacity prices because the out-of-market support means a resource can offer below its costs. This is true even if a resource has low capacity thresholds because, on aggregate, small subsidized resources can influence the clearing price. Thus, the June 2018 Order concludes that, given the proliferation in state subsidies, price suppression stemming from state choices to support certain resources or resource types is indistinguishable from price suppression triggered through the potential exercise of buyer-side market power and should therefore be addressed similarly, thus requiring the Commission to act to ensure that rates for capacity in PJM remain just and reasonable.¹⁶⁰

57. We agree with Public Power Entities that an offer for an existing capacity resource would typically be low, but we disagree that the Commission erred in concluding that this may not always be true. Rather, the June 2018 Order squarely acknowledges that fact

because the economic principle that out-of-market support distorts capacity market prices remains true whether or not the state action is preempted.

¹⁵⁷ See *ANR Pipeline Co. v. FERC*, 205 F.3d 403, 407 (D.C. Cir. 2000) (*ANR Pipeline Co*) (affirming Commission policy change when the Commission explains “how changed circumstances justified a new policy”).

¹⁵⁸ 2011 PJM MOPR Order, 135 FERC ¶ 61,022 at P 153.

¹⁵⁹ *Id.*

¹⁶⁰ June 2018 Order, 163 FERC ¶ 61,236 at P 155. Notably, under the existing MOPR, prior state subsidies of concern targeted new natural gas-fired resources. See *Hughes*, 136 S. Ct. at 1294 (describing how “Maryland solicited proposals from various companies for construction of a new gas-fired power plant”); *NJBPU*, 744 F.3d at 99 (“New Jersey Petitioners claim that the new, gas-fired resources it seeks to build are needed to address New Jersey’s capacity deficiency . . .”).

and the relevant precedent.¹⁶¹ The June 2018 Order then explains why the Commission no longer believes that the fact that a competitive offer for an existing resource would typically be low is a sufficient reason to exempt *all* existing resources from the MOPR. Specifically, the June 2018 Order notes that not all existing resources have low going forward costs. Older, uneconomic existing resources in PJM are increasingly receiving out-of-market support to allow them to remain in the market. The June 2018 Order expressly addresses this concern, finding that the Tariff is unjust and unreasonable because it does not account for out-of-market support for these resources.¹⁶² Thus, the changed circumstances described in the June 2018 Order warrant the expansion of the MOPR to existing and non-natural gas-fired new resources. This shift is within the Commission's discretion in light of the changed market conditions.¹⁶³

58. While we agree with Public Power Entities that the purpose of the MOPR is not to adjust every resource's offer to match its exact costs, the June 2018 Order did not find that to be the standard. Rather, the June 2018 Order preliminarily found that an expanded MOPR "should protect PJM's capacity market from the price suppressive effects of resources receiving out-of-market support by ensuring that such resources are not able to offer below a competitive price."¹⁶⁴ The June 2018 Order, therefore, clearly contemplated the MOPR only applying a price floor to the offers of resources receiving out-of-market support.

59. We deny the Illinois AG's rehearing request that the June 2018 Order's discussion of the replacement is inconsistent with the capacity market principles set forth in the CASPR Order. Because the replacement rate was not determined in the June 2018 Order, how the MOPR will work in PJM had not yet been determined, making that argument

¹⁶¹ June 2018 Order, 163 FERC ¶ 61,236 at P 153 & n.285 ("We recognize that the Commission has previously declined to extend the MOPR to existing resources, finding that a competitive offer for an existing resource would 'typically be very low, and often close to zero—regardless of whether the resource receives any out-of-market payments.'") (quoting 2011 PJM MOPR Rehearing Order, 137 FERC ¶ 61,145 at P 132) (citing *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 118, *order on reh'g*, 124 FERC ¶ 61,301 (2008), *order on reh'g*, 131 FERC ¶ 61,170 (2010), *order on reh'g*, 150 FERC ¶ 61,208 (2015)).

¹⁶² June 2018 Order, 163 FERC ¶ 61,236 at PP 153-154.

¹⁶³ See *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1303 (D.C. Cir. 2014) ("The Commission can depart from a prior policy or line of precedent, but it must acknowledge that it is doing so and provide a reasoned explanation.") (citing *Fox Television Stations*, 556 U.S. at 515); *ANR Pipeline Co.*, 205 F.3d at 407.

¹⁶⁴ June 2018 Order, 163 FERC ¶ 61,236 at P 158.

premature.¹⁶⁵ We also disagree with Public Power Entities’ argument that the Commission does not offer a reasoned explanation for its conclusion that ZECs and RPS programs render the Tariff unjust and unreasonable, when other types of out-of-market support do not. The June 2018 Order makes no such finding. Rather, the June 2018 Order found that out-of-market support in general renders the Tariff unjust and unreasonable.¹⁶⁶

4. State Jurisdiction

a. Requests for Rehearing and Clarification

60. Multiple parties argue that the Commission improperly intruded into the states’ traditional jurisdiction over generation and resource portfolio decisions and violated principles of cooperative federalism.¹⁶⁷ The Maryland Commission states that section 201 of the FPA limits the Commission’s authority to the transmission and wholesale sale of electric energy in interstate commerce, and expressly excludes matters that are the subject of state regulations, such as “facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce.”¹⁶⁸ Parties assert that courts have recognized states’ authority over generation matters and decisions concerning fuel types,¹⁶⁹ and that states may

¹⁶⁵ Also, the Commission has recognized that each RTO/ISO is different and that its market rules may therefore be different. *See* December 2019 Order, 169 FERC ¶ 61,239 at P 204 n.431 (explaining “regional markets are not required to have the same rules. Our determination about what rules may be just and reasonable for a particular market depends on the relevant facts.”); *Midcontinent Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,176, at P 57 & n.133 (2018) (listing cases that reject the “one-size-fits-all-approach”).

¹⁶⁶ *Id.* P 150.

¹⁶⁷ Maryland Commission Rehearing Request at 2-3, 4-14; Illinois Commission Rehearing Request at 3, 11-12; Dominion Rehearing and Clarification Request at 6-7, 13-15; New Jersey Board Rehearing Request at 2, 6-8; PSEG Rehearing Request at 3-5, 11-15; Clean Energy Associations Rehearing Request at 3, 25-27; Joint Consumer Advocates Rehearing and Extension Request at 3, 14-21; Illinois AG Rehearing Request at 3, 5, 12; Clean Energy Advocates Rehearing Request at 8, 48-51.

¹⁶⁸ Maryland Commission Rehearing Request at 4-5 (citing 16 U.S.C. §§ 824(a), (b)(1)); *see also* PSEG Rehearing Request at 11-12.

¹⁶⁹ Maryland Commission Rehearing Request at 5-6 (citing *N.Y. v. FERC*, 535 U.S. 1, 22 (2002) (“[T]he legislative history [of the FPA] is replete with statements describing Congress’ intent to preserve state jurisdiction over local [generation]

pursue measures to encourage the development of clean generation or other public policy goals.¹⁷⁰

61. Further, the Maryland Commission argues that the Commission has recognized that it lacks jurisdiction over sales of state-issued RECs that are not bundled with wholesale energy because an unbundled REC transaction does not affect wholesale electricity rates, and failed in the June 2018 Order to explain its departure from this precedent.¹⁷¹ Similarly, Joint Consumer Advocates and the New Jersey Board argue that the Commission conceded in its amicus brief in *Village of Old Mill Creek v. Star* that state programs such as RECs and ZECs are within the states' jurisdiction.¹⁷² The parties argue that this concession is inconsistent with the June 2018 Order, which the parties claim exercised the Commission's authority over wholesale rates in a way that will effectively force resources participating in these state programs out of the capacity markets, without first making the requisite showing that these programs affect the wholesale electricity market or abrogate a Commission-mandated rate.¹⁷³

62. Parties further argue that by extending the MOPR to resources receiving out-of-market payments, including renewable resources, the June 2018 Order undermines the

facilities.”); *Connecticut PUC*, 569 F.3d at 481 (“State and municipal authorities retain the right to forbid new entrants from providing capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally friendly units, or to take any other action . . . without direct interference from the Commission.”).

¹⁷⁰ Illinois Commission Rehearing Request at 12 (citing *Hughes*, 136 S.Ct. at 1292 (“Nothing in this opinion should be read to foreclose [states] from encouraging production of new or clean generation through measures untethered to a generator’s wholesale market participation.”) (internal quotations omitted)).

¹⁷¹ Maryland Commission Rehearing Request at 8-10 (arguing that the June 2018 Order’s assertion that out-of-market payments interfere with wholesale market signals departs from the Commission’s statement in WSPP that unbundled REC transactions do not affect wholesale rates) (citing *WSPP Inc.*, 139 FERC ¶ 61,061, at P 18 (2012)).

¹⁷² See Joint Consumer Advocates Rehearing and Extension Request at 17-18, 20 (citing Brief at 10, REC and ZEC programs are “not payments for, or otherwise bundled with, sales of energy or capacity at wholesale”); New Jersey Board Rehearing Request at 7-8 (citing *Vill. of Old Mill Creek v. Star*, 2017 WL 3008289 (N.D. Ill. July 14, 2017) and *Coal. for Competitive Elec. v. Zibelman*, 272 F.Supp.3d 554 (S.D.N.Y. 2017)).

¹⁷³ Maryland Commission Rehearing Request at 8-10; NJ Board Rehearing Request at 8; Joint Consumer Advocates Rehearing and Extension Request at 16-18.

value the states place on environmental attributes.¹⁷⁴ Moreover, Clean Energy Advocates argue that the Commission's statement that states can still accomplish their environmental goals by making customers pay more for capacity is incorrect because states will still have to buy extra, unnecessary capacity from polluting resources as a consequence of supporting clean resources; and, even if true, the Commission ignores the fact that imposing unnecessary capacity costs on customers violates the duty to ensure just and reasonable rates.¹⁷⁵ Clean Energy Associations contend that while the Commission has jurisdiction to regulate certain parameters that directly impact how the capacity price is set, even if those determinations touch on state authority, the court made clear in *Connecticut PUC* that federal regulation of capacity market prices does not negate states' authority to decide what types of generation facilities or other technologies are built to serve their customers.¹⁷⁶ Clean Energy Associations continue that the June 2018 Order conflicts with the court's directive in *Connecticut PUC* by directing mitigation rules to block state-supported generation resources from the capacity market and erecting a barrier for states to develop resources.¹⁷⁷

63. These parties argue that the June 2018 Order's intrusion on matters left to the state was not justified. The Illinois Commission contends that the Supremacy Clause prohibits the Commission from using the June 2018 Order to work around state laws that do not seek to impermissibly intrude in the wholesale electricity market or abrogate a Commission mandated rate.¹⁷⁸ Arguing that there is a strong presumption against finding that the FPA supersedes powers traditionally exercised by the states, parties insist that the June 2018 Order lacked record evidence to conclude that state policies intrude on the

¹⁷⁴ Maryland Commission Rehearing Request at 3, 7-8; Dominion Rehearing and Clarification Request at 14-15 (June 2018 Order will prevent supported resources from participating in the capacity market, effectively handicapping state policy subsidies at the behest of the voters); Clean Energy Associations Rehearing Request at 26-27 (Commission is exercising its wholesale rate authority in a manner that targets states' exclusive jurisdiction and effectively forces resources participating in state programs out of the market); Clean Energy Advocates Rehearing Request at 49-50 (the June 2018 Order frustrates the decisions of state environmental regulators); Illinois AG Rehearing Request at 12.

¹⁷⁵ Clean Energy Advocates Rehearing Request at 50-51.

¹⁷⁶ Clean Energy Associations Rehearing Request at 27 (citing *Connecticut PUC*, 569 F.3d at 482-83).

¹⁷⁷ *Id.*

¹⁷⁸ Illinois Commission Rehearing Request at 11.

Commission's authority over wholesale rates.¹⁷⁹ According to the Maryland Commission, the Commission errs in conflating RECs, which represent a state-authorized premium for emissions-free generation, with megawatts, when in fact RECs are traded outside the capacity market and are not intended to suppress wholesale prices.¹⁸⁰

64. The end result of the June 2018 Order, parties contend, will be to require states' customers to pay twice for capacity, through both the state subsidy promoting the renewable resource and through PJM's capacity market, which effectively would ignore those resources and require procurement of redundant capacity.¹⁸¹ Moreover, the Maryland Commission contends that it is not clear that the FRR Alternative will address this issue.¹⁸²

65. PSEG states that the Commission should incorporate state public policy goals, such as carbon abatement and resiliency, into its market designs, consistent with cooperative federalism.¹⁸³

b. Commission Determination

66. We deny rehearing requests that argue that the Commission improperly intruded into the states' traditional jurisdiction over generation, violating principles of cooperative

¹⁷⁹ Joint Consumer Advocates Rehearing and Extension Request at 16 (citing *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 94 (2d Cir. 2012)); Dominion Rehearing and Clarification Request at 14-15 (asserting that the Commission must accommodate state regulation unless doing so would clearly damage federal goals); New Jersey Board Rehearing Request at 8 (the June 2018 Order made no legal determination that the state policies in question impermissibly intrude on matters reserved for federal oversight); Clean Energy Associations Rehearing Request at 25.

¹⁸⁰ Maryland Commission Rehearing Request at 3, 10-13.

¹⁸¹ Maryland Rehearing Request at 13-14; Clean Energy Associations Rehearing Request at 26 (if these resources do not receive a reasonable opportunity to clear in the capacity market and have their capacity recognized, load-serving entities will have to purchase additional unneeded capacity).

¹⁸² Maryland Commission Rehearing Request at 14.

¹⁸³ PSEG Rehearing Request at 3-5, 12-15 (arguing that rather than frustrating state policies, the Commission should be trying to accommodate and give effect to those policies).

federalism, because the Tariff failed to account for out-of-market support..¹⁸⁴ The Commission explained in the June 2018 Order that state out-of-market payments, including RECs and ZECs, give resources the ability to make capacity market offers below costs, suppressing capacity prices.¹⁸⁵ Because these programs disrupt competitive price signals that PJM's capacity auction is designed to produce, we are obligated to act to deter uneconomic participation.¹⁸⁶ The Commission does not improperly intrude on the states' prerogatives to determine its energy resource mix and the development of new generation merely because the wholesale rules affect matters within the states' jurisdiction.¹⁸⁷ As we stated in the June 2018 Order, expanding PJM's MOPR "in no way divests the states in the PJM region of their jurisdiction over generation facilities,"¹⁸⁸ or prevent states from supporting preferred generation resources.¹⁸⁹ The Commission

¹⁸⁴ See *NJBPU*, 744 F.3d at 96 (upholding the Commission's jurisdiction to eliminate the state mandate exemption, which would have permitted states to introduce thousands of megawatts of new capacity into the capacity auction, because state subsidized generation would affect wholesale capacity prices).

¹⁸⁵ June 2018 Order, 163 FERC ¶ 61,236 at PP 150-156; see also *Keech Aff.* ¶¶ 10-13, 15; see also *supra* section A.1.b (elaborating on how state actions impact the capacity market).

¹⁸⁶ See 16 U.S.C. §§ 824, 824d, 824e; 2011 PJM MOPR Rehearing Order, 137 FERC ¶ 61,145 at P 3 ; 2011 PJM MOPR Order, 135 FERC ¶ 61,022 at P 143 ("While the Commission acknowledges the rights of states to pursue legitimate policy interests, and while, as we have said, any state is free to seek an exemption from the MOPR under section 206, it is our duty under the FPA to ensure just and reasonable rates in wholesale markets. . . . Because below-cost entry suppresses capacity prices, and because the Commission has exclusive jurisdiction over wholesale rates, the deterrence of uneconomic entry falls within the Commission's jurisdiction, and we are statutorily mandated to protect the [capacity market] against the effects of such entry."), *quoted with approval in NJBPU*, 744 F.3d at 100, *cited in Hughes*, 136 S.Ct. at 1296.

¹⁸⁷ See, e.g., *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016) ("When FERC sets a wholesale rate, when it changes wholesale market rules, when it allocates electricity as between wholesale purchasers—in short, when it takes virtually any action respecting wholesale transactions—it has some effect . . . on retail rates. That is of no legal consequence.").

¹⁸⁸ June 2018 Order, 163 FERC ¶ 61,236 at P 158.

¹⁸⁹ 2011 PJM MOPR Rehearing Order, 137 FERC ¶ 61,145, at P 3 ("Our intent is not to pass judgment on state and local policies and objectives with regard to the development of new capacity resources, or unreasonably interfere with those objectives.

recognizes that the FPA reserves to the states decisions concerning generation; but the FPA provides the Commission with the jurisdiction and authority to regulate rates for wholesale sales by those generation resources and we are obligated to ensure that such rates are just and reasonable and not unduly discriminatory. Moreover, contrary to Clean Energy Advocates' argument, courts have affirmed Commission decisions resulting in customers having to pay twice for state-preferred capacity.¹⁹⁰

67. The facts that the FPA may not preempt state programs such as the Illinois ZEC program,¹⁹¹ that RECs may not be intended to suppress wholesale rates, or that the Commission does not have jurisdiction over unbundled REC transactions¹⁹² and ZEC programs, do not diminish the Commission's obligation under the FPA to ensure that

We are forced to act, however, when subsidized entry supported by one state's or locality's policies has the effect of disrupting the competitive price signals that PJM's [capacity auction] is designed to produce, and that PJM as a whole, including other states, rely on to attract sufficient capacity."), *quoted with approval in NJBPU*, 744 F.3d at 101, *quoted with approval in Hughes*, 136 S. Ct. at 1296. This determination also comports with precedent in other regional markets. *See, e.g., CASPR Order*, 162 FERC ¶ 61,205 at P 21 & n.32; 2011 ISO-NE MOPR Order, 135 FERC ¶ 61,029 at P 170, *reh'g denied*, 138 FERC ¶ 61,027 (2012), *aff'd sub nom. NEPGA*, 757 F.3d at 293-95 ; *Connecticut PUC*, 569 F.3d at 481, *adopted in NJBPU*, 744 F.3d at 96-97.

¹⁹⁰ *See NEPGA*, 757 F.3d at 294-95; *NJBPU*, 744 F.3d at 98; *Connecticut PUC*, 569 F.3d at 481.

¹⁹¹ *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018) (*EPSA v. Star*) (affirming that Illinois' ZECs program is not preempted by the FPA), *cert. denied*, 139 S.Ct. 1547 (2019).

¹⁹² Contrary to the Maryland Commission's argument, the June 2018 Order did not assert authority over unbundled REC transactions, or any other state out-of-market payments. Rather, the Commission determined that such forms of out-of-market support may permit and encourage state-preferred resources to make uneconomic offers into the capacity market and thereby unreasonably suppress the price paid to competitive resources that do not enjoy such out-of-market support. *See June 2018 Order*, 163 FERC ¶ 61,236 at PP 150-156. The Commission does not usurp state jurisdiction to engage in out-of-market support for preferred resources when the Commission regulates the impact of those state policies on wholesale capacity rates. *See Connecticut PUC*, 569 F.3d at 481-83. If REC revenues are claimed to provide the justification for a lower capacity market offer, then those revenues will directly affect wholesale capacity prices and can no longer be characterized as "independent" from jurisdictional wholesale sales. *WSP Inc.*, 139 FERC ¶ 61,061 at P 24.

wholesale rates are just and reasonable and not unduly discriminatory or preferential.¹⁹³ In discussing ZEC programs, the Seventh Circuit recently confirmed that, to the extent state efforts to support certain resource types in pursuit of state policy goals affects interstate sales, which is “an inevitable consequence of a system in which power is shared between state and national governments,” the Commission may make adjustments based on those effects.¹⁹⁴

5. Undue Discrimination

a. Requests for Rehearing and Clarification

68. Public Power Entities state that the Commission found PJM’s Tariff unjust, unreasonable, and unduly discriminatory, but argue that the June 2018 Order did not elaborate on how the existing Tariff, under which only new natural gas-fired resources are subject to the MOPR, should be deemed unduly discriminatory. Pointing to the Commission’s findings with regard to Capacity Repricing as potential support for the undue discrimination finding, Public Power Entities argue that, to the extent the Commission means to suggest that failing to apply the MOPR to resources that receive out-of-market support unduly discriminates against those not receiving out-of-market payments, the June 2018 Order does not sufficiently support a general proposition that the receipt of subsidies justifies different ratemaking treatment because the June 2018 Order does not show that subsidies have a “material effect on price.”¹⁹⁵

b. Commission Determination

69. We deny Public Power Entities’ rehearing request that the Commission acted arbitrarily and capriciously because it did not elaborate on why the existing Tariff should be deemed unduly discriminatory. Though the Commission stated in making its determinations that PJM’s then existing Tariff was “unjust and unreasonable and unduly

¹⁹³ See *EPSA v. Star*, 904 F.3d at 524. The rehearing petitions are, in effect, making an unwarranted reverse preemption argument by contending that since the FPA does not preempt a state program, the state program preempts the Commission’s jurisdiction over the wholesale market. This is simply not how federal preemption law works.

¹⁹⁴ *Id.* The court specifically pointed to the June 2018 Order and explained that, rather than deeming state programs such as the ZEC program preempted, the Commission in the June 2018 Order “has taken them as givens and set out to make the best of the situation they produce.” *Id.*

¹⁹⁵ Public Power Entities Request for Rehearing at 17-19 (citing June 2018 Order, 163 FERC ¶ 61,236 at P 68).

discriminatory,”¹⁹⁶ we clarify here that the Commission need not make an explicit and separate undue discrimination determination if it finds and explains why the Tariff is unjust and unreasonable, which the Commission did in this proceeding. Thus, elaboration on why the Tariff is unduly discriminatory was not required to support the Commission’s action here.¹⁹⁷ Further, as laid out in the June 2018 Order, and herein, the Commission explained why new and existing resources receiving out-of-market support require mitigation while resources not receiving out-of-market support do not, including why such out-of-market support causes price distortions in the capacity market, which affect market outcomes for all market participants, including suppressing the prices paid to non-subsidized resources.¹⁹⁸ Moreover, the assertion that the Commission’s finding was not sufficiently supported with evidence of a “material effect on price” merely repackages arguments, which we have already rejected above, that the Commission lacked sufficient evidence to find that the then-existing MOPR was unjust and unreasonable.

6. Procedural Schedule

a. Requests for Rehearing and Clarification

70. A number of parties seek rehearing of the procedural schedule set forth in the June 2018 Order for the paper hearing to determine the replacement rate. Clean Energy Associations argue that the Commission’s finding that the existing Tariff is unjust and unreasonable forces the Commission to rush to judgment on a replacement rate that can

¹⁹⁶ June 2018 Order, 163 FERC ¶ 61,236 at PP 150, 156.

¹⁹⁷ 16 U.S.C. § 824e(a) (“Whenever the Commission . . . shall find that any rate . . . by any public utility for any transmission or sale subject to the jurisdiction of the Commission, . . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate”); *see, e.g., Cities of Bethany v. FERC*, 727 F.2d 1131, 1143 (D.C. Cir. 1984) (explaining that under section 206, “FERC itself may establish the just and reasonable rate, provided that it first determines that a rate set by a public utility is unjust, unreasonable, or unduly discriminatory.”).

¹⁹⁸ June 2018 Order, 163 FERC ¶ 61,236 at PP 150-156. Some resources receive state subsidies favoring particular types of resources, such as renewables under RPS programs or nuclear resources through ZECs, other resources do not receive state subsidies. This causes the capacity market not only to produce unjust and unreasonable rates, but also produces unduly preferential rates by allowing subsidized resources to distort the market to their benefit while unduly discriminating against non-subsidized resources.

be implemented by the next annual capacity auction.¹⁹⁹ To remedy this, Clean Energy Associations contend that the Commission should withdraw this finding, or, at a minimum, adjust the procedures to ensure notice of the actual proposed replacement rate and comment prior to adopting the just and reasonable replacement rate going forward.²⁰⁰ Providing notice and an opportunity to comment on the proposed replacement rate prior to its implementation is important, allege Clean Energy Associations, because the Commission's rehearing rules of practice prohibit providing additional evidence when the evidence was available at the time of initial filings or raising issues for the first time on rehearing. Clean Energy Associations believe these rules would foreclose seeking rehearing of issues regarding that become apparent only when the specifics of the replacement rate are known.²⁰¹

71. Joint Consumer Advocates compare the procedural schedule in the June 2018 Order, requiring initial comments within 60 days, to that in other significant market change proceedings in which the Commission has provided between 75 and 90 days for the submission of initial comments.²⁰² Joint Consumer Advocates assert that this proceeding is similar in significance to a rulemaking, for which the Administrative Procedure Act (APA) requires a minimum of 60 days for public comment and, Executive Order No. 12,866, addressing agency rulemakings, recommends 180 days or more for significant regulatory actions.²⁰³ The compressed procedural timeline is unnecessary,

¹⁹⁹ Clean Energy Associations Rehearing Request at 4, 9-10.

²⁰⁰ *Id.* (stating, among other things, that a typical section 206 proceeding involves a filed proposed replacement rate with notice and a full comment opportunity on the proposed replacement rate prior to implementation); *see also* Clean Energy Advocates Rehearing Request at 54; Illinois Commission Rehearing Request at 4, 21-24 (the Commission should have determined the just and reasonable replacement rate, rather than providing vague directions with an unreasonable timeframe).

²⁰¹ Clean Energy Associations Rehearing Request at 8-9.

²⁰² Joint Consumer Advocates Rehearing and Extension Request at 25 (citing *Centralized Capacity Mkts. in Reg'l Transmission Org. & Indep. Sys. Operators*, 149 FERC ¶ 61,145 (2014); *Price Formation in Energy & Ancillary Servs. Mkts. Operated by Reg'l Transmission Org. & Indep. Sys. Operators*, 153 FERC ¶ 61,221 (2015)).

²⁰³ *Id.* at 25-26 (citing Executive Order No. 12,866, *Regulatory Planning & Review*, 58 Fed. Reg. 51,735 (Sept. 30, 1993)).

Joint Consumer Advocates contend, because evidence suggests that PJM's capacity market is robust and not in need to immediate reform.²⁰⁴

72. Parties argue that the procedural timeline is overly aggressive and limits the ability of the parties and the Commission to thoughtfully consider sweeping changes.²⁰⁵ The Maryland Commission and New Jersey Board state that the timeline will limit the ability for states to meaningfully participate in the process and hamper state commissions who are involved in other overlapping PJM matters.²⁰⁶ Public Power Entities argue that the compressed paper hearing schedule threatens to frustrate achieving a workable resource adequacy construct by requiring stakeholders to address complex issues without the time needed to develop a full record and make effective use of the stakeholder process.²⁰⁷ Further, parties argue that because state RPS programs require legislative change, they could not be implemented in response to an FRR Alternative within the June 2018 Order's timeframe, which does not provide an adequate transition mechanism to ensure that states can align their policies to a new capacity market construct.²⁰⁸

73. Parties argue that the paper hearing schedule violates due process because it does not provide parties a "realistic opportunity" to respond to the Commission's directive.²⁰⁹ Pointing to the scope and volume of open questions to be explored during the paper

²⁰⁴ *Id*; see also Maryland Commission Rehearing Request at 22.

²⁰⁵ New Jersey Board Rehearing Request at 2, 8-10; see also Clean Energy Associations Rehearing Request at 3-10; Joint Consumer Advocates Rehearing Request and Extension Request at 2, 4, 21-27; Illinois AG Rehearing Request at 3, 5, 14-17; PJM-ICC Rehearing and Clarification Request at 21-22; Illinois Commission Rehearing Request at 21-23.

²⁰⁶ New Jersey Board Rehearing Request at 10-12; Maryland Commission Rehearing Request at 22-23.

²⁰⁷ Public Power Entities Rehearing Request at 8, 23-24.

²⁰⁸ Joint Consumer Advocates at 27; see also Maryland Commission Rehearing Request at 22-23 (stating that if an FRR Alternative is approved, it will effectively not be available to states should the replacement rate be in place for the May 2019 Base Residual Auction because states will not have enough time to enact new legislation between January 2019 and May 2019); Illinois Commission Rehearing Request at 23-24.

²⁰⁹ Maryland Commission Rehearing Request at 19-23; see also Clean Energy Associations Rehearing Request at 4, 6 (the APA requires adequate notice and an opportunity to be heard).

hearing, parties contend that more time for consideration is warranted.²¹⁰ Joint Consumer Advocates emphasize that the replacement rate outlined in the June 2018 Order will require detailed consideration, as the FRR Alternative was raised by one entity in the stakeholder process and not discussed thoroughly by stakeholders, and that PJM has never instituted as broad a MOPR as proposed in the June 2018 Order.²¹¹

74. Joint Consumer Advocates assert that the paper hearing schedule “eviscerates the due process protections” embodied in the PJM stakeholder process, noting that stakeholders have invested considerable time and effort into these issues.²¹² Joint Consumer Advocates argue that, after finding PJM’s proposals unjust and unreasonable, the Commission should have returned the issues to the stakeholders with limited guidance, rather than foisting an under-developed concept upon them with little time to consider alternatives.²¹³ Joint Consumer Advocates state that by declaring PJM’s Tariff unjust and unreasonable, the June 2018 Order prohibits *ex parte* communications with stakeholders, preventing constructive dialogue on the replacement rate.²¹⁴ If the Commission does not grant its request for rehearing of the June 2018 Order, Joint Consumer Advocates request that the Commission grant a six month extension of time and require PJM to reconvene a stakeholder process with guidance from the Commission to develop a capacity market construct that meets stakeholder needs.²¹⁵

b. Commission Determination

75. We deny parties’ rehearing requests that the June 2018 Order set forth a flawed procedural schedule by setting an initial 60 day comment period, with reply testimony

²¹⁰ Maryland Commission Rehearing Request at 20-21; Clean Energy Associations Rehearing Request at 5, 6-7; Joint Consumer Advocates Rehearing and Extension Request at 23-24; Illinois AG Rehearing Request at 14-16.

²¹¹ Joint Consumer Advocates Rehearing and Extension Request at 23-24; *see also* Illinois AG Rehearing Request at 14 (arguing that the 60-day initial comment period is “facially insufficient” in light of the number of issues to be addressed); Illinois Commission Rehearing Request at 22-24 (June 2018 Order provided limited guidance on proposed FRR Alternative and insufficient time to address changes).

²¹² Joint Consumer Advocates Rehearing and Extension Request at 21-25.

²¹³ *Id.* at 21-22.

²¹⁴ *Id.* at 24.

²¹⁵ *Id.* at 27-28.

due 30 days thereafter (or 90 days from the date of the June 2018 Order).²¹⁶ This schedule was later extended to permit an additional 45 days for initial comments (or 105 days for initial comments), with reply comments due 35 days thereafter.²¹⁷ We are not persuaded that, under these circumstances, parties' opportunity to comment was legally insufficient. Calpine filed its complaint, in Docket No. EL16-49-000, in March 2016, providing notice that the then existing PJM Tariff may be revised to address state support for preferred resources. We further note that the comment period in this case conforms to typical comment time frames afforded by the Commission in comparable circumstances.²¹⁸ In any event, the Commission's extension of the hearing schedule moots the due process and other timing concerns raised by the parties regarding the schedule. While most parties requesting hearing would have preferred to leave the current Tariff in place and institute a more open-ended procedural schedule, with the Commission either providing preliminary guidance for a stakeholder process or instituting a traditional FPA section 206 show cause proceeding, we find that the extension, providing for more than 100 days to file initial testimony, and more than 30 days for reply testimony, afforded the parties a meaningful opportunity for comment.²¹⁹

76. We also disagree that parties were deprived of an opportunity to comment on the actual replacement rate because the Commission sought comment on a proposed replacement rate. The Commission routinely conducts paper hearing proceedings to determine just and reasonable replacement rates, and this does not run afoul of notice protections.²²⁰ If parties wish to comment on the replacement rate determined in the

²¹⁶ June 2018 Order, 163 FERC ¶ 61,236 at P 72.

²¹⁷ Notice of Extension of Time, Docket Nos. EL16-49-000, ER18-1314-000, and EL18-178-000 (August 22, 2018).

²¹⁸ See, e.g., *PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,049, at PP 142-143 (2019) (establishing 45 days to comment on capacity storage run-time rules in Commission instituted paper hearing proceeding); *Del. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,035, at P 42 (2018) (*Del. Pub. Serv. Comm'n*) (finding tariff provisions unjust and unreasonable and instituting paper hearing to determine replacement with 60 day comment period).

²¹⁹ See, e.g., *ISO New England, Inc.*, 131 FERC ¶ 61,065, at P 21 (2010) (establishing paper hearing procedures to address the just and reasonable replacement rate for the ISO New England capacity market, with initial comment period of 69 days and reply comment period of over 60 days).

²²⁰ See, e.g., *Del. Pub. Serv. Comm'n*, 164 FERC ¶ 61,035 at P 42 (finding tariff unjust and unreasonable and instituting paper hearing to determine replacement rate).

December 2019 Order, they will have an opportunity to do so in the compliance phase, and they had an opportunity to seek rehearing of the December 2019 Order.

7. Replacement Rate

a. Requests for Rehearing and Clarification

77. Parties object to the replacement rate proposed in the June 2018 Order, arguing that the proposed framework is not supported by substantial evidence, has not been shown to be just and reasonable,²²¹ and that a sweeping extension of the MOPR is not supported.²²² Public Power Entities argue that extending the MOPR to cover all existing resources benefiting from out-of-market support threatens market integrity because it could result in over-mitigation, cause customers to pay twice for capacity, and send incorrect price signals that more capacity is needed, and potentially exacerbate seller market power and opportunities for strategic behavior.²²³

78. A number of parties contend that the proposed replacement rate is unduly discriminatory, arguing that targeting some sources of out-of-market revenues while permitting other state and federal subsidies results in undue discrimination.²²⁴ The Illinois Commission asserts that it is discriminatory against state programs providing out-of-market support for certain resources by assessing resources as competitive or non-competitive based on whether the resource receives sufficient revenues to cover their costs from PJM markets, and rejects consumer preferences.²²⁵ PSEG states that targeting state policies that price externalities of electricity generation while permitting other federal, state, and local policies is “tantamount to picking winners and losers among

²²¹ See PJM-ICC Rehearing and Clarification Request at 2, 8, 18-22.

²²² Public Power Entities Rehearing Request at 4-5 (noting that exempting public power self-supply would mitigate some of their concerns).

²²³ Public Power Entities Rehearing Request at 19-21; *see also* Illinois Commission Rehearing Request at 17-18 (proposed replacement rate would improperly and unnecessarily raise capacity costs for customers in all PJM states and target resources that are not exercising market power).

²²⁴ Illinois Commission Rehearing Request at 3, 18-21; Clean Energy Associations Rehearing Request at 17-18, 20-22; Clean Energy Advocates Rehearing Request at 43-44; Joint Consumer Advocates Rehearing and Extension Request at 4, 19; Joint Consumer Advocates Rehearing and Extension Request at 20-21.

²²⁵ Illinois Commission Rehearing Request at 14-16.

various externalities.”²²⁶ Nor, Clean Energy Advocates argues, does the Commission explain why RECs and ZECs are different from other valid state property rights.²²⁷ Clean Energy Associations add that government policies have reduced the price of fuel used by fossil fuel resources, allowing them to submit suppressed offers.²²⁸ Parties further contend that it is unduly discriminatory to address state policies that may result in offers that are too low without addressing policies that may result in offers that are too high.²²⁹

79. The Illinois Commission argues that in order to apply the MOPR in a non-discriminatory manner, all resources receiving out-of-market payments should be targeted, resulting in few resources being able to participate in the capacity market without being subject to the MOPR.²³⁰ The Illinois Commission further contends that the intent or purpose behind an offer level is an important distinction, contrary to the June 2018 Order’s finding that there is no substantive difference among resource participating in the capacity market with the benefit of out-of-market support, and that treating resources that submit offers to exercise market power the same as resources that submit offers designed to recover their costs is undue discrimination.²³¹

80. Parties also advocate for specific terms to be incorporated in the replacement rate. Exelon argues that any replacement rate must accommodate state-supported resources and continue to recognize the capacity these resources provide to the system, noting that the replacement rate would not be just and reasonable absent a mechanism to allow states to make their own policy choices with regard to generation facilities and to prevent capacity from being over-procured.²³² Joint Consumer Advocates urge the Commission to provide for a transition period prior to full implementation of the replacement rate to

²²⁶ PSEG Rehearing Request at 14-15.

²²⁷ Clean Energy Advocates Rehearing Request at 50-53.

²²⁸ Clean Energy Associations Rehearing Request at 17-18.

²²⁹ *Id.* at 21-22, 26.

²³⁰ Illinois Commission Rehearing Request at 19; *see also* Exelon Rehearing Request at 12 (agreeing with Commissioner Glick’s dissent that subsidies are ubiquitous and even a broader MOPR would not address all the various subsidies for power plants).

²³¹ Illinois Commission Rehearing Request at 20-21.

²³² Exelon Rehearing Request at 14-16.

allow state legislative and regulatory bodies to undertake the necessary preparations for a new capacity market construct.²³³

81. PJM and PJM-ICC seek clarification that the Commission's discussion of the proposed replacement rate framework in the June 2018 Order does not preclude the consideration of other alternatives or preordain a just and reasonable replacement rate.²³⁴ Specifically, PJM asks for clarification that the June 2018 Order does not prohibit parties from including aspects of its Capacity Repricing proposal, or the Commission's consideration of such proposals, as part of a proposed solution to the unjust and unreasonable conditions identified by the Commission.²³⁵ PJM-ICC maintains that the June 2018 Order recognizes that the preliminary findings have not yet been supported by sufficient evidence and, to the extent that the Commission does not grant its request for clarification that the June 2018 Order did not predetermine a just and reasonable replacement rate, PJM-ICC requests rehearing of the replacement rate framework on grounds that it is not supported by substantial evidence. In particular, PJM-ICC contends that the Commission did not cite any evidence supporting the conclusion that an expanded MOPR will be just and reasonable and did not support the FRR Alternative, which is not fully described in the June 2018 Order.²³⁶ The Illinois AG argues that the Commission improperly excluded consideration of other approaches by presenting only two avenues for the new capacity market rules, and, in particular, that the FRR Alternative was not suggested by any party, but independently identified by the Commission.²³⁷

82. FirstEnergy and Dominion seek clarification regarding an exemption for capacity resources owned or controlled by vertically integrated utilities.²³⁸ FirstEnergy requests clarification that, in finding that the existing MOPR is unjust and unreasonable and rejecting PJM's proposed tariff revisions, the Commission did not determine that

²³³ Joint Consumer Advocates Rehearing and Extension Request at 3, 4, 27 (suggesting that without a transition period, states may be forced to re-regulate or leave PJM altogether).

²³⁴ PJM Clarification and Rehearing Request at 4-6; PJM-ICC Rehearing and Clarification Request at 2, 16-18, 23.

²³⁵ PJM Clarification and Rehearing Request at 4-6.

²³⁶ PJM-ICC Rehearing and Clarification Request at 17-20.

²³⁷ Illinois AG Rehearing Request at 13.

²³⁸ FirstEnergy Clarification and Rehearing Request at 2-10; Dominion Rehearing and Clarification Request at 3, 16-17.

excluding vertically integrated resources from mitigation is not just and reasonable.²³⁹ FirstEnergy also requests that the Commission clarify that the Commission's discussion of the replacement rate did not intend to suggest that the expanded MOPR should exclude an exemption for vertically integrated resources.²⁴⁰ Similarly, Dominion requests clarification whether a self-supply exemption for vertically integrated resources is open for discussion in the paper hearing. If not, Dominion states that the Commission should restore the status quo tariff and order PJM to continue working on capacity market reforms with stakeholders.²⁴¹ In the alternative, Dominion and FirstEnergy seek rehearing if the Commission intends that no self-supply exemption be available for vertically integrated utilities, claiming that vertically integrated utilities do not raise price suppression concerns and that the record lacks evidence that this exemption would be unjust and unreasonable.²⁴²

b. Commission Determination

83. Regarding the requests for clarification that the June 2018 Order did not prejudge the replacement rate, we confirm that the replacement rate framework set forth in the June 2018 Order was only a proposal on which the Commission sought comment.²⁴³ The June 2018 Order did not make findings on possible MOPR exemptions or what resources will be subject to the MOPR, stating in the June 2018 Order that we are not able to determine the just and reasonable replacement rate based on the record.²⁴⁴ In fact, in the December 2019 order, the Commission considered the issues raised by the Commission previously in the June 2018 Order and the comments filed in the paper hearing proceeding to produce a just and reasonable replacement rate different from the preliminary proposal.²⁴⁵ In the paper hearing proceeding, parties had the opportunity

²³⁹ FirstEnergy Clarification and Rehearing Request at 4-6.

²⁴⁰ *Id.* at 6.

²⁴¹ Dominion Rehearing and Clarification Request at 3, 16.

²⁴² *Id.* at 16-17; First Energy Clarification and Rehearing Request at 4, 6-10.

²⁴³ June 2018 Order, 163 FERC ¶ 61,236 at P 157 (“[W]e preliminarily find that modifying two aspects of the PJM Tariff may produce a just and reasonable rate.”).

²⁴⁴ *Id.* P 7.

²⁴⁵ December 2019 Order, 169 FERC ¶ 61,239 at PP 2-16.

to,²⁴⁶ and indeed many parties did, provide additional proposals for the Commission's consideration, including PJM's reiteration of its Capacity Repricing proposal in the form of Extended Resource Carve Out and an exemption for self-supply resources, including vertically integrated resources, proffered by PJM and other parties. The June 2018 Order did not establish a replacement rate, so rehearing arguments relevant to the merits and specifics of the replacement rate are beyond the scope of rehearing of the June 2018 Order and will not be addressed here. Arguments relating to the replacement rate should have been raised in briefs filed in response to the June 2018 Order, or in rehearing requests of the December 2019 Order, which will be addressed in a separate order.

8. Miscellaneous Procedural Arguments

a. Requests for Rehearing and Clarification

84. ODEC requests clarification that, by establishing a March 21, 2016 refund effective date for Docket No. EL16-49-000 (Calpine Complaint) and July 11, 2018 effective date for Docket No. EL18-178-000 (Commission *sua sponte* section 206 finding),²⁴⁷ the Commission has not predetermined whether any remedy or modification to the capacity construct resulting from the proceeding will be applied retroactively back to the refund effective date. ODEC also asks that the Commission clarify that the time period for application of any remedy or design changes required as an outcome of this proceeding will be determined at a later date.²⁴⁸ To the extent that the Commission does not grant this clarification, ODEC seeks rehearing on the basis that the refund effective dates will impose a retroactive remedy that will require re-running past capacity auctions, contrary to the Commission's policy against upsetting past market outcomes.²⁴⁹

85. Clean Energy Associations argue that, by consolidating the records in EL16-49-000 and ER18-1314-000 to find PJM's Tariff unjust and unreasonable, the Commission relied on an incomplete record. Specifically, Clean Energy Associations assert that the Calpine Complaint proceeding in EL16-49-000 focused on state support for existing nuclear plants and parties commented on that, whereas PJM's section 205 filing in ER18-1314-000 dealt with market redesign proposals, and parties were not on notice that the

²⁴⁶ June 2018 Order, 163 FERC ¶ 61,236 at P 172 (stating that the paper hearing will address a just and reasonable replacement rate, "including the proposal identified [in the June 2018 Order] or any other proposal that may be presented").

²⁴⁷ See *id.* at P 174.

²⁴⁸ ODEC Clarification and Rehearing Request at 3

²⁴⁹ *Id.* at 4-6.

record compiled in one proceeding would be used in another to answer a different question.²⁵⁰

86. Illinois Commission argues that the Commission effectively took administrative notice of the combined records in Docket Nos. ER18-1314 and EL16-49, which is only appropriate where facts are not in dispute, and not where a hearing should have been held, as the Illinois Commission contends should have occurred here.²⁵¹

87. The Illinois Commission argues that the Commission erred in failing to rule on the Illinois Commission's motion to dismiss PJM's section 205 filing in Docket No. ER18-1314-000.²⁵² According to the Illinois Commission, even though the Commission rejected PJM's Capacity Repricing and MOPR-Ex proposals in the June 2018 Order, the Commission nonetheless relied on the record in Docket No. ER18-1314-000 to justify opening a section 206 investigation into PJM's capacity market design, a record that the Illinois Commission contends is faulty and fails to substantiate that state subsidies cause price suppression.²⁵³

88. The Illinois Commission further argues that the Commission erred in failing to rule on the Illinois Commission's motion to strike answers filed by PJM and the Market Monitor in Docket No. ER18-1314-000,²⁵⁴ contending that PJM's answer was untimely, and that the Market Monitor's answer misrepresented facts regarding the Illinois ZEC legislation and should therefore not be relied upon.²⁵⁵ The Illinois Commission also asserts that the Commission erred by not ruling on a motion to dismiss the amended

²⁵⁰ Clean Energy Associations Rehearing Request at 10 n.15.

²⁵¹ Illinois Commission Rehearing Request at 4-6 (citing Federal Rules of Evidence Rule 201 regarding judicial notice that judicial notice is an exception to the requirement that decisions be based on evidence adduced at hearing). The Illinois Commission also contends that the Commission failed to rule on its motions to dismiss in both dockets and its motion to strike in Docket No. ER18-1314, calling into question validity of the filings). *Id.* at 5.

²⁵² See Illinois Commission, Motion to Dismiss and Protest, Docket No. ER18-1314-000 (filed May 7, 2018).

²⁵³ Illinois Commission Rehearing Request at 24-25.

²⁵⁴ See Illinois Commission, Motion to Strike, Motion for Leave to Answer, and Answer, Docket No. ER18-1314-0000 (filed June 14, 2018).

²⁵⁵ Illinois Commission Rehearing Request at 25.

complaint filed in Docket No. EL16-49-000,²⁵⁶ arguing that the amended complaint was not germane to the original complaint, which allegedly focused only on certain subsidies.²⁵⁷

b. Commission Determination

89. With regard to ODEC's clarification request regarding the established refund effective dates, we confirm that the mere setting of a refund effective date does not mean that the Commission has determined whether or when any refund would apply. In any event, this request is moot as the Commission exercised its discretion not to order refunds.²⁵⁸

90. We disagree with Clean Energy Associations that the Commission improperly consolidated the records in the Calpine Complaint and April 2018 Filing proceedings to find PJM's Tariff unjust and unreasonable. The Commission enjoys significant discretion in deciding how to process its cases.²⁵⁹ The June 2018 Order explained the Commission's authority to consolidate cases and why consolidation is appropriate here.²⁶⁰ We also disagree that consolidation deprived parties of notice regarding the Commission's decision to *sua sponte* commence a section 206 proceeding to determine the replacement rate. Parties were given notice and opportunity to comment in both

²⁵⁶ See Dayton Power & Light Co. et al., Motion to Dismiss Complaint, To Oppose Acceptance of Motion to Amend Complaint and To Dismiss Amendment to the Complaint and Request for Expedited Action, Docket No. EL16-49-000 (filed Jan. 24, 2017).

²⁵⁷ Illinois Commission Rehearing Request at 25.

²⁵⁸ December 2019 Order, 169 FERC ¶ 61,239 at P 3.

²⁵⁹ See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978) (agencies have broad discretion over the formulation of their procedures); *FPC v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 333-34 (1976) ("a reviewing court may not . . . dictat[e] to the agency the methods, procedures, and time dimension of the needed inquiry"); *Superior Oil Co. v. FERC*, 563 F.2d 191, 201 (5th Cir. 1977) ("We ordinarily will defer to an agency's choices concerning its procedures because in making such choices agencies are best situated to determine how they should allocate their finite resources.").

²⁶⁰ June 2018 Order, 163 FERC ¶ 61,236 at P 6 n.9.

proceedings upon which the Commission based its section 206 finding, as well as opportunity to comment on the proposed replacement rate.²⁶¹

91. We also disagree with the Illinois Commission that the Commission improperly took administrative notice of the records in the Calpine Complaint proceeding and PJM April 2018 Filing. In arguing this, the Illinois Commission implies that it is impermissible for the Commission to make findings based on what is provided in the record, rather than in a hearing, if there is competing record evidence. The Commission properly exercised its discretion to consolidate these proceedings and therefore appropriately considered the record in each of these dockets, and a hearing was not required.²⁶²

92. We disagree with the Illinois Commission that the Commission erred by not ruling on its motion to dismiss PJM's section 205 filing. As an initial matter, the Illinois Commission's motion was rendered moot, to the extent the Commission found, as the Illinois Commission urged, that PJM failed to demonstrate that its proposal was just and reasonable. To the extent the Illinois Commission argues that had the Commission dismissed PJM's April 2018 Filing, the Commission could not have relied upon the record to find PJM's Tariff unjust and unreasonable, we disagree. Even if the Commission had ruled directly on the Illinois Commission's motion, we see no basis for disregarding, and the Illinois Commission has cited no precedent requiring that the Commission disregard, the record compiled on PJM's section 205 filing. Moreover, for the reasons discussed at length above, the record supports the Commission's finding that PJM's Tariff was unjust and unreasonable.

93. As to Dayton, et al.'s motion to dismiss the amended complaint, in Docket No. EL16-49-000, the amended complaint was properly before the Commission, pursuant to the Commission's Rules of Practice and Procedure,²⁶³ which permits amended pleadings. We are not persuaded that the subject of the amended complaint—the adoption of ZECs

²⁶¹ See PJM Interconnection, L.L.C.; *Notice of Institution of Section 206 Proceeding and Refund Effective Date*, 83 Fed. Reg. 32,113 (July 11, 2018) (providing notice of opportunity to comment on replacement rate).

²⁶² See *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 776 (7th Cir. 2013) ("FERC need not conduct an oral hearing if it can adequately resolve factual disputes on the basis of written submissions."); *Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997) ("FERC may resolve factual issues on a written record unless motive, intent, or credibility are at issue or there is a dispute over a past event."). Further, since the Commission is not bound by the Federal Rules of Evidence, we disagree that the Commission improperly took judicial notice of the consolidated records.

²⁶³ 18 C.F.R. § 385.215 (2019).

legislation by the State of Illinois—was not germane to the underlying complaint, as the Illinois Commission asserts given that the complaint was about subsidies generally, not just those cited as examples.

94. Finally, we disagree with the Illinois Commission’s assertion that the Commission erred by accepting the May 25, 2018 answers, submitted by PJM and the Market Monitor, while declining to accept, or otherwise address, the Illinois Commission’s motion to strike those answers, effectively, an answer to an answer. The Commission’s Rules of Practice and Procedure prohibit an answer to an answer unless otherwise ordered by the decisional authority, and having reviewed the disputed answers, the Commission properly exercised its discretion to accept them.²⁶⁴

9. Capacity Repricing Rehearing and Clarification Requests

a. Clarification and Rehearing Requests

95. While no party challenges the Commission’s rejection of PJM’s Capacity Repricing proposal, PJM, the Illinois Commission, and Clean Energy Advocates raise concerns with some of the language the Commission used in the June 2018 Order. PJM asks the Commission to reconsider the finding that the Capacity Repricing proposal would artificially inflate clearing prices.²⁶⁵ PJM argues that resetting a subsidized offer to its relative level compared to the supply stack approximates the competitive outcome had there been no subsidy, similar to applying a MOPR. According to PJM this is because the clearing price and cleared quantity would be the same whether a subsidized offer was set under either Capacity Repricing or a MOPR. What differentiates Capacity Repricing from a MOPR, PJM argues, is which resources make up the cleared quantity. PJM insists that the resulting clearing price under Capacity Repricing, as opposed to the resource mix, is not “artificially inflated” and the Commission’s finding on this point is contrary to fact and prior Commission orders that found that the MOPR, which PJM asserts operates like Capacity Repricing in terms of setting the clearing price, ensures just and reasonable prices.²⁶⁶

96. Stating that the Commission was correct in rejecting Capacity Repricing, the Illinois Commission nonetheless argues that the June 2018 Order’s statement that Capacity Repricing “represents and unjust and unreasonable cost shift to loads who should not be required to underwrite, through capacity payments, the generation

²⁶⁴ 18 C.F.R. § 385.213(a) (2019).

²⁶⁵ PJM Clarification and Rehearing Request at 6-10; June 2018 Order, 163 FERC ¶ 61,236 at P 64.

²⁶⁶ PJM Clarification and Rehearing Request at 7-9.

preferences that other regulatory jurisdictions have elected to impose on their own constituents.”²⁶⁷ The Illinois Commission contends that there is no evidence demonstrating that the Illinois ZEC program or other state policies result in such cost shifts.

97. Clean Energy Advocates ask the Commission to narrow, reverse, or clarify the June 2018 Order’s statement that “[t]he receipt of out-of-market support is a difference that *requires* different ratemaking treatment when such support has a material effect on price or cannot otherwise be justified by our statutory standards.”²⁶⁸ Clean Energy Advocates are concerned that this statement suggests that out-of-market support should apply to state-sponsored resources in all markets, including energy and ancillary services markets, and assert that this determination would not be supported by the record in this proceeding.²⁶⁹

b. Commission Determination

98. In response to PJM’s request for rehearing regarding Capacity Repricing, the Commission affirms its findings regarding the Capacity Repricing proposal, including that the proposal “artificially inflates” clearing prices, noting that these findings are confined to the as-filed Capacity Repricing proposal,²⁷⁰ which was offered as a stand-alone solution, and which disconnected the determination of price and quantity for the sole purpose of facilitating the participation of subsidized resources in the PJM capacity market. We disagree with PJM that Capacity Repricing as proposed in the April 2018 Filing would not artificially increase clearing prices. Although both the MOPR and PJM’s Capacity Repricing proposal produce market clearing prices that are meant to approximate competitive outcomes had there been no subsidy, under Capacity Repricing, that price would be “disconnected from the price used to determine which resources receive capacity commitments” to enable the participation of state-supported resources.²⁷¹ By disconnecting the determination of price and quantity in that manner, PJM’s Capacity Repricing proposal would have sent incorrect price signals to guide entry and exit decisions. Accordingly, PJM’s assertion that its Capacity Repricing proposal

²⁶⁷ Illinois Commission Rehearing Request at 17 (citing June 2018 Order, 163 FERC ¶ 61,236 at P 67).

²⁶⁸ Clean Energy Advocates Rehearing Request at 53 (citing June 2018 Order, 163 FERC ¶ 61,236 at P 68 (emphasis added)).

²⁶⁹ *Id.*

²⁷⁰ See June 2018 Order, 163 FERC ¶ 61,236 at PP 64-65.

²⁷¹ *Id.* P 64.

operates similarly to the MOPR—and likewise ensures just and reasonable rates—is misplaced.

99. We affirm the June 2018 Order’s finding that Capacity Repricing represents an unjust and unreasonable cost shift to loads. Capacity Repricing would have allowed subsidized resources to displace more economic, unsubsidized resources, which would hinder the ability of the market to attract competitive new entry, shifting the financial and operational risks associated with providing capacity from investors to consumers, while also resulting in price increases above the offer of the marginal unit.

100. In response to Clean Energy Advocates’ clarification request, the Commission’s decision in the June 2018 Order is based on the record pertaining to the PJM capacity market and the Commission did not make any findings with respect to other markets. This proceeding is solely focused on the effects of various state subsidies on the capacity market. Should regulated utilities believe there is merit in the contention of Clean Energy Advocates, we invite new filings to initiate a separate proceeding.

The Commission orders:

(A) The requests for rehearing are hereby denied, as discussed in the body of this order.

(B) The requests for clarification are hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, Homer City Generation, L.P., NRG Power Marketing LLC, GenOn Energy Management, LLC, Carroll County Energy LLC, C.P. Crane LLC, Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean Energy, LLC and Panda Power Generation Infrastructure Fund, LLC

Docket Nos. EL16-49-001

v.

PJM Interconnection, L.L.C.

PJM Interconnection, L.L.C.
PJM Interconnection, L.L.C.

EL18-178-001
ER18-1314-002
(Consolidated)

(Issued April 16, 2020)

GLICK, Commissioner, *dissenting*:

1. From the beginning, this proceeding has been about two things: Dramatically increasing the price of capacity in PJM Interconnection, L.L.C. (PJM) and slowing the region's transition to a clean energy future. Today's orders on rehearing make that even more clear.¹ Accordingly, I dissent as strongly as I can from both orders, which are illegal, illogical, and truly bad public policy.

2. The Commission started down this road in June 2018, when it issued a deeply misguided order finding that PJM's capacity market was unjust and unreasonable because it did not prevent state public policies from influencing the resource mix in PJM's capacity market.² Then-Commissioner LaFleur aptly described that decision, which was

¹ *Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035 (2020) (December 2019 Rehearing Order); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,034 (2020) (June 2018 Rehearing Order).

² *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (June 2018 Order).

based on a tenuous theory and a thin record, as “a troubling act of regulatory hubris.”³ To address the purported problems with the capacity market, the June 2018 Order proposed a so-called “resource-specific FRR Alternative”⁴ that would have bifurcated the market and cordoned off state-sponsored resources.

3. Then, in December 2019, after a year and a half of indecision, the Commission took a sharp right turn, altogether abandoning the resource-specific FRR Alternative in favor of a radical effort to extirpate state subsidies from the capacity market.⁵ That order established a sweeping definition of state subsidy that will subject much, if not most, of the resources in PJM’s capacity market to a minimum offer price rule (MOPR). In so doing, the Commission turned the “market” into a system of bureaucratic pricing so pervasive that it would have made the Kremlin economists in the old Soviet Union blush. In addition, the order created a number of exemptions to the MOPR that will have the principal effect of entrenching the current resource mix by excluding several classes of existing resources from mitigation. Finally, in ditching the resource-specific FRR Alternative, the Commission made clear that it had no concern for the interests of states seeking to exercise their authority over generation resources or for the customers that would be left to pick up the tab.

4. Today’s orders affirm the conclusions in both the June 2018 and December 2019 Orders with a degree of condescension that is unbecoming of an agency of the federal government. And, as if that were not enough, today’s orders show no interest in the careful, detailed analysis that has long been the Commission’s hallmark. Instead, they turn away the several dozen rehearing requests with little more than generalities and claims that the parties misunderstood the underlying orders or the governing law—a charge that often more accurately describes the Commission’s orders today than it does those rehearing requests.⁶ All parties deserve better from this Commission, even the ones that will benefit financially from today’s orders.

³ *Id.* (LaFleur, Comm’r, dissenting at 5) (“The majority is proceeding to overhaul the PJM capacity market based on a thinly sketched concept, a troubling act of regulatory hubris that could ultimately hasten, rather than halt, the re-regulation of the PJM market.”).

⁴ “FRR” stands for Fixed Resource Requirement.

⁵ *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) (December 2019 Order).

⁶ Today’s orders address both the requests filed in response to the June 2018 Order and the December 2019 Order. Unless otherwise indicated, citations to rehearing requests refer to requests filed in response to the December 2019 Order.

I. Today's Orders Unlawfully Target a Matter under State Jurisdiction

5. The FPA is clear. The states, not the Commission, are the entities responsible for shaping the generation mix. Although the FPA vests the Commission with jurisdiction over wholesale sales of electricity as well as practices affecting those wholesale sales,⁷ Congress expressly precluded the Commission from regulating “facilities used for the generation of electric energy.”⁸ Congress instead gave the states exclusive jurisdiction to regulate generation facilities.⁹

6. But while those jurisdictional lines are clearly drawn, the spheres of jurisdiction themselves are not “hermetically sealed.”¹⁰ One sovereign’s exercise of its authority will

⁷ Specifically, the FPA applies to “any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission” and “any rule, regulation, practice, or contract affecting such rate, charge, or classification.” 16 U.S.C. § 824e(a) (2018); *see also id.* § 824d(a) (similar).

⁸ *See id.* § 824(b)(1) (2018); *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”); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm’n of Ind.*, 332 U.S. 507, 517-18 (1947) (recognizing that the analogous provisions of the NGA were “drawn with meticulous regard for the continued exercise of state power”). 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 MOPR squares with the Commission’s role under the FPA.

⁹ 16 U.S.C. § 824(b)(1); *Hughes*, 136 S. Ct. at 1292; *see also Pac. 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 new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States”).

¹⁰ *EPSA*, 136 S. Ct. at 776; *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).

inevitably affect matters subject to the other sovereign's exclusive jurisdiction.¹¹ For example, any state regulation that increases or decreases the number of generation facilities will, through the law of supply and demand, inevitably affect wholesale rates.¹² But the existence of such cross-jurisdictional effects is not necessarily a "problem" for the purposes of the FPA. Rather, those cross-jurisdictional effects are the product of the "congressionally designed interplay between state and federal regulation"¹³ and the natural result of a system in which regulatory authority over a single industry is divided between federal and state government.¹⁴ Maintaining that interplay and permitting each sovereign to carry out its designated role is essential to the cooperative federalist regime that Congress made the foundation of the FPA.

¹¹ See *EPSA*, 136 S. Ct. at 776; *Oneok*, 135 S. Ct. at 1601; *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 57 (2d Cir. 2018) (explaining that the Commission "uses auctions to set wholesale prices and to promote efficiency with the background assumption that the FPA establishes a dual regulatory system between the states and federal government and that the states engage in public policies that affect the wholesale markets").

¹² *Zibelman*, 906 F.3d at 57 (explaining how a state's regulation of generation facilities can have an "incidental effect" on the wholesale rate through the basic principles of supply and demand); *id.* at 53 ("It would be 'strange indeed' to hold that Congress intended to allow the states to regulate production, but only if doing so did not affect interstate rates." (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 512-13 (1989) (*Northwest Central*))); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) (explaining that the subsidy at issue in that proceeding "can influence the auction price only indirectly, by keeping active a generation facility that otherwise might close A larger supply of electricity means a lower market-clearing price, holding demand constant. But because states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law.").

¹³ *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting *Northwest Central*, 489 U.S. at 518); *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").

¹⁴ *Cf. Star*, 904 F.3d at 523 ("For decades the Supreme Court has attempted to confine both the Commission and the states to their proper roles, while acknowledging that each use of authorized power necessarily affects tasks that have been assigned elsewhere.").

7. In recent years, the Supreme Court has repeatedly admonished both the Commission and the states that the FPA prohibits actions that “aim at” or “target” the other sovereign’s exclusive jurisdiction.¹⁵ Beginning with *Oneok*, the Court underscored that its “precedents emphasize the importance of considering the *target* at which the state law *aims*.”¹⁶ The Court has subsequently explained how that general principle plays out in practice when analyzing the limits on both federal and state authority. In *EPSA*, the Court held that the Commission can regulate a practice affecting wholesale rates, provided that the practice “directly” affects those rates and that the Commission does not regulate or target a matter reserved for exclusive state jurisdiction.¹⁷ And, in *Hughes*, the Court returned to this theme, explaining that the FPA prohibits one sovereign from exercising its authority in a manner that aims at or targets the other sovereign’s exclusive jurisdiction, which, in that case, meant that a state could not “tether” its regulations to the Commission-jurisdictional wholesale market by requiring the resource to bid and clear in that market in order to secure a subsidy.¹⁸ Together, those cases stand for the unremarkable proposition that the FPA prohibits one sovereign from taking advantage of the law’s cooperative federalist model to aim at or target, and, thus, interfere with, the other sovereign’s exclusive jurisdiction.

8. But that is exactly what the Commission’s new MOPR does. The record in this proceeding makes unmistakably clear that the purpose and effect of the new MOPR is to interfere with state regulation of generation facilities. Indeed, at every turn, the

¹⁵ *E.g.*, *Hughes*, 136 S. Ct. at 1298 (relying on *Oneok*, 135 S. Ct. at 1599, for the proposition that a state may regulate within its sphere of jurisdiction even if its actions “incidentally affect areas within FERC’s domain” but that a state may not target or intrude on FERC’s exclusive jurisdiction); *EPSA*, 136 S. Ct. at 776 (emphasizing the importance of “the *target* at which [a] law *aims*” (quoting *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) (*Northern Natural*)).

¹⁶ *Oneok*, 135 S. Ct. at 1600 (discussing *Northern Natural*, 372 U.S. at 94, and *Northwest Central*, 489 U.S. at 513-14).

¹⁷ *EPSA*, 136 S. Ct. at 775-77; *id.* at 776.

¹⁸ *Hughes*, 136 S. Ct. at 1298, 1299. In the intervening few years, the lower federal courts have carefully followed the Court’s discussion of the prohibition on one sovereign regulating in a manner that interferes with the other sovereign’s authority by targeting matters subject to their exclusive jurisdiction. *See, e.g.*, *Zibelman*, 906 F.3d at 50-51, 53; *Star*, 904 F.3d at 523-24; *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 98 (2d Cir. 2017).

Commission's has described the new MOPR as targeting the PJM states' exercise of their exclusive jurisdiction to regulate generation facilities under FPA section 201(b). For example, the Commission began its determination section in the June 2018 Order with a discussion of purported problems evidenced in "[t]he records [before it, which] demonstrate that states have provided or required meaningful out-of-market support to resources in the current PJM capacity market, and that such support is projected to increase substantially in the future"¹⁹—*i.e.*, the simple fact that states are exercising their reserved authority. The Commission explained that states' exercise of their reserved authority created "significant uncertainty" and left other resources unable to "predict whether their capital will be competing against" subsidized or unsubsidized units,²⁰ again making clear that it is the mere exercise of that authority that is the purported problem. And, ultimately, the Commission found that PJM's tariff was unjust and unreasonable because it did not prevent the ineluctable effects of state action from making their way to the wholesale market.²¹

9. The December 2019 order made the Commission's attempt to interfere with state authority even more clear. Its rationale for the new MOPR was that it was needed to combat increasing state policies and ensure that state actions do not shape entry and exit through the capacity market.²² In addition, the Commission focused *only* on what it deemed to be states' regulation of generation facilities, explicitly ignoring other state policies that might equally affect wholesale rates, such as so-called general industrial development policies or local siting support.²³ That concession is plain evidence that the

¹⁹ June 2018 Order, 163 FERC ¶ 61,236 at P 149.

²⁰ *Id.* P 150.

²¹ *Id.* P 156; *EPSA*, 136 S. Ct. at 776 (explaining that because the federal and state spheres of jurisdiction "are not hermetically sealed from each other," "virtually any action" one sovereign takes pursuant to its authority will have "some effect" on matters within the other's sphere of jurisdiction).

²² December 2019 Order, 169 FERC ¶ 61,239 at P 37.

²³ *Id.* P 83; *see* December 2019 Rehearing Order, 171 FERC ¶ 61,035 at PP 68, 108. The Commission has never attempted to provide a rational justification for that distinction. It certainly did not distinguish between acceptable and unacceptable state policies based on their effects on wholesale rates given that there is no record evidence bearing on that point and certainly no discussion of such a distinction in any of the Commission's orders in this proceeding. *See infra* section II.B.1.c. Instead, the Commission asserted that it was concerned only with those state efforts that it determined (again with no analysis) to be "most nearly directed at or tethered to" the wholesale rate. December 2019 Order, 169 FERC ¶ 61,239 at P 68 (internal quotation marks and

new MOPR is not about the effects of state actions on wholesale rates, but rather all about blocking particular state efforts to shape the generation mix. Indeed, it is irrational in the extreme to profess concern about the effects of state policies on the generation mix, but then completely ignore whole classes of state policies that significantly affect wholesale prices in order to focus exclusively on the particular subsidies that various states have enacted pursuant to their reserved authority under FPA section 201(b). That result, and the Commission's total failure to provide a reasoned explanation for the arbitrary lines it drew, show this proceeding for what it is: An effort aimed directly at state efforts to shape the generation mix, price suppression pretext notwithstanding.²⁴

footnotes omitted); *see* Clean Energy Advocates Rehearing Request at 32 (“The Commission . . . cobbles together a test of whether policies are ‘nearly directed at’ or ‘tethered to’ new entry or continued operation of generating capacity. This test, too, lacks any substantive articulation of explanation, and the Commission does not establish how or why such policies would have the greatest impact on rates.” (footnotes omitted)). That rather awkward repurposing of a preemption term of art tells us nothing. The term “untethered” first entered the FPA lexicon in *Hughes*, 136 S. Ct. at 1299, and the specific concept of “tethering” described in that opinion has played an important role in subsequent FPA preemption litigation. *E.g.*, *Zibelman*, 906 F.3d at 51-55; *Star*, 904 F.3d at 523-24; *Allco*, 861 F.3d at 102. But until December 2019, it was never used as the yardstick for targeting particular state policies that are concededly “untethered” to the wholesale rate. It is not obvious, and the Commission certainly does not explain, why being a valid exercise of state jurisdiction that is close-to-but-not preempted should be relevant to our analysis, especially if that analysis is nominally only about wholesale market effects. Preemption is a binary determination, which is distinctly unlike horseshoes or hand grenades. The failure to provide a reasoned basis for distinguishing between acceptable and unacceptable state policies is itself arbitrary and capricious and only underscores the extent to which the Commission's order targets state jurisdiction, notwithstanding its scattered statements about price suppression and wholesale rates.

²⁴ In addition, the disparate treatment that the Commission accords different types of state policies underscores the extent to which it is meddling in state jurisdiction. The new MOPR is laser-focused on mitigating anything that increases a resource's revenue, but expressly excludes anything that decreases its costs. *See infra* Section II.B.1.d; December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 390 (explaining that the Commission will not treat the Regional Greenhouse Gas Initiative (RGGI) as a subsidy because it “does not provide payments, concessions, rebates, or other financial benefits to resources” even though it meets every other prong of the Commission's subsidy definition, *see* December 2019 Order, 169 FERC ¶ 61,239 at P 67). That means that, in the Commission's eyes, any state policy that augments a resource's revenue is a “problem” that must be solved, but that any state policy that decreases its relative costs is not. But, in a construct where offer prices are calculated as costs *net* of revenues, *see*

10. And, lest there be any doubt, the December 2019 Order made clear that the Commission fully understood the effect of the MOPR on those disfavored state policies. As discussed further below,²⁵ the Commission refused to extend the MOPR to federal policies because doing so would “nullify” those policies.²⁶ Indeed, the Commission asserted that federal subsidies “distort competitive market outcomes” every bit as much as state subsidies²⁷ and that the only reason to refrain from applying the new MOPR to federal subsidies is that the Commission lacks the power to “nullify” or “disregard” federal legislation.”²⁸ That moment of honesty revealed that the Commission knew exactly what its new MOPR did to the state regulation of generation facilities targeted in its order, undercutting its various statements about the MOPR’s supposed limited effect on state resource decisionmaking. The problem for the Commission, is that it is equally impermissible for it to use its authority over wholesale rates in an attempt to nullify state regulation of the generation mix and it cannot, consistent with reasoned decisionmaking, insist that the MOPR has one effect on federal policies and a totally different effect on state policies. If the MOPR would nullify federal policies—an assessment with which I agree—than it must equally nullify state policies.

11. And, finally, the December 2019 Order admitted that its purpose was to the disfavored state actions with what the Commission described as “price signals on which investors and consumers can rely to guide the orderly entry and exit of economically efficient capacity resources.”²⁹ That is to say, its goal was to establish a set of price signals to determine resource entry and exit in the capacity market *for the explicit purpose* of superseding state resource decisionmaking and to better reflect the

infra Section II.B.4, as both the net cost of new entry (Net CONE) and net avoidable cost rate (Net ACR) offer floors are, *see* Section II.B.4, whether a state policy operates on the revenue or cost side of resource’s equation is utterly immaterial. Putting aside whether that distinction makes any sense, it shows the extent to which the Commission is meddling in state resource decisionmaking by finding that the effects of certain state policies are legitimate while the identical effects of others are not.

²⁵ *See infra* Section II.B.1.a.

²⁶ December 2019 Order, 169 FERC ¶ 61,239 at PP 10, 89.

²⁷ *Id.* P 10.

²⁸ *Id.* PP 10, 89.

²⁹ *Id.* P 40.

Commission's preferences for merchant generators that do not rely on compensation they receive for addressing externalities.

12. In short, the December 2019 Order conceded that the “problem” was state efforts to shape the generation mix, that the Commission was focused *only* on those state efforts, that the Commission's action would “nullify” those state efforts, and that it would override those efforts in order to send price signals that better aligned with the Commission's preferences.³⁰ That directly targets states' reserved authority under section 201(b).

13. Today's orders erase any lingering doubt about the purpose and effect of the Commission's new MOPR. In addition to affirming its earlier statements, the Commission doubles down on its still unexplained “most nearly tethered” standard, this time describing it as some form of administrative grace for which states should thank their lucky stars.³¹ Putting aside the dripping arrogance of that worldview, the only issue that phrase elucidates is the extent to which today's orders are focused on blocking state efforts to shape the resource mix and not on the effects of state policies on wholesale markets.³² After all, if today's orders were actually concerned with the wholesale-market effects of state policies, they would not excuse from the new MOPR general industrial development policies and local siting support—categories which have much larger effects on the wholesale market than many of the policies targeted in today's orders.³³

³⁰ As discussed further below, it is hard to tally up the cumulative effect of today's orders and find that characterization even remotely accurate. In any case, a policy of blocking state efforts to address externalities is itself very much a policy, not the absence thereof. Elsewhere, the Commission suggests that it lacks the authority to directly address any environmental considerations. *E.g.*, December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 41. Assuming, for the moment, the accuracy of that statement, it still does not explain why the Commission should or must affirmatively block state efforts to the same using authority that no one contests they possess.

³¹ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 78; *see supra* note 23.

³² As discussed above, *supra* note 23 and accompanying text, the Commission's unexplained focus on only certain state policies, and not others that might equally cause the sort of price suppression about which it purports to be so concerned, lays bare that today's orders is about blocking disfavored state policies and not wholesale market effects. *See* December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 106 (“[T]he expanded MOPR is not intended to address all commercial externalities or opportunities that might affect the economics of a particular resource.”).

³³ *See infra* Section II.B.3.

14. But that is not even the half of it. A few hundred paragraphs later, the Commission comes right out and admits that its goal is to penalize and, ultimately, discourage states from exercising their exclusive jurisdiction. In patting itself on the back for issuing what it describes as a “decisive order,” the Commission laments the fact that its supposedly decisive order was not enough to deter states from continuing to exercise their section 201(b) jurisdiction.³⁴ But it is no more our role to deter states from regulating generation facilities than it is the states’ role to prevent us from ensuring that rates are just and reasonable.³⁵ And, as the Supreme Court has repeatedly made clear, the FPA does not permit FERC or the states to exercise their authority under the FPA to target the other sovereign’s exclusive jurisdiction.³⁶

15. All told, this simply is not a proceeding where “the Commission’s justifications for regulating . . . are all about, and only about, improving the wholesale market.”³⁷ Unlike the rule upheld in *EPSA*, where the matters subject to state jurisdiction “figure[d] no more in the Rule’s goals than in the mechanism through which the Rule operates,” state actions are front and center in the Commission’s justification for acting.³⁸ To be sure, the Commission doffs its hat to “price suppression” throughout the orders. But repeating the phrase “price suppression” does not change the fact that the Commission’s stated concern in the June 2018 Order, the December 2109 Order, and today’s orders is

³⁴ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 319 (“Even after the June 2018 Order, certain states pursued new or expanded out-of-market support for preferred resources”).

³⁵ Elsewhere in today’s orders, the Commission suggests that federal subsidies, presumably in contrast to state subsidies, are as “equally valid” as regulations under the FPA. December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 120. There is no basis for the insinuation that state subsidies are somehow less valid than federal ones. Although it is true that state subsidies that directly regulate or aim at the Commission’s exclusive jurisdiction or that conflict with a Commission regulation are preempted, *see supra* P 7, the December 2019 Rehearing Order deals with state actions that are concededly not preempted and were enacted pursuant to the states exercise of their reserved authority under the FPA. *See, e.g.*, December 2019 Rehearing Order, 171 FERC ¶ 61,035 at PP 76-77. But, although the Commission’s “equally valid” rationale is unhelpful as a statement of law, it is a revealing illustration of the attitude toward state authority that pervades the order.

³⁶ *See supra* P 7.

³⁷ *EPSA*, 136 S. Ct. at 776 (citing *Oneok*, 135 S. Ct. at 1599).

³⁸ *Id.*

the states' exercise of their authority under section 201(b) or the fact that the goal of the new MOPR is to "nullify" and "disregard" the effects of state resource decisionmaking. Similarly, the Commission's observation that it is not literally precluding states from building new resources is beside the point. As I explained in my earlier dissent, that is the equivalent of saying that a grounded teenager is not being punished because he can still play in his room—it deliberately mischaracterizes both the intent and the effect of the action in question.³⁹

16. The extent to which the Commission is attempting to interfere with state resource decisionmaking is even clearer with a little context. The MOPR was originally used to mitigate buyer-side market power within the wholesale market⁴⁰—a concern at the heart of the Commission's responsibility to ensure that wholesale rates are just and unreasonable.⁴¹ And for much of the MOPR's history, that is what it did. Even when the Commission eliminated the categorical exemption for resources developed pursuant to state public policy, the Commission limited the MOPR's application only to natural gas-fired resources—*i.e.*, those that would most likely be used as part of an effort to decrease capacity market prices.⁴²

³⁹ December 2019 Order, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 13).

⁴⁰ Specifically, those early MOPRs were designed to ensure that net buyers of capacity were not able to use market power to drive down the capacity market price. *See N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,121 (2020) (Glick, Comm'r, dissenting at P 2); *see generally* Richard B. Miller, Neil H. Butterklee & Margaret Comes, "Buyer-Side" Mitigation in Organized Capacity Markets: Time for a Change?, 33 Energy L.J. 459 (2012) (discussing the history of buyer-side mitigation at the Commission).

⁴¹ *See, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (noting that "FERC's authority generally rests on the public interest in constraining exercises of market power"); *Pub. Util. Dist. No. 1 of Snohomish Cty. v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 760 (9th Cir. 2004) (explaining that the absence of market power could provide a strong indicator that rates are just and reasonable); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) ("In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment."); *see also N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,121 (Glick, Comm'r, dissenting at P 2) (explaining that "the Commission's buyer-side market power mitigation regime should focus only on actual market power" a concern that "is both more consistent with the FPA's dual-federalist design and the Commission's core responsibility as a regulator of monopoly/monopsony power").

⁴² *See N.J. Bd. of Public Utils. v. FERC*, 744 F.3d 74, 106-07 (3d Cir. 2014)

17. How things have changed. Today, the Commission expressly admits that, for the first time, the MOPR is no longer about buyer-side market power.⁴³ Instead, as noted, it is all about and only about nullifying the effects of state public policies. That dramatic shift began only in 2018, more than a decade after the MOPR was first employed to mitigate the exercise of market power.⁴⁴ The intervening two years have been head-spinning as the Commission has rapidly transformed a narrowly tailored anti-monopsony measure into a regime for blocking state efforts to shape the generation mix.

18. At no point, however, has the Commission been able to coherently justify the MOPR's change of target. It first claimed that this transformation of the MOPR was necessary to ensure "investor confidence" and the ability of unsubsidized resources to compete against resources receiving state support.⁴⁵ A few months later, at the outset of this proceeding, the Commission abandoned "investor confidence" and asserted that the need to mitigate state policies in order to protect the "integrity" of the capacity market—another concept that it did not bother to explain.⁴⁶ And last December, the Commission added yet another new twist: That state subsidies "reject the premise of the capacity market."⁴⁷ But, as with investor confidence and market integrity, it is hard to know exactly what that premise is. Today's orders provide more of the same, reiterating those

(*NJBPU*) (summarizing the Commission's reasoning for limiting the MOPR to only natural gas-fired resources). The Commission asserts, without explanation, that there is a "clear tension" between the 2011 order eliminating the public policy exemption to then-limited MOPR and recent state efforts to shape the generation mix. December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 320. Nonsense. The 2011 order specifically exempted all non-natural-gas-fired resources from the MOPR, squarely foreclosing whatever tension the Commission pretends to uncover today. In any case, it is hardly fair to assign states the responsibility for predicting when the Commission will abandon its precedent and entirely reorient its approach to regulating a construct like the PJM capacity market.

⁴³ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 45 (stating that "the expanded MOPR does not focus on buyer-side market power mitigation").

⁴⁴ See *ISO New England Inc.*, 162 FERC ¶ 61,205, at PP 20-26 (2018). That order also came after every existing court case considering the legality of the Commission's use of the MOPR.

⁴⁵ *Id.* P 21.

⁴⁶ June 2018 Order, 163 FERC ¶ 61,236 at PP 150, 156, 161.

⁴⁷ December 2019 Order, 169 FERC ¶ 61,239 at P 17.

buzz words without any further explanation.⁴⁸ If there is one thing that those inscrutable terms share, it is their inability to conceal, much less justify, the fundamental shift in the Commission's focus.⁴⁹ The Commission's effort to recast the MOPR as always having been about price suppression at some level of generality⁵⁰ obfuscates that point and badly mischaracterizes the recent shift in the MOPR's focus.

19. Neither of the Commission's responses provide it much cover. First, the Commission asserts that the new MOPR does not intrude on states' exclusive jurisdiction just because it "affect[s] matters within the states' jurisdiction."⁵¹ Of course that is true; *EPSA* tells as much.⁵² But it is also beside the point. My argument—and the arguments made by several parties on rehearing⁵³—is that the Commission is exercising its authority

⁴⁸ *E.g.*, December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 78 (asserting that "[t]he Commission may, as here, take action to protect the integrity of federally-regulated markets against state policies" without explaining what exactly integrity means in this context); *id.* P 320 (explaining that the various exemptions provided for in the December 2019 Order are for "resources that accept the premise of a competitive capacity market" (quoting December 2019 Order, 169 FERC ¶ 61,239 at P 17)); *id.* P 337 (asserting that "[t]he replacement rate directed in the December 2019 Order addresses State-Subsidized Resources, which pose a risk to the integrity of competition in the wholesale capacity market").

⁴⁹ Public Power Entities Rehearing Request at 6-7 ("The Commission did not justify the transformation of the MOPR from a limited mechanism aimed at preventing price suppression by subsidized new entry into a sweeping restriction on almost all forms of non-federal support for generation resources.").

⁵⁰ December 2019 Order, 169 FERC ¶ 61,239 at 136; *see* December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 338 ("[T]he December 2019 Order expands the scope of the MOPR, but not its underlying purpose."). As I noted in my underlying dissent, suggesting that the MOPR has always been about price suppression is the equivalent of saying that speed limits have always been about keeping people from getting to their destination too quickly. There is a sense in which that is true, but it kind of misses the point. December 2019 Order, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at n.35).

⁵¹ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at PP 15-16.

⁵² *EPSA*, 136 S. Ct. at 776 ("[A] FERC regulation does not run afoul of § 824(b)'s proscription just because it affects—even substantially—the quantity or terms of retail sales.").

⁵³ *See, e.g.* Public Power Entities Rehearing Request at 13-15; Clean Energy

over wholesale sales to “aim at” or “target” matters subject to exclusive state jurisdiction. As explained above, the “goals” of the new MOPR and the mechanism “through which [it] operates” demonstrate an unmistakable focus on states’ exercise of their reserved authority.⁵⁴ That means that, unlike the rule in *EPSA*, today’s orders are not “all about, and only about, improving the wholesale market.”⁵⁵ Accordingly, the Court’s precedent regarding the incidental effects of a valid exercise of Commission authority are beside the point.

20. In addition, the Commission appears to suggest that it can overstep its jurisdictional bounds only if it *literally* requires states to build certain resources or prevents states from doing the same.⁵⁶ In other words, the Commission’s theory of the case is that it exceeds its jurisdiction *only* if it directly regulates the construction of new resources. But that suggestion is inconsistent with the Supreme Court’s recent cases, including *EPSA*, that make clear that the FPA does not permit federal or state regulators to use their authority in an attempt to interfere with the other’s sphere of exclusive jurisdiction by aiming at or targeting the matters peculiarly within that sphere.⁵⁷ Accordingly, the Commission’s reasoning is both a misapplication of the law and arbitrary and capricious insofar as it utterly misses the point of the argument made by several parties on rehearing.⁵⁸

21. Second, the Commission points to a handful of court of appeals decisions upholding various Commission orders addressing capacity markets. None of those cases sanction the Commission’s actions in this proceeding. The December 2019 Rehearing Order contends principally that the U.S. Court of Appeals for the Third Circuit’s (Third Circuit) decision in *NJPBU* inoculates the Commission against any charge that it has exceeded its jurisdiction by intruding on state authority over resource decisionmaking.⁵⁹

Advocates Rehearing Request at 85-89.

⁵⁴ *EPSA* 136 S. Ct. at 776-77.

⁵⁵ *Id.* at 776.

⁵⁶ See December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 17.

⁵⁷ See *supra* P 7; *EPSA* 136 S. Ct. at 776-77.

⁵⁸ See, e.g., Public Power Entities Rehearing and Clarification Request at 13-16; Clean Energy Associations Rehearing and Clarification Request at 10-11; Maryland Commission Rehearing and Clarification Request at 9-13; see also *supra* P 7; December 2019 Order, 169 FERC ¶ 61,239 (Glick, Comm’r, dissenting at PP 7-17).

⁵⁹ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 16 (“The court’s

That is not how precedent works. Just because a court upheld one order against a particular challenge does not mean that it would uphold all similar orders against other challenges.

22. In any case, the orders in this proceeding bear only a surface-level similarity to *NJBPU*.⁶⁰ As the Third Circuit explained, the purpose of the MOPR on review in that case was limited to mitigating the exercise of buyer-side market power⁶¹—a concern that, as noted, lies at the core of the Commission’s authority over wholesale rates and practices.⁶² Consistent with that focus, that MOPR applied only to natural gas-fired power plants because they were the resources that a large net buyer of capacity could rationally use to suppress the capacity market clearing price.⁶³ In that case, the Commission eliminated an “exception” from the MOPR that had previously allowed state-sponsored natural gas-fired units to skirt the MOPR.⁶⁴ The Commission justified its decision by pointing to a pair of (ultimately preempted) state laws that subsidized new natural gas plants by effectively guaranteeing them a predetermined wholesale rate.⁶⁵

decision in *NJBPU* demonstrates that the findings from the December 2019 Order are within the Commission’s jurisdiction.”); June 2018 Rehearing Order, 171 FERC ¶ 61,034 at P 66.

⁶⁰ See *supra* PP 16-18 (discussing the MOPR’s evolution).

⁶¹ *NJBPU*, 744 F.3d at 84-85. In other words, the “aim” or “target” of the MOPR was limited to the exercise of wholesale market power. *Id.*

⁶² See *supra* note 41.

⁶³ *NJBPU*, 744 F.3d at 106 (“[T]he only resources subject to the MOPR are natural gas-fired technologies.”); *id.* (“FERC asserts that the characteristics of gas units make them more likely to be used as price suppression tools.” (internal quotation marks omitted)).

⁶⁴ *Id.* at 79.

⁶⁵ *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61022, at P 139 (2011); *id.* PP 128-138 (discussing the evidence in the record). In *Hughes*, the Supreme Court subsequently held that the Maryland law, which was functionally identical to the New Jersey law, was preempted because it aimed at FERC’s exclusive jurisdiction over wholesales. 136 S. Ct. at 1928. That the Commission’s elimination of the state resource exemption was both focused exclusively on the exercise of buyer-side market power and in response to a state’s “intrusion” on FERC’s exclusive jurisdiction, *id.* n.11, only underscores the differences between that decision and today’s orders.

The court concluded that all the MOPR did in that case was ensure a “new resource is economical—*i.e.*, that it is needed by the market—and ensures that its sponsor cannot exercise *market power* by introducing a new resource into the auction at a price that does not reflect its costs and that has the effect of lowering the auction clearing price.”⁶⁶ In addition, in reviewing those facts, the court observed that “FERC’s enumerated reasons for approving the elimination of the state-mandated exception relate directly to the wholesale price for capacity.”⁶⁷

23. Today’s orders are an altogether different animal. As noted above, the December 2019 Rehearing Order explicitly disavows the mitigation of market power as the basis for the new MOPR,⁶⁸ instead making it “all about and only about”⁶⁹ “nullifying”⁷⁰ state efforts to shape the generation mix⁷¹—or at least those state efforts that the Commission dislikes.⁷² As explained above, today’s orders—and, indeed, every order in this proceeding—has made clear that the aim of the new MOPR is to “deter” states from

⁶⁶ *NJBPU*, 744 F.3d at 97 (emphasis added).

⁶⁷ *Id.*

⁶⁸ *See supra* P 7; December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 45 (“[T]he expanded MOPR does not focus on buyer-side market power mitigation.”); June 2018 Rehearing Order, 171 FERC ¶ 61,034 at P 56.

⁶⁹ *EPSA*, 136 S. Ct. at 776.

⁷⁰ As noted, this is the Commission’s own term for describing the effect that applying the MOPR has on a particular policy. December 2019 Order, 169 FERC ¶ 61,239 at P 87. On rehearing, several parties identified the tension between the Commission’s assertions that it could not apply the MOPR to federal policies because to do so would “nullify” those policies and its statements that applying the MOPR to state policies has no effect whatsoever. December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 12. Although the Commission summarizes some of those arguments, it does not respond to them.

⁷¹ *See supra* P 9 (explaining how the Commission’s orders focus only on state efforts to regulate the generation mix and not on other state efforts that could conceivably have the same price suppressive effects). Even PJM, which brought this problem to our doorstep in 2018, criticizes the Commission for abandoning the MOPR’s role as “guardrail” and turning it into an “over-broad and over-prescriptive” rule that “needlessly interferes with state resource policies.” PJM Rehearing and Clarification Request at 6-9.

⁷² *See supra* PP 11-12; *infra* Section II.B.1.d.

taking actions of which the Commission disapproves.⁷³ That makes today's orders a far cry from *NJBPU*. In addition, the new MOPR mitigates indiscriminately and explicitly does not require that the mitigated state policy actually affect the capacity market clearing price or even be likely to have such an effect.⁷⁴ That is distinctly unlike the targeted MOPR in *NJBPU* that addressed only the resources most likely to be used in an exercise of market power.⁷⁵ Simply put, the MOPR addressed in today's orders is so fundamentally different from that before the court in *NJBPU* as to render the holding in that case next to meaningless as applied to these orders.

24. The Commission also suggests that the D.C. Circuit's decisions in *Connecticut Department* and *Municipalities of Groton* support today's outcome.⁷⁶ But those cases have even less in common with the facts before us than *NJBPU*. In both instances, the court upheld the Commission's authority to require wholesale buyers to purchase particular quantities of capacity.⁷⁷ As the Court explained in *Connecticut Department*, the Commission's focus was squarely on market structures that would motivate utilities to develop or acquire the necessary capacity.⁷⁸ But the Court went out of its way to explain that nothing in the Commission's orders in any way limited the states' ability to *influence* or, indeed, directly select the resources that would meet those capacity requirements.⁷⁹ And that is where any superficial similarity to today's orders ends. As noted, the new MOPR is expressly about limiting—"nullify[ing]" to use the

⁷³ See *supra* P 14.

⁷⁴ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 132.

⁷⁵ Public Power Entities Rehearing Request at 15 (The "expansion of the MOPR fundamentally alters its purposes and impact in a way that impermissibly intrudes on state authority.").

⁷⁶ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 15 & n.45 (citing *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481-82 (D.C. Cir. 2009) and *Muns. of Groton v. FERC*, 587 F.2d 1296, 1301 (D.C. Cir. 1978)).

⁷⁷ *Connecticut Dep't*, 569 F.3d 481-85; *id.* at 482 (explaining that *Municipalities of Groton* "sustained the Commission's jurisdiction to review the 'deficiency charges' . . . charged . . . when member utilities failed to live up to their share of NEPOOL's reliability requirement").

⁷⁸ *Id.* at 482.

⁷⁹ *Id.*

Commission's word⁸⁰—state efforts to shape the resources that meet those requirements.⁸¹ What is more, that nullification is the express reason for of the Commission's action: The orders' goal is to block the effects of state policies and deter states from exercising their authority over generation facilities.⁸²

25. Finally, it is important to be precise about my jurisdictional argument. I do not believe that any MOPR is *per se* invalid just because it complicates state efforts to regulate generation facilities.⁸³ After all, *NJBPU* indicates that the use of a MOPR that addresses matters squarely within the Commission's authority is permissible, at least in certain circumstances.⁸⁴ But that is not what we have here. As explained above, today's orders confirm that the Commission is deploying its new MOPR to aim at state resource decisionmaking and for the purpose of substituting its own policy preferences for those of the states. That "fatal defect" renders this particular MOPR in excess of the Commission's jurisdiction.⁸⁵

II. The Commission's Orders Are Arbitrary and Capricious

26. Today's orders are also arbitrary and capricious. The upshot of the majority's position is that PJM's capacity market is a just and reasonable construct *only* if the Commission "nullifies" the effects of state public policies. That interpretation of the FPA is as radical as it is wrong and finds no support in the 80-year history of the Act or in any

⁸⁰ December 2019 Order, 169 FERC ¶ 61,239 at PP 10, 89.

⁸¹ *See supra* P 10.

⁸² December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 319. The Commission is also fond of pointing to the U.S. Court of Appeals for the Seventh Circuit's statement, in resolving preemption litigation regarding Illinois's zero-emissions credits, that the Commission has the authority to make "adjustments" to its regulations in light of state action. *Star*, 904 F.3d at 524. And indeed it does. But it does not follow that the Commission can make *any* "adjustment" that it wants, certainly not one inconsistent with Supreme Court's holdings on the limit of federal authority under the FPA.

⁸³ As I have elsewhere explained, the proper role for MOPRs is in combatting exercises of market power, not state efforts to shape the generation mix. *N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,121 (2020) (Glick, Comm'r, dissenting at PP 15-16).

⁸⁴ *NJBPU*, 744 F.3d at 96-98.

⁸⁵ *Cf. Hughes*, 136 S. Ct. at 1299.

Commission or court precedent.⁸⁶ I suppose it should be no surprise that installing such an unprecedented mitigation regime proves to be a difficult task. But that is no excuse for an order riddled with determinations that are unsupported by the record and deeply arbitrary and capricious. The whole purpose of the Administrative Procedure Act is to prevent an agency from relying on fundamentally flawed reasoning in order to impose its policy preferences. If ever those protections were needed to address an action of the Commission, it is this one, both because of the shoddy reasoning on which the Commission's actions are based and the tremendous damage they may ultimately do. In the following sections, I detail several of what I view to be the most serious flaws in the Commission's reasoning, any of which should be sufficient to invalidate today's orders.

A. The Commission Has Not Shown that the Existing Rate Was Unjust and Unreasonable

27. Section 206 of the FPA requires the Commission to show that the existing rate is unjust and unreasonable or unduly discriminatory or preferential before it can set a replacement rate.⁸⁷ The June 2018 Rehearing Order fails to articulate a reasoned basis for concluding that the pre-existing capacity market rules were unjust and unreasonable or unduly discriminatory or preferential. Instead, the Commission doubles down on a conclusory theory of the case that does not seriously wrestle with the contrary arguments and evidence in the record.

28. The June 2018 Rehearing Order does not rely on any evidence that state policies are actually distorting prices, much less that they are doing so in a way that imperils resource adequacy in the region. Instead, the Commission's case rests on two propositions: (1) that certain state subsidies permit resources to lower their capacity

⁸⁶ The December 2019 Order also swept beyond what was contemplated in the original *Calpine* complaint by suggesting that voluntary commercial transactions involving renewable energy credits (RECs) would constitute a state-subsidized transaction and be subject to the MOPR. In response, several parties sought late intervention, which the Commission denies. December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 4. I would have granted those interventions. The December 2019 Order took an approach to mitigation that was far broader than any that had been contemplated to date in this proceeding and, indeed, in the Commission's history. Under those circumstances, we would be better served by letting would-be parties have their full say, rather than forcing them to sit on the sidelines.

⁸⁷ *Emera Maine v. FERC*, 854 F.3d 9, 25 (D.C. Cir. 2017) (“[A] finding that an existing rate is unjust and unreasonable is the ‘condition precedent’ to FERC’s exercise of its section 206 authority to change that rate.” (quoting *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956))).

market offers, which, if enough resources do it, will lower the clearing price⁸⁸ and (2) that the number of potentially subsidized megawatts in PJM appears likely to grow in coming years.⁸⁹ That is the entirety of the Commission's theory. And that is not enough, on this record, to reasonably conclude that PJM's existing tariff was unjust and unreasonable or unduly discriminatory or preferential.

29. As numerous parties argued on rehearing, the idea that resource adequacy in PJM is currently imperiled by state subsidies is, frankly, laughable. The Base Residual Auction has consistently procured more resources than required to meet PJM's reliability requirement and thousands of megawatts of additional resources have elected not to retire, even though they are not receiving any capacity market payment.⁹⁰ If state policies are, in fact, a threat to resource adequacy, there is certainly no evidence of that in PJM's current reserve margins. Instead, as discussed in some detail in another statement I am issuing today, if there is a problem in PJM's capacity market, it is not that prices are too low, but rather that the market is designed to produce prices that are too high, over-procuring capacity and dulling the price signals in the energy and ancillary service markets.⁹¹ Faced with that fact, the Commission responds with the assertion that state subsidies will surely cause a problem in the future.⁹² Maybe, but there is no evidence in

⁸⁸ *E.g.*, June 2018 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.”).

⁸⁹ *E.g.*, *id.* P 29 (“Rather, the June 2018 Order emphasized the significant and continued growth of out-of-market support. As this growth continues, more subsidized resources will have the ability to offer below their costs and suppress prices” (footnotes omitted)).

⁹⁰ *See, e.g.*, Joint Consumer Advocates June 2018 Order Rehearing Request at 8 (citing PJM 2021/2022 RPM Base Residual Auction Results at 1, <https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2021-2022/2021-2022-base-residual-auction-report.ashx> (2021/2022 BRA Summary)); *see also* 2021/2022 BRA Summary (“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.*” (emphasis added)).

⁹¹ *See PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,040 (2020) (Glick, Comm'r. dissenting).

⁹² June 2018 Rehearing Order, 171 FERC ¶ 61,034 at PP 29-30.

this record that suggests that state policies will cause any resource adequacy concerns whatsoever.

30. Apparently recognizing that point, the Commission pivots to economic theory as the basis for its action.⁹³ It is true that the Commission need not prove *basic* economic principles every time that it seeks to act on them. After all, “[a]gencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall.”⁹⁴ Instead, agencies can rely on economic theory to make predictive judgments about how the future will play out.⁹⁵ But that does not mean that an agency can turn “economic theory” into a “talismanic phrase that does not advance reasoned decision making” and claim to have satisfied its obligations under the APA.⁹⁶ In other words, an agency cannot articulate a principle, label it “economic,” make a prediction, and move on without wrestling with contrary record evidence or reasonable alternative applications of that economic theory.

31. But that is exactly what the June 2018 Rehearing Order does. It asserts that state subsidies in PJM are increasing, that subsidies reduce the costs of the resource being subsidized and, therefore, subsidies will cause more subsidized resources to clear the capacity market. All true. From that though, the Commission concludes that PJM’s tariff will no longer ensure resource adequacy at rates that are just and reasonable and not unduly discriminatory or preferential, which is where its reasoning gets a little tenuous, as the economic principle articulated does not lead ineluctably to the regulatory conclusion reached. Instead, the record is replete with evidence and reasonable theories that could support an alternative conclusion. For one thing, the evidence in the record of continued high prices and entry of new resources (not to mention, retention of old ones) could just as easily support the conclusion that a more-than-adequate quantity of

⁹³ *E.g., id.* PP 25, 27, 29, 34, 37.

⁹⁴ *Assoc. Gas Distributors v. FERC*, 824 F.2d 981, 1008 (D.C. Cir. 1987). I cannot help but note the mild irony that the rest of that example of an assumable economic theory is that “competition will normally lead to lower prices,” *id.* at 29, while the Commission’s theory of the case today rests on the supposedly urgent need to raise prices.

⁹⁵ *See, e.g., NextEra Energy Res., LLC v. FERC*, 898 F.3d 14, 23 (D.C. Cir. 2018); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 65, 76 (D.C. Cir. 2014) (“[A]t least in circumstances where it would be difficult or even impossible to marshal empirical evidence, the Commission is free to act based on reasonable predictions rooted in basic economic principles.”).

⁹⁶ *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 13 (D.C. Cir. 2015).

resources will remain in the market, state subsidies notwithstanding.⁹⁷ As numerous parties point out, that has been the experience to date in PJM.⁹⁸ Why the Commission is so confident that things will change at some undefined future inflection point is never explained. Nor does the Commission explain why it is confident that those assumed effects justify an increase in customer's rates.

32. In addition, it is equally reasonable to suggest that the natural effect of state subsidies (indeed, in many cases, their intended result) will be to bring online large amounts of new resources that will themselves help to ensure resource adequacy.⁹⁹ Nothing in today's orders explains why the Commission is so confident that the deployment of state-sponsored resources will impair PJM's ability to ensure resource adequacy at just and reasonable rates rather than enhancing it. After all, it is worth remembering that, as discussed above, the FPA expressly reserved the regulation of generation facilities to the states and Congress presumably expected the states to wield that reserved authority.¹⁰⁰ Why the exercise of that authority is inherently unjust and unreasonable or a "problem" in need of "solving" is never clearly explained. Repeated incantations of the phrase "economic theory" does not provide a reasoned answer to the question.

33. The closest the Commission comes to explaining its confidence in a looming future problem is its series of elliptical statements about investor confidence and the merchant business model. Throughout this proceeding, the Commission has relied on

⁹⁷ Today's orders contain several variations on the notion that "adequate reserve margins today do not necessarily mean that such conditions will continue into the future." June 2018 Rehearing Order, 171 FERC ¶ 61,034 at P 35. Sure. But the burden of proof is on the Commission to show that the current tariff is unjust and unreasonable, not on proponents of the status quo to show that the tariff will necessarily remain just and reasonable in perpetuity. See *Emera Maine*, 854 F.3d at 24 ("The proponent of a rate change under section 206, however, bears 'the burden of proving that the existing rate is unlawful.'" (quoting *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993))).

⁹⁸ June 2018 Rehearing Order, 171 FERC ¶ 61,034 at PP 16-17.

⁹⁹ It is certainly possible that the entry of those resources will lower the capacity market clearing price, which should not necessarily be a bad result in the eyes of an agency whose "primary purpose" is to protect customers. See, e.g., *City of Chicago, Ill. v. FPC*, 458 F.2d 731, 751 (D.C. Cir. 1971) ("[T]he primary purpose of the Natural Gas Act is to protect consumers." (citing, *inter alia*, *City of Detroit v. FPC*, 230 F.2d 810, 815 (1955))).

¹⁰⁰ See *supra* P 5.

various inscrutable principles, such as “investor confidence” or “market integrity,” to justify its new MOPR.¹⁰¹ At various points in the June 2018 Order, and again today, the Commission expressed concern about the challenges state policymaking may create for investors in particular resources in the capacity market¹⁰² and the June 2018 Rehearing Order specifically raises the concern that state policies may harm unsubsidized generators.¹⁰³ These statements seem to suggest that the problem with the state policies is that they may reduce the profit margins of unsubsidized resources and make it correspondingly less likely investors will pour their money into those resources, which the Commission assumes will impair resource adequacy.

34. I recognize and appreciate the large influx of capital that investors and the merchant business model, more generally, have brought to PJM over the last two decades. Those investments have enhanced the grid’s reliability while helping to decrease its carbon intensity—both good outcomes. But it is not our responsibility to protect particular businesses, business models, or their investors from state regulation. If states choose to address a market failure by promoting particular resource types or business models over others, it is not for the Commission to give a leg up to business models that might lose out as a result. In any case, PJM’s generation resource mix has long reflected a mix of vertically integrated utilities and merchant generators, both of which have benefited from public policies. The June 2018 Rehearing Order does not adequately explain the Commission’s apparent confidence that that cannot continue in a future in which states continue to exercise their authority under FPA section 201(b).

35. The Commission also makes the assertion that state policies are a problem because they create “significant uncertainty” and “investors cannot predict whether their capital will be competing” against subsidized resources.¹⁰⁴ As I explained in my dissent from the June 2018 Order, uncertainty about regulation will always be endemic in a regulated industry.¹⁰⁵ And nothing in the June 2018 Order or the June 2018 Rehearing Order

¹⁰¹ *Supra* P 18.

¹⁰² *E.g.*, June 2018 Rehearing Order, 171 FERC ¶ 61,034 at P 35 (“[I]nvestors 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.”); June 2018 Order, 163 FERC ¶ 61,236 at P 150 (similar).

¹⁰³ June 2018 Rehearing Order, 171 FERC ¶ 61,034 at P 28 (noting the potential that state policies will “injure[] non-subsidized competitors”).

¹⁰⁴ June 2018 Order, 163 FERC ¶ 61,236 at P 150.

¹⁰⁵ *Id.* (Glick, Comm’r, dissenting at 11)

explains why the purported uncertainty caused by state policymaking is more problematic than the other forms of uncertainty that pervade the industry.

36. The bottom line is that neither the June 2018 Order nor today's order on rehearing has adequately explained why the existing tariff is unjust and unreasonable or unduly discriminatory or preferential. The sum total of the Commission's analysis is that the PJM states will likely, in the future, subsidize more generating resources and that, all else equal, those subsidies will cause those resources to offer into the capacity market at lower prices than they would otherwise. But that alone does not prove the existing tariff is unjust and unreasonable, especially given the long history of state policies affecting the capacity market and the equally plausible future scenarios in which the capacity market continues to ensure resource adequacy at just and reasonable rates while state-sponsored resources co-exist with other business models. After all, to carry its burden under section 206, the Commission must do more than articulate a theory, label it "economics," and call it a day.

B. The Commission Has Not Shown that Its Replacement Rate Is Just and Reasonable

37. If the Commission meets its burden to show that the existing rate is unjust and unreasonable or unduly discriminatory or preferential, then the burden is again on the Commission to establish a "replacement rate" that is itself just and unreasonable and not unduly discriminatory or preferential.¹⁰⁶ The December 2019 Rehearing Order fails to articulate a reasoned basis for concluding that the new MOPR meets that burden. Instead, like the June 2018 Rehearing Order, it doubles down on a conclusory statements that do not seriously wrestle with the contrary arguments and evidence in the record.

1. The Commission's Definition of State Subsidy Is Arbitrary and Capricious

38. The crux of the December 2019 Order, and today's order on rehearing, is the Commission's definition of subsidy. That definition, however, is also the source of many of the Commission's most arbitrary and capricious determinations. Simply put, it is little

¹⁰⁶ *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 663 (D.C. Cir. 2017) ("When the Commission changes an existing filed rate under section 206, it is 'the Commission's burden to prove the reasonableness of its change in methodology.'" (quoting *PPL Wallingford Energy L.L.C. v. FERC*, 419 F.3d 1194, 1199 (D.C. Cir. 2005))); *see also Emera Maine*, 854 F.3d at 27 ("Although it is not our role to tell the Commission what the correct rate of return calculation is . . . we do have an obligation to remand when the Commission's conclusions are contrary to substantial evidence or not the product of reasoned decisionmaking." (quoting *Pub. Serv. Comm'n of N.Y. v. FERC*, 813 F.2d 448, 465 (D.C. Cir. 1987))).

more than a series of arbitrary lines that do not comport with the Commission's explanation for why the existing tariff was unjust and unreasonable or why the new MOPR will produce a just and reasonable rate.

a. Excluding Federal Subsidies Is Arbitrary and Capricious

39. No single determination in today's orders is more arbitrary than the Commission's exclusion of all federal subsidies from the new MOPR.¹⁰⁷ Federal subsidies have pervaded the energy sector for more than a century, beginning even before Congress, in the FPA, declared that the "business of transmitting and selling electric energy . . . is affected with a public interest."¹⁰⁸ Since 1916, federal taxpayers have supported domestic exploration, drilling, and production activities for our nation's fossil fuel industry.¹⁰⁹ 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.¹¹⁰ Those federal policies present all the same "problems" that the Commission identifies with state policies. They 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 orders—to submit "uncompetitive" bids into PJM's markets. By lowering the marginal cost of fossil fuel-fired units, federal policies have allowed those units to operate more frequently and have encouraged the development of more of those units than would otherwise have been built.

¹⁰⁷ December 2019 Order, 169 FERC ¶ 61,239 at P 89; *see* December 2019 Rehearing Order, 171 FERC ¶ 61,035 at PP 118-120.

¹⁰⁸ 16 U.S.C. § 824.

¹⁰⁹ *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).

¹¹⁰ *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, *inter alia*, 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 Apr. 16, 2020)) (extending the DBL analysis through 2016).

Indeed, those subsidies, even ones that have subsequently lapsed, are a major reason why many of the current resources in PJM are able to bid into the capacity market at the levels they do.

40. Federal subsidies remain pervasive in PJM. The federal tax credit for nonconventional natural gas¹¹¹ sparked the shale gas revolution, triggering a steep decline in natural gas prices, which, in turn, drove the spike in new natural gas-fired power plants starting in the early 2000s. Similarly, federal subsidies such as the percentage depletion allowance and the ability to expense intangible drilling costs have shaved billions of dollars off the cost of extracting coal and natural gas—two of the principal sources of electricity in PJM.¹¹² In addition, the domestic nuclear power industry would not exist without the Price-Anderson Act, which saves nuclear power generators billions of dollars through indemnity limits that enable them to secure financing and insurance at rates far below their true cost.¹¹³ Federal subsidies have also promoted the growth of renewable resources through, for example, the production tax credit (largely used by wind resources)¹¹⁴ and the investment tax credit (largely used by solar resources).¹¹⁵ These and other federal government interventions have had a far greater “suppressive” impact on the capacity market than the “state subsidies” targeted by today’s orders, especially

¹¹¹ Energy Tax Policy at 2 n.3. That credit has lapsed. *Id.* at 18.

¹¹² The Joint Committee on Taxation, Estimates Of Federal Tax Expenditures For Fiscal Years 2018-2022 at 21-22 (2018); Monitoring Analytics, *Analysis of the 2021/2022 RPM Base Residual Auction: Revised* 95 (2018), available at https://www.monitoringanalytics.com/reports/Reports/2018/IMM_Analysis_of_the_20212022_RPM_BRA_Revised_20180824.pdf (Market Monitor 2021/2022 BRA Analysis) (reporting that coal, natural gas, and nuclear collectively make up more than three-quarters of the generation mix in PJM); see generally Molly Sherlock, Cong. Research Serv., Energy Tax Policy: Historical Perspectives on and Current Status of Energy Tax Expenditures 2-6 (May 2011) (discussing the history of energy tax policy in the United States).

¹¹³ 42 U.S.C. § 2210(c).

¹¹⁴ U.S. Department of Energy, 2018 Wind Technologies Market Report 70, available at http://eta-publications.lbl.gov/sites/default/files/wtmr_final_for_posting_8-9-19.pdf (last viewed Apr. 16, 2020).

¹¹⁵ Solar Energy Industries Assoc., *History of the 30% Solar Investment Tax Credit* 3-4 (2012), <https://www.seia.org/sites/default/files/resources/History%20of%20ITC%20Slides.pdf>.

when you consider that resources having benefited from them make up the vast majority of the cleared capacity in PJM.¹¹⁶

41. Nevertheless, today's order affirms the December 2019 Order's decision to exclude all federal subsidies from the new MOPR on the theory that the Commission lacks the authority to "disregard or nullify the effect of federal legislation."¹¹⁷ It is true that the FPA does not give the Commission the authority to undo other federal legislation. But the Commission's defense of applying the new MOPR to state policies is that it neither disregards nor nullifies those policies, but instead addresses only the effects that those policies have on the PJM market.¹¹⁸

42. "[T]he Commission cannot have it both ways."¹¹⁹ If the MOPR disregards or nullifies federal policy, then it must do the same to state policy. And if it does not nullify or disregard state policy, then the Commission's justification for exempting federal subsidies collapses. The Commission, however, does not even attempt to explain its conclusion that applying the new MOPR to state policies respects authority, but applying it to federal policies would "disregard" or "nullify" federal authority. The failure to address, much less resolve, that tension is arbitrary and capricious.

43. Instead of confronting this tension, the December 2019 Order cited to a number of cases for well-established canons of statutory interpretation, such as that the general cannot control the specific and that federal statutes must, when possible, be read

¹¹⁶ Market Monitor 2021/2022 BRA Analysis 95 (reporting that coal, natural gas, and nuclear collectively make up more than three-quarters of the generation mix in PJM).

¹¹⁷ December 2019 Order, 169 FERC ¶ 61,239 at P 87; December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 119.

¹¹⁸ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at PP 16, 17, 19; December 2019 Order, 169 FERC ¶ 61,239 at PP 7, 40; June 2018 Order, 163 FERC ¶ 61,236 at P 153. The December 2019 Rehearing Order shies away from the words "nullify" and "disregard" that it used (quite accurately) in the underlying order. I can understand why. Those terms so clearly laid bare the glaring inconsistencies in the Commission's effort to explain why the MOPR did not target state authority, but could not legally be applied to federal subsidies. Nevertheless, the rationale in today's order is the same: The new MOPR cannot be applied to federal subsidies because doing so would somehow contravene an act of Congress, which is precisely the result that the Commission insists it would not have on state policies.

¹¹⁹ *Atlanta Gas Light Co. v. FERC*, 756 F.2d 191, 198 (D.C. Cir. 1985); *Cal. ex rel. Harris v. FERC*, 784 F.3d 1267, 1274 (9th Cir. 2015) (same).

harmoniously.¹²⁰ Today's order does the same.¹²¹ But those general canons do not help much. They discuss rules of statutory interpretation that are not disputed here and they certainly do not give the Commission license to pretend that the new MOPR has one type of effect on state policies and another type on federal policies.¹²² In any case, if we assume, for the sake of argument, that the Commission's benign characterization of the effect of the new MOPR on state policies is accurate,¹²³ then no number of interpretive canons can cure the Commission's arbitrary refusal to apply the MOPR to federal subsidies.

44. In addition, the Commission asserts that it may treat state and federal subsidies differently because it "has a reasonable basis to distinguish federal subsidies and State Subsidies, that is, whether the subsidies were established via federal law or state law."¹²⁴ But that tautology is not as helpful as it might at first seem. Just as not all discrimination is undue, irrelevant differences do not make parties dissimilarly situated.¹²⁵ Today's order does not coherently explain why the difference between federal and state subsidies is relevant to its theory of the case.

45. The Commission's apparent belief—implicit today, but stated explicitly in the December 2019 order—is that resources that receive federal subsidies are not similarly situated to resources that receive state subsidies because the Commission cannot nullify

¹²⁰ December 2019 Order, 169 FERC ¶ 61,239 at n.177.

¹²¹ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 120.

¹²² Today, the Commission tries a slightly different tack, responding to rehearing requests raising this very point with the assertion that the cited canons "reflect judicial guidance regarding the appropriate way to reconcile Congressional directives." December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 120. No doubt they do, but all the interpretive canons in the world cannot explain why it is rational to pretend that applying the MOPR to a federal subsidy has an inherently different effect than applying it to a state subsidy.

¹²³ To be clear, I vehemently disagree that is, but I'll indulge the hypothetical for the moment.

¹²⁴ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 119.

¹²⁵ *Complex Consol. Edison Co. of N.Y. v. FERC*, 165 F.3d 992, 1013 (D.C. Cir. 1999) ("Differences . . . based on *relevant, significant* facts which are explained are not contrary to the NGA." (quoting *TransCanada Pipelines Ltd. v. FERC*, 878 F.2d 401, 413 (D.C. Cir. 1989)) (emphasis added)).

or disregard federal policies, but can do that to state subsidies.¹²⁶ Putting aside whether that is true,¹²⁷ that line of reasoning just brings us back to square one as it relies on an unexplained distinction in the differing effects that the MOPR has on state and federal policies.

**b. Treating Any Revenue or Other Funding Tangentially
Related to a State Law As a Subsidy Is Arbitrary and
Capricious**

46. As discussed at the outset, the FPA divides jurisdiction between the Commission and the states, envisioning an important role for both in ensuring that the electricity sector is regulated in a manner consistent with the public interest. As the Commission explains, Congress enacted Title II of the FPA to fill the “*Attleboro* Gap” by “allow[ing] the federal government to step in and regulate interstate transactions over which no single state had authority to regulate.”¹²⁸ And while the FPA did more than just “fill the gap,”¹²⁹ it was nevertheless “drawn with meticulous regard for the continued exercise of state power.”¹³⁰ It would be strange if, having so “meticulous[ly]” preserved state authority, Congress believed that the “continued exercise of” that authority would become inherently a problem.¹³¹

47. And yet that is precisely what the December 2019 Rehearing Order does. It treats many fundamental elements of state regulation as impermissible subsidies simply because the state is involved. Even putting aside the jurisdictional problems with that approach,¹³² today’s order does not explain why it is just and reasonable to mitigate any

¹²⁶ December 2019 Order, 169 FERC ¶ 61,239 at P 89; December 2019 Rehearing Order, 171 FERC ¶ 61,035 at PP 118-119 & n.298.

¹²⁷ See *supra* Section I.

¹²⁸ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at n.298.

¹²⁹ *New York v. FERC*, 535 U.S. 1, 6 (2002) (“[W]hen it enacted the FPA in 1935, Congress authorized federal regulation of electricity in areas beyond the reach of state power, such as the gap identified in *Attleboro*, but it also extended federal coverage to some areas that previously had been state regulated.” (footnotes omitted)).

¹³⁰ *Zibelman*, 906 F.3d at 50 (quoting *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 754 F.2d 99, 104 (2d Cir. 1985)).

¹³¹ See *supra* note 10 and accompanying text.

¹³² See *supra* Section I.

resource that is affected by many of the most foreseeable consequences of the FPA's jurisdictional framework. Nor does it make any effort to consider the litany of practical challenges and complications that that approach creates, even though many of them were squarely presented on rehearing.

48. Take the example of state default service auctions. As PJM explained in its rehearing request, state default service auctions are state-directed “mechanisms by which load-serving entities in retail choice states acquire obligations to provide energy and related services to retail customers.”¹³³ In layman's terms, that means that they are a market-based mechanism for ensuring that all retail customers have access to reliable and affordable electricity. As the New Jersey Board of Public Utilities—which oversees one of these auctions—explained, these mechanisms are best viewed as hedging constructs that help ensure that state-regulated retail suppliers have access to reliable electricity without wild swings in price.¹³⁴ In New Jersey's case, the default service auction is a voluntary mechanism that will rarely, if ever, produce a state-regulated contract with an actual generator (as opposed to a power marketer—*i.e.*, a middle man) or support the retention or new entry of particular resources¹³⁵—details that are apparently too complicated or too inconvenient for the Commission to wrestle with. Today's order finds that a state default service auction qualifies as a State Subsidy because it is a state sponsored process that results in indirect payments to various resources.¹³⁶

49. It is not clear from the record before us exactly how far reaching this decision will be. New Jersey alone serves over 7,000 MW of retail load through its BGS auctions,¹³⁷ and every indication is that other retail-choice states have similar mechanisms.¹³⁸ To start with, the District of Columbia Public Utility Commission and Pennsylvania Public Utility Commission sought clarification and rehearing of the December 2019 Order, understandably concerned that it could mean that *any* resource that serves load in those

¹³³ PJM Rehearing and Clarification Request at 23.

¹³⁴ New Jersey Board Rehearing Request at 47-48.

¹³⁵ *Id.* at 48.

¹³⁶ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 386.

¹³⁷ See *The 2019 BGS Auctions*, www.bgs-auction.com http://www.bgs-auction.com/documents/2019_BGS_Auction_Results.pdf (last viewed Apr. 16, 2020).

¹³⁸ See, e.g., New Jersey Board Rehearing Request at n.260 (“New Jersey is not alone; PJM's other restructured states follow models similar to the BGS construct.”).

states would be subject to the Commission's administrative pricing regime.¹³⁹ In addition, Maryland runs a similar default service auction that procures service for over 50 percent of the state's retail load.¹⁴⁰ Delaware too has a default service auction, which cleared over 500 MW in the most recent auction.¹⁴¹ Additionally in Ohio each utility has its own Standard Service Offer auction for retail load.¹⁴² It quickly becomes clear that state default auctions are a commonplace in retail choice states and can often be used to meet the needs of upwards of 50% of retail load. The Commission's decision to label these auctions—which sometimes cover more than half a state's retail load—state subsidies could have sweeping consequences for the retail-choice states that make up the majority of PJM states.

50. And is if that were not bad enough, the Commission makes no effort to wrestle with the practical challenges of its edicts. As the New Jersey Board explained in its rehearing request, the “suppliers” in New Jersey's default service auction are generally power marketers that rely on either financial or physical hedging and are not necessarily backed by particular physical generators.¹⁴³ Do the Commission's statements in today's orders mean that PJM, the Market Monitor, or someone else will have to chase down every resource power marketers use to satisfy a default service auction contract? In

¹³⁹ DC Commission Rehearing and Clarification Request at 1-3; Pennsylvania Commission Rehearing and Clarification Request at 13. As noted, PJM also sought clarification, arguing that “it is not apparent how these auctions amount to a State Subsidy.” PJM Rehearing and Clarification Request at 23.

¹⁴⁰ See Maryland Public Service Commission, Report to the Governor and the Maryland General Assembly on the Status of Standard Offer Service, the Development of Competition, and the Transition of Standard Offer Service to a Default Service at 5-6 (Dec. 31, 2018), *available at* <https://www.psc.state.md.us/wp-content/uploads/Final-Competition-Report.pdf> (discussing Maryland's default service auction).

¹⁴¹ See James Letzelter, The Liberty Consulting Group, Inc., Delmarva Power & Light's 2020 Request for Proposals for Full Requirements Wholesale Electric Supply for Standard Offer Service (2020), *available at* <https://depsec.delaware.gov/wp-content/uploads/sites/54/2020/02/Liberty-DE-PSC-Technical-Consultant-Final-Report-02-19-2020.pdf>.

¹⁴² See *How are electric generation rates set?* <https://www.puco.ohio.gov/be-informed/consumer-topics/how-are-electric-generation-rates-set/> (last viewed Apr. 16, 2020).

¹⁴³ New Jersey Board Rehearing Request at 48; see Pennsylvania Commission Rehearing and Clarification Request at 13.

addition, default service auctions generally do not align with PJM's annual single-delivery-year capacity auctions. For example, in New Jersey the auction runs annually and covers only one-third of load at time, but with three year contracts.¹⁴⁴ In the District of Columbia the auctions are held annually.¹⁴⁵ And in Pennsylvania they are run "quarterly, or every 6 months."¹⁴⁶ How will PJM, the Market Monitor, or the Commission sort out which resources are to be mitigated in PJM's Base Residual Auction based on those differing state calendars?

51. I find the failure to carefully consider these impacts on a fundamental aspect of state regulation particularly troubling. This Commission has rightly enjoyed a reputation for focusing on the technical and arcane elements of providing reliable electricity at just and reasonable rates rather than on making broad policy pronouncements. Today's orders will do much to damage that reputation. It makes clear that the Commission is uninterested in the effects its orders may have on how states carry out their basic responsibilities. Instead, it is comfortable pursuing its quixotic quest to rid the wholesale market of state subsidies and leave it to the states to pick up the pieces.

c. Excluding State Actions That May Equally "Suppress" Prices Is Arbitrary and Capricious

52. Although the definition of state subsidy is overbroad, it is also irrational. Today's order on rehearing affirms the December 2019 Order's unreasoned distinctions drawn among different state public policies. In particular, the Commission expressly excludes state industrial development policies and local siting subsidies from its definition of state subsidy.¹⁴⁷ The rationale, while murky, seems to be that those policies are "too attenuated" from the wholesale rate to constitute an impermissible state policy while other state policies, even ones with a lesser effect on the wholesale rate, are somehow more closely related.¹⁴⁸ That distinction is neither reasonable nor reasonably explained.

53. Let's begin with the fact that the distinction drawn is inconsistent with the Commission's rationale for the new MOPR. As discussed, throughout this proceeding the Commission has asserted that the problem with state policies is their ability to

¹⁴⁴ See *Overview* <http://www.bgs-auction.com/bgs.auction.overview.asp> (last visited Apr. 16, 2020) (describing New Jersey's default service auction).

¹⁴⁵ DC Commission Rehearing and Clarification Request at 2.

¹⁴⁶ Pennsylvania Commission Rehearing and Clarification Request at 13.

¹⁴⁷ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 106.

¹⁴⁸ *Id.*

“suppress” the wholesale rate.¹⁴⁹ And, in the December 2019 Rehearing Order, the Commission again dismisses arguments that the MOPR should apply only to state policies that materially affect the capacity price.¹⁵⁰

54. That is irrational. “General industrial development” policies, such as reduced tax rates, can have an enormous effects on resources’ going forward costs, leading resources to “reduce their offers commensurately to ensure they clear the market,” exactly the way the Commission described state policies that are subject to the new MOPR.¹⁵¹ Moreover, the ubiquity and potential cumulative effect of these programs—which the Commission does not contest¹⁵²—would seem to suggest that they represent exactly the sort of threat to “market integrity” about which the Commission’s purports to be so concerned.¹⁵³ If today’s orders were actually concerned about the price suppressive effects of state policies, general industrial development and local siting policies would have to be front and center in any rational response. The fact that they are not shows the extent to which the new MOPR is a campaign to stamp out disfavored state efforts to shape the generation mix and not to address capacity prices themselves.

¹⁴⁹ *E.g. id.* PP 36, 55, 224.

¹⁵⁰ *Id.* P 130.

¹⁵¹ *See id.* P 38; *see also id.* P 130 (rejecting PJM’s proposed materiality threshold because “out-of-market support at any level is capable of distorting capacity prices”).

¹⁵² At no point in today’s order or the December 2019 Order does the Commission suggest that state industrial development or siting support programs are likely to have less of an effect on wholesale rates than the other state policies targeted by the new MOPR. *See, e.g., id.* PP 106-108 (discussing the justification for excluding these policies from the new MOPR).

¹⁵³ *Id.* PP 20, 301. In any case, the District of Columbia Attorney General’s rehearing request details how these programs can provide enormous financial benefits to generators, significantly decreasing their capacity market offers in a way that affects the capacity market rate every bit as much as the state policies targeted by today’s orders. DC Attorney General Rehearing Request at 22-24. In addition, that rehearing request explained how these supposed “generic” subsidies are, in fact, often deployed for the purpose of subsidizing particular resources. *Id.* at 23-24; *see* Clean Energy Associations Rehearing and Clarification Request at 40-41. The Commission’s response that general industrial development policies are categorically “too attenuated” to constitute a state subsidy for the purposes of the MOPR fails to wrestle with the evidence and arguments showing the opposite to be true.

55. The Commission's effort to justify that arbitrary line drawing only underscores the point. The Commission again asserts that the new MOPR is aimed only at state policies that are "most nearly . . . directed at or tethered to the" wholesale rate.¹⁵⁴ But as discussed above, that awkward repurposing of a preemption term of art does not make things any clearer.¹⁵⁵ It certainly does not explain why it is rational for the Commission to apply the new MOPR only to those state policies that it believes are close-to-but-not-preempted¹⁵⁶ or why the degree of "attenuation" is relevant in a proceeding that is nominally about actual effects on wholesale rates. Indeed, at no point in this proceeding has the Commission explained why, if the "problem" at hand is the effect of state policies on wholesale rates, it is reasonable to target only certain state efforts and not others that may well have a greater wholesale market effect.¹⁵⁷ The failure to do so is arbitrary and capricious.

d. Addressing Only State Actions that Reduce Cost Is Arbitrary and Capricious

56. The December 2019 Rehearing Order grants clarification that the Regional Greenhouse Gas Initiative (RGGI) is not an actionable subsidy.¹⁵⁸ I am glad to hear it. Although I maintain that the distinction drawn in today's order is inconsistent with the most natural reading of the Commission's subsidy definition,¹⁵⁹ just about anything that

¹⁵⁴ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 106; December 2019 Order, 169 FERC ¶ 61,239 at P 68.

¹⁵⁵ See *supra* note 23.

¹⁵⁶ See *id.*

¹⁵⁷ Throughout the December 2019 Rehearing Order, the Commission responds to this point by quoting portions of the December 2019 Order that describe the Commission's action without responding to this argument. See, e.g., December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 106 ("As we said in the December 2019 Order, the expanded MOPR is not intended to address all commercial externalities or opportunities that might affect the economics of a particular resource."). Although that quote accurately describes what the Commission said in its earlier order, it does not respond to the arguments that the line drawing described in that quote is arbitrary and capricious. That is a not a reasoned response; rehearing orders are an opportunity to further explain the Commission's analysis, not just regurgitate it.

¹⁵⁸ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 390.

¹⁵⁹ December 2019 Order, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 23).

limits the extent of the Commission's interference with state resource decisionmaking is a step in the right direction.

57. But although that outcome may be a good one, it vividly illustrates the arbitrariness with which the Commission is going after state policies. The Commission's single-sentence clarification regarding RGGI is a little light on reasoning, but the upshot appears to be that RGGI does not cause problems for "market integrity,"¹⁶⁰ "investor confidence,"¹⁶¹ "the first principles of capacity markets,"¹⁶² or the "premise of a capacity markets"¹⁶³ because it addresses the externality of climate change by raising prices, rather than by lowering them. At no point, however, does the Commission explain why a state effort to tax the harm associated with a market failure is consistent with capacity markets, but a state effort to address the same harm by subsidizing resources that do not contribute to that externality is inconsistent with capacity markets. It may well be that a so-called "Pigouvian tax" is economically preferable to a "Pigouvian subsidy,"¹⁶⁴ but, even if true, that does explain why the former is consistent with the Commission's various capacity market buzzwords, but the latter is not.

58. In any case, the Commission's decision to find one approach inherently problematic and the other acceptable illustrates the extent to which it is meddling directly in state resource decisionmaking. Whatever you think about the economic merits of subsidies versus taxes as ways of addressing externalities, there should be no question that a state's choice between the two approaches is entirely the state's to make or that the Commission has no business in enacting regulations that give a preference to one approach over the other. In this example, the Commission's willingness to pick and choose which of the broadly equivalent state approaches to addressing climate change are allowed to affect the wholesale rate and which are not, is clear and unmistakable evidence of its meddling in decisions that the FPA expressly reserves to the states. The

¹⁶⁰ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 301; June 2018 Rehearing Order, 171 FERC ¶ 61,034 at P 50; June 2018 Order, 163 FERC ¶ 61,236 at PP 1-2, 150, 156, 161.

¹⁶¹ *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 21; *see* December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 141.

¹⁶² *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 21.

¹⁶³ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 320; December 2019 Order, 169 FERC ¶ 61,239 at P 17.

¹⁶⁴ Sylwia Bialek & Burcin Unel, Institute for Policy Integrity, *Capacity Markets and Externalities: Avoiding Unnecessary and Problematic Reforms* at 6-7 (2018).

failure to recognize, much less explain, why it is appropriate to pick and choose which state policies are acceptable and which are not is arbitrary and capricious.

59. And that is particularly so given the structure and purpose of the capacity market, which exists to provide the “missing money.”¹⁶⁵ Because the missing money is the *net* difference between a resource’s revenue and its costs,¹⁶⁶ a resource should be indifferent, for the purposes of the capacity market, between a state policy that forces resources to internalize the cost of the externality or one that achieve the same thing by paying resources for not contributing to the externality. In other words, the Commission is relying on a distinction that is, for our purposes today, without a difference.

2. Ignoring the Cost Impacts of the New MOPR Is Arbitrary and Capricious

60. One of the most glaring omissions from the December 2019 order was its failure to make any effort to consider the costs of the new MOPR.¹⁶⁷ As the Commission acknowledges, “[s]etting a just and reasonable rate necessarily ‘involves a balancing of the investor and consumer interests.’”¹⁶⁸ The Commission’s various orders in this proceeding spend plenty of time asserting that investors need sweeping reforms in order to remain “confident” in the PJM capacity market. Unfortunately, the costs to consumers of making investors so confident went unmentioned in both the Commission’s June 2018 and December 2019 orders.

61. Many parties raised the Commission’s failure to consider consumer interests on rehearing.¹⁶⁹ In response, the Commission recites general propositions about the importance of customer interests only to undercut itself almost immediately thereafter. For example, the Commission begins one paragraph by stating that it “disagree[s] that the

¹⁶⁵ *I.e.*, the capacity revenue a resource needs to be economic over and above what it earns in the energy and ancillary service markets. *N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,121 (2020) (Glick, Comm’r, dissenting at P 4).

¹⁶⁶ Which is, after all, why the Commission’s orders use net measures as the default offer floors for resources subject to the new MOPR. *See infra* PP 81-85.

¹⁶⁷ December 2019 Order, 169 FERC ¶ 61,239 at PP 54-57.

¹⁶⁸ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 139 (citing *NextEra*, 898 F.2d at 21).

¹⁶⁹ *Id.* at n.330 (non-exhaustive list of fifteen different rehearing requests raising this point).

Commission failed to consider the costs of the replacement rate.”¹⁷⁰ But it then spends the rest of that paragraph explaining why it did not consider any estimate of the customer impacts before concluding that the resulting costs, whatever they may be, are necessarily just and reasonable because they “protect the integrity of the capacity market, which, in turn, ensures that investors will continue to be willing to develop resources to meet current and future reliability needs.”¹⁷¹ That sort of conclusory statement is hardly convincing evidence that the Commission actually took a hard look at the costs its orders will impose on customers.

62. The Commission dismisses as “speculative” any estimates of those costs. It would appear that a fair degree of work went into many of those estimates and I do not see the wisdom in dismissing them out-of-hand just because the details of the new MOPR have yet to be fully worked out.¹⁷² After all, if the record provides enough evidence for the Commission to confidently assess that the costs of its new MOPR are worth it,¹⁷³ you

¹⁷⁰ *Id.* P 139.

¹⁷¹ *Id.*

¹⁷² *Id.* In so doing, the Commission goes out of its way to criticize what I described as a “conservative,” “back-of-the-envelope” calculation meant to help fill the void left by the Commission’s failure to seriously consider the December 2019 Order’s financial impact on customers. *Id.* n.352. In particular, it points to doubts raised by the Market Monitor about whether that calculation considered the right quantity of to-be-MOPR megawatts of capacity from nuclear generators. *Id.* I assumed it would be 6,000 MW. The Market Monitor suggested that number would be closer to 4,000 MW. *Id.* He may be right; it is hard to say how an unprecedented mitigation regime will work in practice.

In any case today’s order makes clear that my cost estimate was, if anything, too conservative. For one thing, my estimate did not consider the cost of paying twice for capacity as a result of MOPR’ing the tens of the thousands of megawatts of renewable resources slated to be developed in the region to meet state renewable energy targets over the coming years. Clean Energy Associations estimated that that cost will be between \$14 and \$24 billion over the next decade. Clean Energy Associations Rehearing and Clarification Request at 22-23. My estimate also did not attempt to assess the effects of the bizarre conclusion, affirmed today, that the default service auctions in PJM retail choice states are somehow “subsidies,” which will subject the resources that serve significant fractions of load in those states to the MOPR. *See supra* PP 49-51. Those are just two examples, but they illustrate why I remain confident that, when the dust settles, that back-of-the-envelope calculation will prove to have been a conservative one.

¹⁷³ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at PP 139-140 (asserting

would think it would provide enough evidence to at least gauge the likely impact on consumers.

63. In addition, there is every reason to believe that the actual costs of today's orders will increase with time. Although these orders aim to hamper state efforts to shape the generation mix, they likely will not snuff them out entirely. In other words, there simply is no reason to believe that the Commission will succeed in realizing its "idealized vision of markets free from the influence of public policies."¹⁷⁴ As former Chairman Norman Bay aptly put it, "such a world does not exist, and it is impossible to mitigate our way to its creation."¹⁷⁵

64. But that means that, as a resource adequacy construct, the PJM capacity market will increasingly operate in an alternate reality, ignoring more and more resources just because they receive some form of state support. That also means that customers will increasingly be forced to pay twice for capacity or, to put it differently, to buy more unneeded capacity with each passing year. I cannot fathom how the costs imposed by a resource adequacy regime that is premised on ignoring actual capacity can ever be just and reasonable.

65. The Commission responds to this point by asserting that the costs of double-procuring capacity are irrelevant because *NJBPU* held that states may "appropriately bear the costs" of their resource decisionmaking, including the costs associated with resources whose capacity does not clear in the capacity auction.¹⁷⁶ As noted above, there are good reasons to pause before applying *NJBPU* whole hog to this proceeding.¹⁷⁷ In any case, the Commission's citation to that decision's jurisdictional analysis does not insulate today's orders from the charge that it is arbitrary and capricious to altogether disregard the costs imposed by forcing the capacity market to ignore resources that actually exist or will developed and procuring additional resources as if those ignored resources did not

that while the "actual cost impacts of the replacement rate are speculative at this point," they will result in a rate increase the Commission deems just and reasonable).

¹⁷⁴ *N.Y. State Pub. Serv. Comm'n*, 158 FERC ¶ 61,137 (2017) (Bay, Chairman, concurring).

¹⁷⁵ *Id.*

¹⁷⁶ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 141.

¹⁷⁷ *See supra* PP 22-23.

exist.¹⁷⁸ Those are real costs that are directly traceable to the Commission's orders and cannot logically be ignored by an agency claiming to balance "consumer interests."¹⁷⁹

66. The record before us provides every reason to believe that this approach will lead to other significant cost increases. For example, the new MOPR will exacerbate the potential for the exercise of seller-side market power in what the Market Monitor has described as a structurally uncompetitive market.¹⁸⁰ As the Institute for Policy Integrity explained, expanding the MOPR will decrease the competitiveness of the market, both by reducing the number of resources offering below the MOPR price floor and by changing the opportunity cost of withholding capacity.¹⁸¹ With more suppliers subject to administratively determined price floors, resources that escape the MOPR—or resources with a relatively low offer floor—can more confidentially increase their bids up to that level, secure in the knowledge that they will still under-bid the mitigated offers. That problem is compounded by PJM's weak seller-side market power mitigation rules, which include a safe harbor for mitigation up to a market-seller offer cap that has generally been well above the market-clearing price.¹⁸²

¹⁷⁸ At various points, the Commission makes assertions, such as even the new MOPR forces customers to "pay twice" for capacity, "preserving the integrity of the capacity market will benefit customers over time by ensuring capacity is available when needed." December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 223. Conclusory assertions are the same thing as considering customers' interests.

¹⁷⁹ *Id.* P 139.

¹⁸⁰ See Market Monitor 2021/2022 BRA Analysis 2 ("The capacity market is unlikely ever to approach a competitive market structure in the absence of a substantial and unlikely structural change that results in much greater diversity of ownership. Market power is and will remain endemic to the structure of the PJM Capacity Market Reliance on the RPM design for competitive outcomes means reliance on the market power mitigation rules.")

¹⁸¹ Institute for Policy Integrity Initial Brief at 14-16.

¹⁸² For example, the RTO-wide market seller offer cap for the 2018 Base Residual Auction \$237.56 per MW/day while the clearing price for the RTO-wide zone was \$140.00 per MW/day. See PJM Interconnection, *2021/2022 RPM Base Residual Auction Results*, <https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2021-2022/2021-2022-base-residual-auction-report.ashx> (last visited Dec. 19, 2019).

3. Disregarding the Effects of the New MOPR on Well-Established Business and Regulatory Models Is Arbitrary and Capricious

i. Demand Response

67. The PJM region has long benefitted from a robust participation of demand response resources. That is in part because PJM has had in place rules that accommodate short-lead-time resources. Specifically, the Commission has long recognized that demand response resources may not be identified years in advance of the delivery year.¹⁸³ Accordingly, PJM has permitted Curtailment Service Providers (CSP), *i.e.*, a demand response provider, to participate in the Base Residual Auction without identifying all end-use demand response resources at the time of the auction.¹⁸⁴ That has been fundamental to the demand response business model, since, without it, the short-lead time resources on which demand response depends might never be able to participate in the Base Residual Auction.¹⁸⁵

68. So much for that. The December 2019 Rehearing Order states that the new MOPR “may require aggregators and CSPs to know all of their demand response resource end-users prior to the capacity auction.”¹⁸⁶ In addition, it appears to require that,

¹⁸³ For example, recognizing that demand response is a “short-lead-time” resource, the Commission previously directed PJM to revise the allocation of the short-term resource procurement target so that short-lead-time resources have a reasonable opportunity to be procured in the final incremental auction. *PJM Interconnection L.L.C.*, 126 FERC ¶ 61,275 (2009). The Commission subsequently removed the short-term resource procurement target only after concluding that doing so would not “unduly impede the ability of Demand Resources to participate in PJM’s capacity market.” *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208, at PP 394, 397 (2015).

¹⁸⁴ Under PJM’s current market rules, CSPs must submit a Demand Resource Sell Offer Plan (DR Sell Offer Plan) to PJM no later than 15 business days prior to the relevant RPM Auction. This DR Sell Offer Plan provides information that supports the CSP’s intended DR Sell Offers and demonstrates that the DR being offered is reasonably expected to be physically delivered through Demand Resource Registrations for the relevant delivery year. *See* PJM Manual 18: PJM Capacity Market – Attachment C: Demand Resource Sell Offer Plan.

¹⁸⁵ As CPower and LSPower explain, such customers typically make participation decisions in a shorter time frame than the three-year forward auction designed to reflect the time needed to develop a new generation facility. CPower/LSPower Rehearing Request at 11.

¹⁸⁶ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 266.

for each resource with behind-the-meter generation, the CSP must identify the relative share of its capacity that results from demand reduction versus behind-the-meter generation.¹⁸⁷ And the CSP will have to know all of that three years before the delivery year. That is a stunning level of paperwork to impose on CSPs, which may well require many, if not most, of them to fundamentally change or altogether abandon their business model. I fail to see anything in this record that suggests that the Commission's concerns about state policies justifies that result.

69. While the grandfathered treatment provided to existing demand response resources could help blunt the impact of the new MOPR, the confusing language in the Commission's order raises more questions than it answers, leaving CSPs, PJM, and the Market Monitor with little guidance on how to mitigate demand response resources. Rather than explaining that the grandfathered treatment attaches to the resource itself, which would seem the only logical conclusion, the Commission adds that "Aggregators and CSPs will be considered to have previously cleared a capacity auction only if *all the individual resources within the offer* have cleared a capacity auction."¹⁸⁸ Why an entire CSP's portfolio must receive all-or-nothing treatment is unclear, unexplained and raises fundamental questions about how this will work when resources switch CSPs, as they often do.¹⁸⁹

¹⁸⁷ In response to requests to clarify offer floors for demand response resources backed by a combination of behind-the-meter generation and reduced consumption, the Commission simply reiterates that the December 2019 Order found that different default offer price floors should apply to demand response backed by behind-the-meter generation and demand response backed by reduced consumption (*i.e.*, curtailment-based demand response programs). December 2019 Rehearing Order, 171 FERC ¶ 61,035 at PP 187-188.

¹⁸⁸ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at 265 (emphasis added).

¹⁸⁹ In addition, the December 2019 Rehearing Order concludes that if a demand response resource earns any revenue through a state-sponsored *retail* demand response program, it is impermissibly subsidized and subject to the new MOPR. *Id.* P 264. But just a few months ago, the Commission approved rules in NYISO that treat a state retail demand response program as a subsidy for the purposes of the capacity *only* if the purpose of that state program is to procure demand response for its capacity value. *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,120 (2020) ("[W]e will evaluate retail-level demand response programs on a program-specific basis to determine whether payments from those programs should be excluded from the calculation of SCRs' offer floors."). Those are radically different approaches to the permissible effects of state retail demand response programs, which cannot be papered

70. The bottom line here is that the Commission's attempt to root out certain state "subsidies" manifests itself as an out-and-out attack on the demand response business model in PJM.¹⁹⁰ That attack is particularly unfortunate as PJM indicated that the default offer floor for at least certain demand response resources should be at or near zero,¹⁹¹ suggesting that even if demand response resources receive a subsidy, that subsidy would not reduce their offer below what this Commission calls a "competitive offer." Demand response has provided tremendous benefits to PJM, both terms of improved market efficiency and increased reliability. I see no reason to give up those benefits based on an unsubstantiated concern about state policies.

ii. Public Power

71. Today's order also continues the Commission's attack on public power, dismissing the entire business model as a state subsidy and jeopardizing the viability of a construct that has long benefited customers. As ill-advised as that attack is, it is equally unsupported. The Commission neither marshals evidence that the existence of public power has actually suppressed prices¹⁹² nor addresses arguments that the type of balanced portfolio typically developed by public power entities will not have that effect.¹⁹³ The

over simply by observing that one set of rules apply in PJM and another in NYISO.

¹⁹⁰ Indeed, buried in footnotes in the December 2019 Rehearing Order, the Commission appears to insinuate that demand response resources, among other resources, should perhaps be kicked out of the capacity market entirely. *See* December 2019 Rehearing Order, 171 FERC ¶ 61,035 at n.598. ("We pause to note that, as the capacity market has developed, an ever-growing number of resource types have come to participate in the market that were not contemplated. This proceeding . . . does not necessarily resolve issues regarding whether, to what extent, and under what terms resources that are not able to produce energy on demand should participate in the capacity market consistent with the Commission's mandate to ensure the reliability of the electric system"); *id.* n.451 ("The Commission is concerned that there may be a point where energy efficiency is unable to supply capacity when needed to maintain system reliability. However, that issue can be pursued in a separate proceeding.").

¹⁹¹ PJM explains that, beyond the initial costs associated with developing a customer contract and installing any required hardware or software, it could not identify any avoidable costs that would be incurred by an existing Demand Resource that would result in a MOPR Floor Offer Price of greater than zero. PJM Initial Brief at 47.

¹⁹² The Commission offers no data, such as sell-offer data of utilities or public power entities or provides any evidence in support of this finding. *See* SMECO Rehearing Request at 6; Allegheny Rehearing Request at 12.

¹⁹³ After all, public power entities typically procure roughly the amount of supply

Commission's unsupported treatment of public power is, as PJM points out in its rehearing request, "overbroad and unwarranted."¹⁹⁴

72. Today's order leaves public power with few options. Unlike most public utilities,¹⁹⁵ PJM's existing FRR option is not much good for many public power entities since "participating in the FRR option is an all-or-nothing proposition, and appeals as a practical matter only to large utilities that still follow the traditional, vertically integrated model."¹⁹⁶ In addition, the Commission concludes that third-party contracts signed by public power entities are also state subsidies.¹⁹⁷ That effectively forces public power to procure capacity based only on the narrow considerations evaluated in the PJM capacity market—a result inimical to the purpose of the public power model.

73. The public power model predates the capacity market by several decades and is premised on securing a reliable supply of power for each utility's citizen-owners at a

needed to meet their demand. In response to arguments raising this point and contending that an approach based on net long, net short thresholds (which would formally require a rough equivalence between supply and demand to avoid mitigation) would be just and reasonable and more consistent with Commission precedent, *see* Public Power Entities Request for Rehearing and Clarification at 30-32; PJM Request for Rehearing and Clarification at 13-14; ODEC Request for Rehearing and Clarification at 7-9, today's order asserts that "the expanded MOPR is premised on a resource's ability to suppress price due to the benefit it receives from out-of-market support, not based on the likelihood and ability to exercise of buyer-side market power." December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 228. But the ability to "exercise" buyer-side market power is the ability to reduce prices. If public power entities' load equals their supply, their choice of how to serve that load will not cause price suppression plain and simple. The Commission has previously found such thresholds can protect against price suppression. *See N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,121, at P 90 (2020) (discussing buyer-side market power concerns associated with self-supply). It fails to provide a reasoned basis for rejecting the same approach today.

¹⁹⁴ PJM Rehearing and Clarification Request at 13.

¹⁹⁵ These terms get confusing quickly. Under the FPA, a "public utility" will typically be privately owned while an entity that is not a "public utility" will often be publically owned. *See* 16 U.S.C. §§ 824(e) & (f). Accordingly, "public power" is generally made up of non-public utilities.

¹⁹⁶ *NJBPU*, 744 F.3d at 84 (footnote omitted).

¹⁹⁷ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at PP 243, 325.

reasonable and stable cost, which often includes an element of long-term supply.¹⁹⁸ The policy affirmed in today's order is a direct threat to the long-term viability of the public power model in PJM. Although the Commission exempts existing public power resources from the MOPR, it provides that all new public power development will be subject to mitigation. That means that public power's selection and development of new capacity resources will now be dependent on the capacity market outcomes, not the self-supply model on which it has traditionally relied. That fundamentally upends the public power model because it limits the ability of public power entities to choose how to develop and procure resources over a long time horizon.

iii. Energy Efficiency

74. The Commission is also arbitrary and capricious in its treatment of energy efficiency resources—*e.g.*, efficient light bulbs, air conditioning units, and water heaters whose installation reduces electricity use. Although energy efficiency resources reduce demand for electricity, they participate in the PJM capacity auction as “supply” for four years so that they can receive compensation for reducing the total amount of capacity needed in the region.¹⁹⁹ To make that work in practice, PJM “adds back” to the demand curve the capacity equivalent of any energy efficiency resources that participate in the auction.²⁰⁰ Doing so ensures that the capacity provided by energy efficiency resources is not double counted.

75. Today's order concludes that any energy efficiency resources that participate in the PJM capacity auction and receive a state subsidy suppress prices and, therefore, must be subjected to the new MOPR.²⁰¹ The record does not support that determination. As

¹⁹⁸ American Municipal Power and Public Power Association of New Jersey Initial Brief at 14-15; American Public Power Association Initial Brief at 15.

¹⁹⁹ PJM Manual 18B, Energy Efficiency Measurement & Verification 10-13, *available at* pjm.com/~media/documents/manuals/m18b.ashx. After those four years, energy efficiency resources no longer participate in the capacity auction and instead are recognized only as reductions in demand. *Id.*

²⁰⁰ *Id. Participate*, not clear. That means that if an energy efficiency resource bids into, but does not clear the capacity market, its capacity is *still* added back to the demand curve. This is because as PJM explains, the auction parameters are adjusted by adding the MWs in approved energy efficiency plans that are proposed for that auction back into the reliability requirements. PJM Rehearing and Clarification Request at 15, n.41. For approved plans, that add back occurs whether or not resources will know if they cleared the auction.

²⁰¹ December 2019 Order, 169 FERC ¶ 61,239 at P 255.

PJM's Market Monitor explained, including energy efficiency in the PJM capacity auction—by treating it as supply and then adding it back to the demand curve—actually *increases* the prices in that auction by roughly 10 percent, all else equal.²⁰² In other words, the record does not indicate that the energy efficiency resources participating in the capacity market (subsidized or otherwise) are having any price suppressive effect whatsoever. Instead, the record indicates that the only time energy efficiency resources can decrease capacity market prices is when, after four years, those resources no longer participate in the capacity market and are no longer subject to the new MOPR.²⁰³

76. Today's order completely fails to address these points even though PJM itself, not to mention several other parties, argued on rehearing that the Commission's approach to energy efficiency was inconsistent with its own theory of the case and would make a hash of the markets.²⁰⁴ Instead, the Commission asserts that energy efficiency resources can cause price suppression because, according to the Commission, that is the inevitable result of subsidizing any resource.²⁰⁵ To support that proposition, the Commission relies on a single piece of irrelevant arithmetic. It multiplies the total MWs of energy efficiency that cleared in the capacity market in a given year by the clearing price that year and asserts that the resulting figure shows that energy efficiency "has affected revenues in the PJM capacity market."²⁰⁶ That may be true, but it does not shed any light whatsoever on whether energy efficiency, subsidized or not, suppresses the capacity market clearing price. Indeed, the Commission fails to wrestle with the fact that, as a result of the add-

²⁰² The Independent Market Monitor for PJM, *Analysis of the 2021/2022 RPM Base Residual Auction* 20 (2018), available at http://www.monitoringanalytics.com/reports/Reports/2018/IMM_Analysis_of_the_20212022_RPM_BRA_Revised_20180824.pdf (2018 PJM State of the Market Report).

²⁰³ At that point, the energy savings from energy efficiency resources are "baked into" PJM's demand forecast and, thus, the resources are no longer eligible for a capacity payment for reducing demand relative to that projection.

²⁰⁴ E.g., PJM Rehearing and Clarification Request at 15 & n.41; Advanced Energy Entities at 12-15; CPower/LSPower Rehearing and Clarification Request at 6-8.

²⁰⁵ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 257 ("We reject the contention that energy efficiency's market participation cannot suppress prices. State Subsidies, if effective, will by their very nature increase the quantity of whatever is subsidized. State subsidies to energy efficiency should result in additional energy efficiency resource participation.").

²⁰⁶ *Id.* P 256.

back provision, energy efficiency resources will not suppress the capacity clearing price. Calculating their total revenue does not change that fact.

77. In addition, the Commission blithely asserts that energy efficiency must be subject to the new MOPR because “[d]ecreased demand resulting from a State Subsidy will suppress prices just as a State Subsidy to supply will suppress prices.”²⁰⁷ That general statement proves too little. It simply cannot be the case that any action a state takes to conserve electricity is a “problem” for the Commission to fix. Instead, the state action can implicate the Commission’s interests through resources’ participation in the capacity market, if at all. As explained above, however, the record is clear that energy efficiency resources’ participation in the capacity market does not have a price suppressive effect; quite the opposite, in fact. The Commission’s failure to wrestle with the actual effects of energy efficiency participating as a capacity resource renders its justification for applying the MOPR to such resources arbitrary and capricious.

iv. Voluntary RECs

78. Today’s order grants clarification that “purely voluntary transactions for RECs are not considered State Subsidies.” Again, I am glad to hear it. As I explained in my earlier dissent, transactions involving voluntary REC sales would not meet any reasonable definition of subsidy and would instead amount to “mitigating the impact of *consumer preferences* on wholesale electricity markets just because they may potentially overlap with state policies.”²⁰⁸ In addition, I noted that there were eminently reasonable ways to address the Commission’s practical concerns about ensuring that voluntary RECs are not eventually used to comply with state mandates. I am glad to see that that view seems to have prevailed.

79. Nevertheless, today’s order makes clear that voluntary RECs are not out of the woods yet. In a pair of ominous (and redundant) footnotes, the Commission’s goes out of its way to assert that all today’s order concludes is that voluntary RECs are not state subsidies and that, pardon the double negative, that conclusion is not a finding that voluntary RECs do not distort capacity market outcomes.²⁰⁹ If the question is whether consumers’ voluntary decision to purchase clean energy could “distort” efficient market

²⁰⁷ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 257.

²⁰⁸ December 2019 Order, 169 FERC ¶ 61,239 (Glick, Comm’r, dissenting at P 41) (footnotes and internal quotation marks omitted).

²⁰⁹ See December 2019 Rehearing Order, 171 FERC ¶ 61,035 at n.808 (“The treatment of voluntary RECs in this order is not a determination regarding whether the revenue from voluntary REC transactions results or could result in capacity market distortions.”); *id.* n.807 (exact same point).

outcomes, the answer is a straightforward no. The fact that the Commission feels the need to go out of its way to preserve that question for a future proceeding is as ominous as it is unnecessary. It is both notable and concerning that the Commission did not feel the need to preserve the same question when addressing other voluntary out-of-market for capacity resources, such as sales of coal ash, which it describes as “similarly situated” to voluntary REC sales.²¹⁰

4. Applying Different Offer Floors to New and Existing Resources Is Arbitrary and Capricious

80. As I explained in my dissent from the December 2019 Order, the Commission’s imposition of disparate offer floors for new and existing resources is unjust and unreasonable, unduly discriminatory as well as arbitrary and capricious. Today’s order affirms the decision to require new resources receiving a State Subsidy to be mitigated to Net Cost of New Entry (Net CONE) while existing resources receiving a State Subsidy are mitigated to their Net Avoidable Cost Rate (Net ACR). The Commission suggested that this distinction is appropriate because new and existing resources do not face the same costs.²¹¹ In particular, the Commission suggested that setting the offer floor for new resources at Net ACR would be inappropriate because that figure “does not account for the cost of constructing a new resource.”²¹² Today’s order uses more words to make the same points.²¹³

81. Regardless, the Commission’s distinction does not hold water. As the Market Monitor explained in his comments, it is illogical to distinguish between new and existing resources when defining what is (or is not) a competitive offer.²¹⁴ That is because, as a

²¹⁰ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 326 (finding “to the extent coal ash sales are purely voluntary, such that they do not fall under the definition of State Subsidy, they are similarly situated to voluntary RECs, which are not mitigated under the replacement rate.”).

²¹¹ December 2019 Order, 169 FERC ¶ 61,239 at P 140.

²¹² *Id.*

²¹³ December 2019 Rehearing Order, 171 FERC ¶ 61,035 at PP 157-159.

²¹⁴ Independent Market Monitor Brief at 16 (“A competitive offer is a competitive offer, regardless of whether the resource is new or existing.”); *id.* at 15-16 (“It is not an acceptable or reasonable market design to have two different definitions of a competitive offer in the same market. It is critical that the definitions be the same, regardless of the reason for application, in order to keep price signals accurate and incentives consistent.”).

result of how most resources are financed, a resource's costs will not materially differ based on whether it is new or existing (*i.e.*, one that has cleared a capacity auction). That means that there is no basis to apply a different formula for establishing a competitive offer floor based solely on whether a resource has cleared a capacity auction. To the extent it is appropriate to consider the cost of construction for a new resource it is just as appropriate to consider the cost of construction for one that has already cleared a capacity auction. That is consistent with Net CONE, which calculates the nominal 20-year levelized cost of a resource minus its expected revenue from energy and ancillary services. Because that number is *levelized*, it does not change between a resource's first year of operation and its second.

82. In addition, as the Market Monitor explains, Net CONE does not reflect how resources actually participate in the market.²¹⁵ Instead of bidding their levelized cost, both new and existing competitive resources bid their marginal capacity—*i.e.*, their net out-of-pocket costs, which Net ACR is supposed to reflect. Perhaps reasonable minds can differ on the question of which offer floor formula is the best choice to apply. But there is nothing in this record suggesting that it is appropriate to use different formulae based on whether the resource has already cleared a capacity auction.

83. It may be true that setting the offer floor at Net ACR for new resources will make it more likely that a subsidized resource will clear the capacity market, MOPR notwithstanding. Holding all else equal, the higher the offer floor, the less likely that a subsidized resources will clear, so a higher offer floor will more effectively block state policies. But that does not justify applying Net ACR to existing resources and Net CONE to new ones.

84. The purpose of a capacity market, the whole reason the market exists, is to ensure resource adequacy at just and reasonable rates.²¹⁶ It is a means, not an end. And for that purpose, a megawatt of capacity provided by a new resource is every bit as effective as a megawatt provided by an existing one. Applying entirely different bid floor formulae based only on whether the resource is new or existing does not further that basic purpose. Instead, as the Commission all but admits,²¹⁷ the purpose those disparate bid floors serve

²¹⁵ *Id.*

²¹⁶ *Cf.* December 2019 Rehearing Order, 171 FERC ¶ 61,035 at 230 (“The objective of the capacity market is to select the least cost resources to meet resource adequacy goals.”).

²¹⁷ *Id.* P 158 (“Using Net ACR as the MOPR value for new resources would not serve the purpose of the MOPR, because it does not reflect new resources’ actual costs of entering the market and therefore would not prevent uneconomic State-Subsidized Resources from entering the market.”); December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 159 (“Using Net CONE as the default offer price floor for new resources

is to make it easier to block the entry of state-subsidized resources. A capacity market designed first and foremost for the purpose of blocking state policies is one in which the tail truly wags the dog.²¹⁸

III. Today's Orders Are Not about Promoting Competition

85. By this point, the irony of today's orders should be clear. The Commission spends hundreds of pages decrying government efforts to shape the generation mix because they interfere with "competitive" forces.²¹⁹ In order to stamp out those efforts and promote its vision of "competition," the Commission creates a byzantine administrative pricing scheme that bears all the hallmarks of cost-of-service regulation, without any of the benefits. That is a truly bizarre way of fostering the market-based competition that these orders claim to so highly value.

86. It starts with the Commission's definition of subsidy, which encompasses vast swathes of the PJM capacity market, including new investments by vertically integrated utilities and public power, merchant resources that receive any one of the litany of subsidies available to particular resources or generation types, and any resource that benefits even indirectly from one of the many state default service auctions in PJM.²²⁰ Moreover, the Commission's inaptly named Unit-Specific *Exemption*²²¹—its principal

will ensure that the expanded MOPR achieves its goal and prevents uneconomic new entry from clearing the capacity market as a result of State Subsidies").

²¹⁸ To appreciate this, one need only look at the Commission's apparent willingness to set certain resources offer floor—*i.e.*, their Net CONE—above the demand curve's intercept. That means that the Commission is willing to set price floors that ensure that those resource *can never* clear the capacity market, no matter how serious the reliability need and even if that resource is the only that can meet it. *See* Illinois Commission Rehearing Request at 18. In a choice between ensuring reliability and blocking state policies, the Commission will choose the latter.

²¹⁹ June 2018 Order, 163 FERC ¶ 61,236 at P 1.

²²⁰ *See Supra* Section II.B.1.b.

²²¹ In the December 2019 Order, the Commission renamed what is currently the "Unit Specific *Exception*" in PJM's tariff to be a Unit Specific *Exemption*. But, regardless of name, it does not free resources from mitigation because they are still subject to an administrative floor, just a lower one. An administrative offer floor, even if based on the resource's actual costs does not protect against over-mitigation and certainly is not market competition.

response to concerns about over mitigation—is simply another form of administrative pricing.²²² All the Unit-Specific Exemption provides is an escape from the relevant default offer floor. Resources are still required to bid above an administratively determined price floor, not at the level that they believe would best serve their competitive interests.²²³ Nor is it clear that this so-called exemption will even be resource-specific.²²⁴ And even resources that might appear eligible for the Competitive Entry Exemption may hesitate to take that option given the Commission’s proposal to permanently ban from the capacity market any resource that invokes that exception and later finds itself subsidized.²²⁵ Are those resources really going to wager their ability to participate in the capacity market on the proposition that their state will never institute a non-bypassable policy that the Commission might deem an illicit financial benefit?

87. To implement this scheme, PJM and the Market Monitor will need to become the new subsidy police, regularly reviewing the laws and regulations of 13 different states and the District of Columbia—not to mention hundreds of localities and municipalities—in search of any provision or program that could conceivably fall within the Commission’s definition of State Subsidy. “But that way lies madness.”²²⁶ It will also

²²² It bears repeating that the Commission has expressly abandoned market-power—the justification for cost-of-service regulation—as the basis for its new MOPR. December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 45 (“[T]he expanded MOPR does not focus on buyer-side market power mitigation.”).

²²³ See Public Power Entities Rehearing Request at 4 (“Ironically, by its latest action, the Commission has removed any remaining genuine market component . . . by requiring all ‘competitive’ offers to be determined administratively in Valley Forge, Pennsylvania.”).

²²⁴ The Commission is requiring that all new resources, regardless of type, must use a standard asset life. That flouts the entire premise of a Unit-Specific Exemption, which, the Commission reminds us throughout today’s order, is supposed to reflect the *specific* unit’s costs and expected market revenues. It is particularly, “arbitrary and illogical” to mandate that resources assume a 20-year asset life when most renewable units typical have a useful commercial life of 35 years. See Clean Energy Advocates Rehearing Request at 83. The Commission dismisses such concerns by stating that standardized inputs are a simplifying tool December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 290.

²²⁵ December 2019 Order, 169 FERC ¶ 61,239 at P 162.

²²⁶ David Roberts, *Trump’s crude bailout of dirty power plants failed, but a subtler bailout is underway* (Mar. 23, 2018), <https://www.vox.com/energy-and-environment/2018/3/23/17146028/ferc-coal-natural-gas-bailout-mopr>.

require PJM and the Market Monitor to identify any and all contracts power marketers have with resources that may be used to serve commitments incurred in a state default service auction. Rooting through retail auctions results and hundreds of different sets of laws and regulations looking for anything that might be “nearly tethered” to wholesale rates is hardly a productive use of anyone’s time.

88. And identifying the potential subsidies is just the start. Given the consequences of being subsidized, today’s orders will likely unleash a torrent of litigation over what constitutes a subsidy and which resources are or are not subsidized. Next, PJM will have to develop default offer floors for all relevant resource types, including many that have never been subject to mitigation in PJM or anywhere else—*e.g.*, demand response resources, energy efficiency resources, or resources whose primary function is not generating electricity. Moreover, given the emphasis that the Commission puts on the Unit-Specific Exemption as the solution to concerns about over-mitigation, we can expect that resources will attempt to show that their costs fall below the default offer floor, with many resorting to litigation should they fail to do so. The result of all this may be full employment for energy lawyers, but it is hardly the most obvious way to harness the forces of competition.

89. Finally, although this administrative pricing regime is likely to be as complex and cumbersome as cost-of-service regulation, it provides none of the benefits that a cost-of-service regime can provide. Most notably, the administrative pricing regime is a one-way ratchet that will only increase the capacity market clearing price. Unlike cost-of-service regulation, there is no mechanism for ensuring that bids reflect true costs. Nor does this pricing regime provide any of the market-power protections provided by the cost-of-service model. Once mitigated, resources are required to offer no *lower* than their administratively determined offer floor, but there is no similar prohibition on offering above that floor.²²⁷

IV. Today’s Orders Are Instead All about Slowing the Clean Energy Transition

90. If they do not promote competition, today’s orders certainly serve an alternative, overarching purpose: Slowing the region’s transition to a clean energy future. Customers throughout PJM, not to mention several of the PJM states, are increasingly demanding that their electricity come from clean resources. Today’s orders represent a major obstacle to those goals. Although even this Commission won’t come out and say that, the cumulative effect of the various determinations in today’s orders is

²²⁷ Moreover, as discussed above, *see supra* P 67, PJM’s capacity market is structurally uncompetitive and lacks any meaningful market mitigation. There is every reason to believe that today’s orders will exacerbate the potential for the exercise of market power.

unmistakable. It helps to rehash in one place what the mitigation regime affirmed in the December 201 Rehearing Order will do.

91. First, after establishing a broad definition of subsidy, the Commission creates several categorical exemptions that overwhelmingly benefit existing resources. Indeed, the exemptions for (1) renewable resources, (2) self-supply, and (3) demand response, energy efficiency, and capacity storage resources are all limited to existing resources.²²⁸ That means that all those resources will never be subjected to the MOPR and can continue to bid into the market at whatever level they choose, while every comparable new resource must run the administrative pricing gauntlet. In addition, new natural gas resources remain subject to the MOPR.²²⁹ All told, those exemptions provide a major benefit to existing resources.

92. Second, as noted above, the Commission creates different offer floors for existing and new resources.²³⁰ Using Net CONE for new resources and Net ACR for existing resources will systematically make it more likely that existing resources of all types can remain in the market, even if they have higher costs than new resources that might otherwise replace them. As the Market Monitor put it, this disparate treatment of new and existing resources “constitute[s] a noncompetitive barrier to entry and . . . create[s] a noncompetitive bias in favor of existing resources and against new resources of all types, including new renewables and new gas fired combined cycles.”²³¹

93. Third, the mitigation scheme imposed by today’s orders will likely cause a large and systematic increase in the cost of capacity. Although that will appear as a rate increase for consumers, it will be a windfall to existing resources that clear the capacity market. That windfall will make it more likely that any particular resource will stay in the market, even if there is another resource that could supply the same capacity at less cost to consumers.

94. Finally, the December 2019 Order again dismisses the June 2018 Order’s fig leaf to state authority: The resources-specific FRR Alternative.²³² That potential path for accommodation was what allowed the Commission to profess that it was not attempting

²²⁸ December 2019 Order, 169 FERC ¶ 61,239 at PP 173, 202, 208.

²²⁹ *Id.* PP 2, 42.

²³⁰ *See supra* Section II.B.4.

²³¹ Internal Market Monitor Reply Brief at 4.

²³² December 2019 Rehearing Order, 171 FERC ¶ 61,035 at P 348; June 2018 Order, 163 FERC ¶ 61,236 at P 157.

to “disregard” or “nullify” state public policies. Although implementing that option would no doubt have been a daunting task, doing so at least had the potential to establish a sustainable market design by allowing state policies to have their intended effect on the resource mix. And that is why it is no longer on the table. It could have provided a path for states to continue shaping the energy transition—exactly what this new construct is designed to stop.

95. The Commission proposes various justifications for each of these changes, some of which are more satisfying than others. But don’t lose the forest for the trees. At every meaningful decision point in today’s orders, the Commission has elected the path that will make it more difficult for states to shape the future resource mix. Nor should that be any great surprise. Throughout this proceeding, the Commission has focused narrowly on states’ exercise of their authority over generation facilities, treating state authority as a problem that must be remedied by a heavy federal hand. The only thing that was new in the December 2019 order was the extent to which the Commission was willing to go. Whereas the June 2018 Order at least paid lip service to the importance of accommodating state policies,²³³ the December 2019 Order—and today’s orders—are devoid of any comparable sentiment.

96. In addition, in a now-familiar pattern, today’s orders put almost no flesh on the bones of the Commission’s edicts and provide precious little guidance how the new MOPR will work in practice. Most of the actual work will come in the compliance proceedings, not to mention the coming litany of section 205 filings, section 206 complaints, and petitions for declaratory orders seeking guidance on fact patterns that the Commission, by its own admission, has not yet bothered to contemplate. In each of those proceedings, the smart money should be on the Commission adopting what it will claim to be facially neutral positions that, collectively, entrench the current resource mix. Although the proceedings to come will inevitably garner less attention than today’s orders, they will be the path by which the “quiet undoing” of state policies progresses.²³⁴

97. The December 2019 Rehearing Order is a concerning preview of that process. In the two thousand-plus pages of rehearing requests filed in response to December 2019 Order, parties raised a wide range of concerns. Today’s orders duck almost every single one, falling back on generalizations and a single-minded focus on extirpating the effects of state policies. Although the order is long in pages, it is short on any serious effort to

²³³ June 2018 Order, 163 FERC ¶ 61,236 at P 161.

²³⁴ Danny Cullenward & Shelley Welton, *The Quiet Undoing: How Regional Electricity Market Reforms Threaten State Clean Energy Goals*, 36 Yale J. on Reg. Bull. 106, 108 (2019), available at <https://www.yalejreg.com/bulletin/the-quiet-undoing-how-regional-electricity-market-reforms-threaten-state-clean-energy-goals/>.

grapple with or explain the implications of the Commission's actions. Moreover, in the few instances in which the Commission gave ground, such as voluntary RECs, it did so only with an ominous warning that is likely to cause more confusion than it clears up.²³⁵ Everything about today's orders should concern those with a stake in a durable resource adequacy construct in PJM.

* * *

98. At this point, the die has been cast. Today's orders make unambiguously clear that the Commission intends to array PJM's capacity market rules against the interests of consumers and of states seeking to exercise their authority over generation facilities. For all the reasons discussed above, these orders are illegal, illogical, and truly bad public policy.

99. But, even beyond that, today's orders are deeply disappointing because they will fracture PJM, the largest RTO in the country. As I predicted in my dissent from the December 2019 Order, states throughout the region are already looking for ways to pull their utilities out of the capacity market rather than remain under rules designed to damage their interests. Today's orders snuff out what little hope may have remained that the Commission would again change course and adopt a more sensible market design. As a result, states committed to exercising their rights under FPA section 201(b) will have little choice but to exit the capacity market. I strongly urge PJM to work with the states and provide them the time needed to make the transition as smooth as possible.

100. Fostering large regional markets for energy, ancillary services, and capacity, has been one of the Commission's principal successes over the last quarter century. I hate to see that success undone based on an obsession with blocking the effects of state public policies. But, unfortunately, the Commission chose the path that it did. In so doing, we have abdicated the leadership role that we ought to have taken in developing a resource adequacy paradigm that accommodates the fundamental changes currently under way in the electricity sector.

101. The irony in all this is that the Commission asserts that it is acting to "save" the capacity market even as it sets the market on a course toward its eventual demise.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner

²³⁵ See *supra* p 79; see also *supra* note 190.