137 FERC ¶ 61,145
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

PJM Interconnection, L.L.C.	Docket Nos. ER11-2875-001 and ER11-2875-002
PJM Power Providers Group	
v.	EL11-20-001
PJM Interconnection, L.L.C.	(Unconsolidated)

ORDER ON COMPLIANCE FILING, REHEARING,
AND TECHNICAL CONFERENCE

(Issued November 17, 2011)

Table of Contents

I. Introduction

1. We address below requests for rehearing and clarification of an April 12, 2011 order issued in this proceeding, including those requests for which additional procedures, including a technical conference proceeding, were established.[1] We also address a compliance filing submitted by PJM Interconnection, L.L.C. (PJM) on May 12, 2011. For the reasons discussed below, we grant, in part, and deny, in part, rehearing of the April 12 Order. We also accept, in part, and reject, in part, PJM's compliance filing and direct PJM to submit an additional compliance filing within 30 days of the date of this order.

2. At issue in this order is PJM's Minimum Offer Price Rule (MOPR), which is the mechanism that seeks to prevent the exercise of buyer market power in the forward capacity market by ensuring that all new resources are offered into PJM's Reliability Pricing Model (RPM) on a competitive basis. The MOPR imposes a minimum offer screen to determine whether an offer from a new resource is competitive. We continue to conclude that the MOPR serves a critical function to ensure that wholesale prices are just and reasonable and should elicit new entry when new capacity is needed. The long-term viability of the PJM market demands an assurance of competitive offers from new entrants.

3. Some parties in this proceeding have argued that RPM has failed to attract sufficient capacity, requiring state and local entities to take action to encourage the development of new capacity resources in their areas. These parties argue that the MOPR will impede states' and localities' efforts to build new resources to ensure reliability by mitigating certain projects. We note at the outset that the evidence before us suggests that RPM has in fact succeeded in securing sufficient capacity to meet reliability requirements for the PJM region.[2] We also recognize that states and localities have their own policies and objectives that they wish to carry out, and the benefits of some of these policies and objectives may not be recognized in the RPM construct generally or the MOPR in particular. 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. We are forced to act, however, when subsidized entry supported by one state's or locality's policies has the effect of disrupting

---

[1] *PJM Interconnection, L.L.C.,* 135 FERC ¶ 61,022 (2011) (April 12 Order).

[2] *See* Second Performance Assessment and CONE Study, prepared for PJM Interconnection, L.L.C. by The Brattle Group (August 18, 2011); Brattle Report Second Performance Assessment of PJM Reliability Pricing Model (August 26, 2011).

the competitive price signals that PJM's RPM is designed to produce, and that PJM as a whole, including other states, rely on to attract sufficient capacity.

4. We believe that the MOPR that we accept subject to modification in this proceeding, including the unit-specific review process proposed in PJM's compliance filing, serves to reconcile the tension that has arisen between policies enacted by states and localities that seek to construct specific resources, and our statutory obligation to ensure the justness and the reasonableness of the prices determined in the RPM. First, we note that PJM only proposed, under section 205, and we accepted based on the record before us, to apply the MOPR to new gas-fired facilities.

5. Second, while we continue to find that an across-the-board exemption from MOPR for new resources designated as self-supply would allow for an unacceptable opportunity to exercise buyer market power and inhibit competitive investment, we agree with PJM and those intervenors who argue that well-recognized business models should not be considered automatically suspect when determining whether a sell offer accurately reflects avoidable net costs. We therefore find that a unit-specific cost justification process, as proposed by PJM, will allow PJM to consider project costs as well as revenues the project would receive on a competitive basis and will mitigate much of the concern parties have about the possibility of having their capacity market offers mitigated solely on the basis of triggering the MOPR.

6. Third, in addition to the unit-specific review process, we emphasize that states and localities also retain the statutory right under section 206 of the Federal Power Act (FPA) to seek an exemption from the MOPR if they believe that the MOPR unjustly and unreasonably interferes with a legitimate policy objective.

II. <u>Background</u>

7. On February 1, 2011, the PJM Power Providers Group (P3)[3] filed a complaint, seeking expedited revisions to PJM's capacity procurement minimum offer price mechanism, the MOPR,[4] in response to certain state-sponsored initiatives designed to

---

[3] P3 is a non-profit organization made up of twelve member companies, namely Calpine Corporation; Constellation Energy Group; DPL Energy; Edison Mission Energy; Exelon; GenOn Energy Management, LLC (GenOn); International Power America; NextEra Energy Resources, LLC; North American Energy Alliance LLC; NRG Energy; PPL Parties; and PSEG Energy Resources & Trade LLC (PSEG). P3 states that the content of its complaint represents the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

[4] *See* PJM Open Access Transmission Tariff (OATT) at Attachment DD, Section 5.14(h).

support new generation entry into PJM's capacity market.[5] P3 asserted that these state-sponsored initiatives would promote price suppression and the exercise of buyer market power, absent revision of PJM's MOPR.[6]

8. On February 11, 2011, PJM submitted proposed MOPR changes adopting, in part, P3's requests.

A. <u>PJM's February 11, 2011 Filing</u>

9. PJM stated that its proposed MOPR revisions were designed to apply to PJM's upcoming May 2011 RPM auction. PJM proposed to revise, among other things: (i) the reference values applicable to the calculation of Net Asset Class Cost of New Entry (Net CONE)—the benchmark used by PJM to assess the competitiveness of a sell offer; (ii) the percentage factors applicable to the conduct screen used by PJM to establish a benchmark price—the price used to determine whether a sell offer may be uncompetitive; (iii) the re-pricing of mitigated offers; (iv) PJM's then-existing net-short requirement and impact screen, which PJM proposed to eliminate; (v) an exemption applicable to resources developed in response to a state regulatory or legislative mandate; (vi) resource-type exemptions; (vii) mitigation terms; and (viii) the New Entry Price Adjustment.

B. <u>April 12 Order</u>

10. In the April 12 Order, the Commission accepted, subject to conditions, PJM's proposed tariff revisions, to become effective April 13, 2011. The April 12 Order also addressed the issues raised by P3 for immediate consideration but denied, without prejudice, P3's request to address, on a deferred basis, additional issues. The Commission found that these issues should first be considered by PJM's stakeholders.

---

[5] *See* PJM Filing at 3, *citing* S. 2381, 214th Leg. (N.J. 2011) (authorizing the establishment of a Long-Term Capacity Agreement Pilot Program (LCAPP)); *see also In re Whether New Generating Facilities are Needed to Meet Long-Term Demand for Standard Offer Service*, No. 9214, Request for Proposals for Generation Capacity Resources Under Long-Term Contract (M.P.S.C. Dec. 29, 2010).

[6] P3 asserted that, in addition to its request for expedited relief, related issues should be addressed on a non-expedited basis, including the issue of whether all resources, without exception, should be subject to buyer market power mitigation.

III. Requests for Rehearing and Clarification

11. Requests for rehearing and/or clarification of the April 12 Order were submitted by PJM; P3;[7] Dominion Resources Services, Inc. (Dominion); National Rural Electric Cooperative Association (NRECA); New Jersey Division of Rate Counsel (New Jersey Rate Counsel); the Maryland Public Service Commission (Maryland Commission); FirstEnergy Solutions Corp. (FirstEnergy); New Jersey Board of Public Utilities (New Jersey Board); PJM Load Group;[8] CPV Power Development, Inc. (CPV); NCEMC; and Hess Corporation (Hess). Answers to requests for rehearing and/or clarification were submitted on May 24, 2011, by the Delaware Public Service Commission, and on May 27, 2011, by P3, the Maryland Commission, and New Jersey Rate Counsel.[9]

A. Calculation of the Benchmark Value Used by PJM to Assess the Competitiveness of a Sell Offer

12. PJM proposed in its filing to update the benchmark values it uses to assess the competitiveness of a sell offer. Specifically, PJM proposed to revise the reference components used to calculate the Net CONE as they relate to: (i) gross CONE; (ii) revenue requirements; (iii) construction costs; (iv) energy and ancillary services revenue offsets; and (v) locational differences. PJM also proposed to calculate the gross CONE based on locational differences within the PJM region, consistent with the calculation of gross CONE it employs for its existing Variable Resource Requirement (VRR) Curve.[10] In addition, PJM proposed to replace its then-existing use of a real

---

[7] P3, on rehearing, consists of P3 and two of its members, GenOn and PSEG (collectively referred to in this order, unless otherwise noted, as "P3"). PSEG also filed its own rehearing request. In addition, another P3 member, PPL submitted an individual request for rehearing and clarification.

[8] The PJM Load Group, on rehearing, consists of: American Public Power Association (APPA); American Municipal Power, Inc. (AMP); ArcelorMittal USA, LLC; Blue Ridge Power Agency (Blue Ridge); Chambersburg, PA (Chambersburg); Delaware Municipal Electric Corp.; Duquesne Light Co. (Duquesne); Electricity Consumers Resource Council; Maryland Office of People's Counsel; North Carolina Electric Membership Corp. (NCEMC); Old Dominion Electric Cooperative (ODEC); Pennsylvania Office of Consumer Advocate; PJM Industrial Customer Coalition PJMICC); and Public Power Association of New Jersey (PPANJ).

[9] Answers to requests for rehearing are prohibited under our rules and are therefore rejected. *See* 18 C.F.R. § 385.713(d)(1) (2011).

[10] For PJM's VRR Curve, the demand curve PJM uses in RPM, PJM uses different

(continued…)

levelized model to calculate operating expenses with a nominal levelized model, a methodology that calculates the single fixed annual revenue requirement that has the same present value as the increasing revenue requirements over twenty years.

1. April 12 Order

13. The April 12 Order accepted PJM's proposal to update its existing MOPR reference values as used to calculate the Net CONE.[11] Specifically, the Commission accepted PJM's proposal to: (i) update its gross CONE values for a combustion turbine (CT) and combined cycle (CC) plant; (ii) track changes in construction costs on an annual basis, based on the Handy-Whitman Index; (iii) clarify the process by which PJM will calculate the energy and ancillary services revenue offsets; (iv) recognize locational differences in capital costs; and (v) replace its real levelized model to calculate operating expenses with a nominal levelized model.[12] The Commission also found that Net CONE is a reasonable approximation of the cost of new entry, less the energy and ancillary services revenues that resources are likely to receive, on average, over the resource's life. The Commission found that, as such, Net CONE serves as a reasonable estimate for a competitive offer price.

14. The April 12 Order further found that the use, in PJM's baseline values, of the highest Locational Marginal Price (LMP) in a zone was reasonable, given that the use of nodal LMP values could trigger the market power screen even if the resource at issue was simply using its historical energy and ancillary services revenues offset for its zone.[13] In addition, the April 12 Order found that a nominal levelized approach was appropriate for use in the Net CONE, given that a first-year offer based on this methodology is more likely to match the typical cash flow streams associated with financing by either a mix of corporate debt and equity or with project financing.[14]

CONE values in different locations to reflect locational differences in capital costs and energy revenues. In this order, the Commission refers to this methodology as the VRR guidelines.

[11] April 12 Order, 135 FERC ¶ 61,022 at P 43.

[12] *Id*.

[13] *Id*. P 47.

[14] *Id*. P 49-50.

2. **Requests for Rehearing**

15. New Jersey Rate Counsel asserts as error the April 12 Order's rejection of its argument that Net CONE is a poor proxy for a competitive offer price, given that it deviates from fundamental economic concepts by: (i) relying on a levelized annual value in place of a present value; and (ii) excludes from consideration future capacity revenues.

16. The Maryland Commission also challenges the Commission's acceptance of PJM's proposal. The Maryland Commission asserts that PJM's proposal is founded on the erroneous assumption that competitive markets should provide, on average, revenues sufficient to recover the Net CONE over time. The Maryland Commission asserts, to the contrary, that a potential new competitive entrant will base its offer on the costs that it can avoid if it does not become a capacity supplier, not, as the April 12 Order found, on the potential resource's full nominal levelized costs.

17. The Maryland Commission and New Jersey Rate Counsel further assert as error the Commission's acceptance of PJM's proposal to use historical data to calculate energy and ancillary services offsets. New Jersey Rate Counsel agrees, noting that the use of a forecasted offset is more appropriate because the offset is used to determine the future capacity revenue (or at least the first year of capacity revenue) on a nominal levelized basis that would be needed to make entry economic.

18. New Jersey Rate Counsel also takes issue with the Commission's reasoning that, because the use of historic energy and ancillary services revenue was used to establish the demand curve parameters, use of this same approach to establish the offset is reasonable.[15] New Jersey Rate Counsel responds that the Commission's assumed need for consistency is unfounded because, in the case of the demand curve, a high Net CONE is needed to avoid pricing some legitimate offers out of the market, while in the case of the MOPR, a low Net CONE is needed to avoid mitigating some legitimate offers out of the market.

19. P3 asserts that the April 12 Order overestimates energy and ancillary service offsets based on the highest such revenues historically achieved by any resource within the zone, rather than by the revenues the resource historically would have achieved at its actual, known location.

20. P3 and PSEG assert that the Commission erred in accepting a methodology that will calculate energy and ancillary services offsets based only on the real-time energy price, instead of the real-time or day-ahead price each resource would have been paid for each interval. Specifically, P3 and PSEG argue that while determining revenue offsets

---

[15] *Id.* P 48.

for CT plants based exclusively on real-time revenues may be appropriate, the Commission erred with respect to CC units as they are typically committed in the day-ahead market. P3 and PSEG argue that, as such, there is no need to maintain consistency with the Net CONE calculation applicable to a CT plant. P3 argues that the better approach would be to use the prices that each resource would have received based upon the actual unit commitment process. P3 asserts that using only real-time prices, particularly for CC units, skews the results of the offset calculations to the high side and will suppress capacity prices. PSEG adds that even if CC unit owners desired to clear in the real-time market, rather than the day-ahead market, PJM's mitigation protocols include "must offer" requirements for a day-ahead bid and the use of a "three pivotal supplier test," rules that can be expected to mitigate an affected unit to its cost-based bid.

21. New Jersey Rate Counsel contends that the use of a nominal levelized approach is unreasonable because it artificially increases the capacity revenue that a resource is assumed to need for "economic" entry and thus raises a barrier to new economic entry by deeming uneconomic some resources that, in fact, are economic. New Jersey Rate Counsel further argues that the April 12 Order failed to acknowledge that the choice of an appropriate levelization methodology requires consideration of the project sponsor's expectations regarding how energy, ancillary services, and capacity revenues will change over time, not a consideration of the relevant financing arrangements that may be involved. New Jersey Rate Counsel also argues that the April 12 Order failed to address its request that a market participant be permitted to use the real levelized method if that approach better matches its expectations.

22. PJM seeks clarification that the April 12 Order's failure to address its request regarding PJM's proposed stakeholder process on the day-ahead price revenue estimating method does not preclude PJM's stakeholders from considering these issues. While PJM argued that no change should be made for the May 2011 auction, PJM agreed with P3 and others that there may be value to refining the energy revenues calculation to take into account both real-time and day-ahead prices, and PJM argued that the precise split would benefit from closer stakeholder review and discussion.

3. <u>Commission Determination</u>

23. We deny rehearing of the April 12 Order regarding the Commission's acceptance of PJM's tariff changes addressing PJM's calculation of the Net CONE.

24. The MOPR is a necessary part of PJM's capacity market because it addresses the concern that some market buyers may have an incentive to depress market clearing prices by offering supply at less than a competitive level.[16] This incentive may occur when the

[16] *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 103 (2006).

reduction in capacity prices across the market participant's entire load achieved by a below-market bid for a new generating resource offsets any losses suffered on the individual new entrant being bid into the market below its true competitive cost. In order to address the possibility of buyer market power, regional transmission organizations (RTO) like PJM require some administrative provisions for evaluating the bids of new entrants and mitigate these bids in appropriate circumstances. This approach is parallel to the need to establish a method of evaluating and mitigating generation sell offers that may be too high due to the exercise of seller market power.

25. We find that PJM's proposal as accepted in the April 12 Order establishes a just and reasonable administrative method for calculating the MOPR reference values consistent with the existing VRR Curve guidelines. These reference values establish a reasonable estimate of the average annualized cost (net of expected energy and ancillary service revenues) that a new entrant would incur to enter the market. In contrast with the view of the Maryland Commission, we conclude that a competitive capacity market would provide annual revenues over time that, on average, would approximate Net CONE. If annual revenues were significantly lower, prospective developers of new capacity would not enter the market, because they would not expect to recover the costs of their investments over time. Consequently, expecting that a typical supplier acting competitively would not likely offer to provide new capacity at a price significantly below its net entry cost is reasonable. Thus, a reasonable offer floor would be near Net CONE.

26. The MOPR reference values merely establish a screen that determines whether a project sponsor will use the unit-specific, cost-justification review process, as discussed below. Offers above the MOPR reference values, based on Net CONE, are not mitigated. Offers below these MOPR values, however, are not automatically mitigated, as a mitigation determination is subject to the seller availing itself of the unit-specific review process. Thus, we find that using more conservative, prescriptive assumptions for the purposes of calculating the MOPR reference values, while providing for a unit-specific review process, is reasonable.

27. The Maryland Commission and New Jersey Rate Counsel assert that PJM's proposal to evaluate new resource offers against Net CONE is a poor proxy, or benchmark, and does not provide a reasonable approximation of the revenues needed to recover the cost of new entry. These requests for rehearing, however, raise issues that are beyond the scope of this proceeding. Neither PJM nor P3 proposed to change this methodology here. We further note that our acceptance, in part, of PJM's compliance filing, as discussed below, will give project sponsors additional flexibility when submitting new resource offers under the unit-specific cost-justification review process.

28. Moreover, we disagree with the various parties who assert that the specific methodologies used to calculate energy and ancillary services revenue offsets are unjust,

unreasonable, and unduly discriminatory. Specifically, we find reasonable PJM's proposals to estimate energy and ancillary services revenue offsets for the MOPR reference values when they are consistent with the existing VRR Curve methodologies. Of course, predicting the future is inherently uncertain, and no forecasting method is likely to perfectly predict future revenues. There may be more than one method that provides a reasonably accurate forecast of future revenues over time. The relevant question here is whether PJM's proposed method is likely to provide a reasonably accurate forecast. PJM's method is based on the revenues that a CT would have earned in the recent past based on market conditions at that time. We believe that recent past market conditions is one reasonable basis for forecasting future revenues, and thus, we find PJM's proposed method reasonable. However, for calculating MOPR reference values for CC units, we clarify that deviations from CT methodologies may be appropriate as the VRR Curve does not use CC units as the reference unit.

29. The Maryland Commission and New Jersey Rate Counsel assert as error the Commission's acceptance of using historical data, rather than forward-looking data, to calculate energy and ancillary services revenue offsets. However, as discussed above and in the April 12 Order,[17] we are not persuaded that it is unreasonable for the MOPR screen, for both CTs and CCs, to use historical data when estimating energy and ancillary service revenues offsets. PJM's reliance on a three-year average, in this regard, is reasonable, particularly given the difficulties associated with the design of a forward-looking method. Moreover, PJM's methodology for calculating the MOPR screen is consistent with the guidelines for the VRR Curve.

30. P3 asserts that the Commission erred in the April 12 Order in accepting a revised methodology that will estimate energy and ancillary services offsets based on the highest revenues historically achieved by any resource within the relevant zone, and thus rejecting an approach based on the revenues received by a resource at its actual location, i.e., a nodal LMP approach. In accepting PJM's proposal as reasonable, however, we were not required to consider whether additional, alternative approaches might have also been reasonable. Nor are we persuaded that P3's proposed approach is supported by the requisite finding that PJM's provision (and its reliance on zonal LMPs), as accepted in the April 12 Order, is unjust and unreasonable. Regardless, we find that use of zonal LMPs, rather than nodal LMPs, for the MOPR screens is appropriate, given this methodology's consistency with PJM's existing VRR Curve guidelines.

31. P3 and PSEG assert that the Commission erred, in the April 12 Order, by accepting PJM's proposal to calculate energy and ancillary services revenue offsets based solely on real-time prices for resources, particularly for CC units, which are not the

[17] April 12 Order, 135 FERC ¶ 61,022 at P 48.

reference unit for the VRR Curve. While other methodologies could be used to estimate energy and ancillary services revenue for CT and CC units based upon the actual unit commitment process (and PJM may wish to examine such methods), we cannot find PJM's reliance on real-time prices unreasonable. PJM's approach, as noted above, is consistent with PJM's VRR Curve guidelines. While it may be possible to rely on day-ahead prices, as P3 and PSEG suggest, they have not established a sufficient record for us to find that PJM's proposal is unjust and unreasonable nor to establish a day-ahead method as just and reasonable. Neither P3 nor PSEG provided a specific proposal for an appropriate mix of day-ahead and real-time prices.

32. New Jersey Rate Counsel asserts that the Commission erred, in the April 12 Order, in accepting PJM's proposal to adopt a nominal levelized method for calculating Net CONE for the MOPR screen, and it further asserts that the Commission never addressed its arguments that the choice of a nominal, as opposed to a real, levelization method should be based upon a project sponsor's expectations regarding how energy, ancillary services, and capacity revenues will change over time, rather than the relevant financing arrangements. We deny New Jersey Rate Counsel's request for rehearing on this issue as it applies to the calculation of the offer floor. We find that for the purpose of calculating an offer floor, the nominal levelized method is reasonable. PJM's proposal to change from a real levelized method to a nominal levelized method was made pursuant to section 205. Under section 205, PJM is required to demonstrate that its proposal is just and reasonable, but it is not required to demonstrate that its existing tariff method is unjust and unreasonable. We found in the April 12 Order, and we continue to find here, that the nominal levelized method is a just and reasonable method of modeling a competitive bid, in part because it is a reasonable method of modeling a competitive first-year offer based upon typical cash flow streams associated with financing. We reaffirm our findings that nominal levelization is consistent with the VRR Curve parameters, as well as the mortgage-like cash stream associated with project finance, and therefore, its use for the MOPR benchmark is reasonable.

33. New Jersey Rate Counsel asserts that the Commission failed to recognize that while a high Net CONE (for the VRR Curve) is needed to avoid pricing some legitimate offers out of the market, in the case of the MOPR screen, a low Net CONE is needed to avoid mitigating some legitimate offers out of the market. As discussed above in our acceptance of PJM's specific energy and ancillary services revenues calculations proposals, we clarify that the requirement to use the nominal levelized method is specific to the calculation of the MOPR screen. For purposes of calculating the MOPR screen, which serves as the benchmark to detect offers of supply that may be an attempt to exert buyer market power, we continue to find a single levelization methodology as reasonable. As discussed above, the Commission believes that for its purposes as a screen, using methodologies for the MOPR that may err on the side of a higher Net CONE is reasonable, as the very purpose of the screen is to detect potentially low uncompetitive offers. As discussed below, in our partial acceptance of PJM's compliance filing, project

sponsors seeking an offer price floor lower than the MOPR screen will have recourse to a unit-specific, cost-justification review process that may include alternative levelization methods, among other proposed cost assumptions. Accordingly, while we continue to find the nominal levelized method to be just and reasonable for the initial screening of offers, we will grant rehearing (as discussed below) with respect to unit-specific offers and permit project sponsors the opportunity to justify the use of a real levelized method with respect to their specific processes.

34. Finally, in response to PJM's request for clarification, the April 12 Order did not preclude the parties from pursuing these MOPR issues, including the use of day-ahead prices for calculating energy and ancillary service offsets. We also note that, in denying rehearing on this issue, we are not prejudging future proposals to modify MOPR reference value calculation methodologies that may result from the PJM stakeholder process.

B. Percentage Factors Used in the Conduct Screen

35. PJM proposed to increase, from 80 percent to 90 percent of Net CONE, the percentage factor applied to trigger mitigation under the MOPR conduct screen for both CC and CT plants.

1. April 12 Order

36. The April 12 Order accepted PJM's proposal to raise the conduct screen to 90 percent of Net CONE for CC and CT plants subject to the MOPR.[18] The Commission found that this increase reasonably balanced the need to prevent uneconomic entry, the inherent difficulty of estimating a resource's costs, and the administrative burdens entailed by having to provide data to justify a generator-specific threshold.

2. Requests for Rehearing

37. CPV asserts that the Commission's findings in support of PJM's proposed percentage factor increase lacked substantial evidence and failed to adequately explain its departure from PJM's prior threshold or the practices followed by ISO New England, Inc. (ISO-NE) and the NYISO. In particular, CPV asserts that the Commission failed to demonstrate that: (i) PJM's proposed CONE calculation will be more accurate than the initially-approved 80 percent trigger, or was otherwise administratively-justified; or (ii) that the 80 percent trigger would give rise, or had given rise, to an unreasonable exercise of market power. In particular, CPV asserts that the April 12 Order ignored the argument raised by CPV and others that PJM's calculation of Net CONE fails to consider

---

[18] April 12 Order, 135 FERC ¶ 61,022 at P 66.

the non-fungible aspects of state resource choices, including such factors as environmental improvement considerations, optimization of local resources (such as offshore wind), and economic development.

38. PJM Load Group asserts as error the Commission's acceptance of PJM's proposal as based on PJM's claim regarding the effect of maintaining an 80 percent threshold. PJM Load Group adds that PJM offered no evidence suggesting that the 80 percent threshold, in actual practice, allowed or permitted price suppression.

39. The Maryland Commission argues that because new resources must compete against unmitigated incumbent generators, a 90 percent threshold, in conjunction with the other MOPR changes approved in the April 12 Order, will create barriers to entry for new technologies and will reduce innovation across the market.

40. P3, on the other hand, argues that the Commission's decision to raise the conduct screen to 90 percent, while an improvement on the status quo, still results in unjust and unreasonable market outcomes by permitting the exercise of market power to suppress prices by ten percent.[19] P3 argues that any percentage factor below 100 percent will permit the exercise of buyer market power and deter new entry.

41. P3 argues that any potential negative consequences associated with a percentage factor that has been set too high, even at a level in excess of 100 percent, would be far less severe than those consequences attributable to a percentage factor set below 100 percent. P3 notes that the only harm resulting from a screen that is set too high would be that a planned project might not get built due either to there being no need for it or, where a need existed, due to that need being filled by a lower-cost alternative competitive supplier. P3 argues that if a screen is set too low, on the other hand, it could do harm to the competitive market by ensuring that capacity prices will not sufficiently compensate a new entrant for its costs. Finally, P3 argues that the Commission should act consistently in the way it mitigates seller- and buyer-side market power, noting that buyers would certainly not approve of a Commission-sanctioned scheme in which sellers could push the clearing price up by ten percent.

42. PPL argues that the April 12 Order erred by failing to explain why a 90 percent conduct screen does not also allow an unreasonable tolerance for below-cost offers that can evade the MOPR and suppress prices to a considerable degree. PPL asserts that a 90 percent threshold suffers from the same flaws as PJM's prior 80 percent screen.

---

[19] PPL Rehearing Request at 6 (citing arguments made in P3's complaint).

3. Commission Determination

43. We deny rehearing of the April 12 Order's findings with respect to the conduct screen. On rehearing, parties have challenged this ruling as both setting a threshold that is too high and one that is too low.

44. In the April 12 Order, the Commission accepted PJM's proposal as a reasonable balance between the need to prevent uneconomic entry, the inherent imprecision of cost estimation, and the administrative burdens involved in providing data to justify a unit-specific lower threshold.[20] Under FPA section 205, a utility filing to change its tariff needs to show that its newly proposed tariff provisions are just and reasonable, not that the tariff provisions it seeks to modify or replace are unjust and unreasonable or that the new tariff provisions are more just and reasonable than the old ones. We therefore reject assertions from CPV that we erred by failing to demonstrate that: (i) PJM's proposed CONE calculation will be more accurate than the initially-approved 80 percent trigger, or was otherwise administratively-justified; or (ii) that the 80 percent trigger would give rise, or had given rise, to an unreasonable exercise of market power. We similarly reject arguments from PJM Load Group questioning whether PJM has adequately shown that its previously-effective 80 percent threshold was insufficient to protect against buyer market power.

45. We also reject the Maryland Commission's assertion that raising the conduct screen to 90 percent of Net CONE will impose barriers to entry for new technologies given that incumbent generators are not subject to MOPR. As the Commission found in the April 12 Order, the level of the conduct screen should not determine whether a resource is ultimately selected as a capacity resource; it merely indicates the point at which the burden to prove that an offer is economic falls on the seller making the below-threshold offer.[21] Any resource whose bid falls below the administratively-determined benchmark has the opportunity to justify, on a unit-specific basis, that its net costs are indeed below the benchmark. Therefore, we find that the Maryland Commission failed to demonstrate how raising the conduct screen will keep competitive offers from new technologies out of the market.

46. We reject CPV's argument that PJM's reliance on Net CONE as a mitigation trigger fails to consider the non-fungible aspects of state resource choices. First, PJM's continued use of Net CONE as a mitigation trigger was not an issue before us in considering PJM's more limited section 205 proposal in this proceeding. Moreover, as

[20] April 12 Order, 135 FERC ¶ 61,022 at P 66.

[21] *Id.* P 71.

the Commission found in the April 12 Order, the MOPR "ensures only that the wholesale capacity market prices remain at just and reasonable levels."[22]

47. We also reject P3's and PPL's argument that the Commission erred by accepting any downward adjustment to the Net CONE. PJM's proposal appropriately recognized that seeking a unit-specific exemption poses an administrative burden on sellers. As such, we disagree that any bid falling below 100 percent of the benchmark must *per se* be recognized as uncompetitive, or that, by setting the conduct screen at something less than 100 percent, the Commission is endorsing the acceptance of some permissible level of buyer market power. The conduct screen is an estimate of new entry costs, and some resources will have legitimately lower costs than the threshold. While these resources can seek a unit-specific exemption, this process is not costless to the resource making the sell offer, and we therefore continue to hold that the 90 percent screen reflects a reasonable balance of these factors.

C. Net-Short Requirement

48. PJM proposed to eliminate its net-short requirement, a provision that subjected to the MOPR capacity offers from a seller and its affiliates who buy substantially more capacity from the RPM auction than they sell into it.[23] The net-short requirement operated on the premise that only entities purchasing substantially more capacity than they sell have the incentive to depress market clearing prices below competitive levels, and thus only a seller in that position should be subject to the bid floor, while capacity offers from a seller and its affiliates who are not substantially net short should not be subject to the MOPR. In proposing to eliminate this distinction, PJM argued that its prior rule could be manipulated and avoided.

1. April 12 Order

49. The April 12 Order accepted PJM's proposal to eliminate the net-short requirement.[24] The Commission concluded that the net-short requirement was ineffective

---

[22] *Id.* P 141.

[23] Only PJM actually procures capacity through RPM. More precisely, therefore, the net-short requirement sought to apply the MOPR only to entities that pay PJM more to cover their capacity obligations through RPM than they would receive from PJM as a credit for the capacity resources they offered into RPM. For simplicity, we refer to entities in this position as "net buyers."

[24] *Id.* P 86.

because it could be gamed and unnecessary given that the unit-specific review process available to sellers will protect against over-mitigation.

2. Requests for Rehearing

50. New Jersey Rate Counsel argues that the net-short requirement is central to the use of the MOPR as a market-power mitigation measure and should not have been eliminated, given that it focuses on the actual incentive of an entity to impact market prices. The Maryland Commission similarly argues that without the net-short requirement, PJM's MOPR will effectively set an offer floor price for all new non-exempt resources without regard to intent or ability to suppress price, the result of which will deter entry by new technologies.

51. New Jersey Rate Counsel and PJM Load Group also challenge the April 12 Order's finding that the net-short requirement was subject to a form of gaming that is difficult to police. PJM Load Group argues that the only basis for this finding was PJM's speculative claim that its existing net-short requirement allows a seller that may have an incentive to make an uncompetitive offer to structure a new entry transaction in a way that achieves the desired price-lowering effects without triggering the MOPR. New Jersey Rate Counsel notes that it proposed modifications to the rule that would have addressed these concerns.[25] In addition, New Jersey Rate Counsel argues that by eliminating the net-short requirement, MOPR mitigation will be applicable to net sellers, which could provide a means for a net seller to evade the seller market power mitigation provisions and thus withhold planned new resources.

3. Commission Determination

52. We deny rehearing and uphold the April 12 Order's acceptance of PJM's proposal to eliminate its net-short requirement. On rehearing, New Jersey Rate Counsel, PJM Load Group and the Maryland Commission challenge this rule change on the grounds that it will extend the reach of MOPR mitigation to sellers that may have no incentive to suppress market clearing prices given that they are not net short. As the Commission found in the April 12 Order, however, the net-short requirement's narrow focus enabled a net buyer, or an entity acting on behalf of a net buyer, to evade mitigation by structuring a new entry transaction in such a way that achieves the same price-lowering effect without triggering mitigation. As such, PJM's prior rule was ineffective, and its elimination was just and reasonable.

---

[25] *See* New Jersey Rate Counsel Rehearing Request at 60-61 (arguing that the net-short requirement could be applied more broadly to contractual counterparties of net buyers).

53. New Jersey Rate Counsel argues that the Commission could have revised, but need not have eliminated, the net-short requirement. Specifically, New Jersey Rate Counsel argues that the net-short requirement could have been revised to apply more broadly to contractual counterparties of net buyers. New Jersey Rate Counsel suggests that, to the extent a gaming potential might continue to persist, the Independent Market Monitor (IMM) or other parties could be relied upon to detect any such evasive behavior. The Commission's consideration of PJM's proposal, however, did not require the Commission to address whether alternative proposals might also be just and reasonable. Regardless, while we acknowledge that there may be ways to adjust the net-short requirement so as to alleviate some of PJM's concerns about gaming, PJM's proposal represents an appropriate approach that avoids the need to anticipate and respond effectively to all the ways that its prior provision could be gamed.

54. We also find that the elimination of the net short requirement will not lead to over-mitigation. New Jersey Rate Counsel challenges the April 12 Order's finding that the net-short requirement is unnecessary, arguing that applying the MOPR to entities that may not appear to have an incentive to suppress prices is unreasonable and will lead to over-mitigation. As explained below, the unit specific review process will be available for resources that seek to justify below-benchmark bids. These resources may be able to demonstrate that their bids are made independently based on costs and not as an attempt to lower the market clearing price for a particular sponsor. We also find that the Maryland Commission failed to demonstrate how eliminating the net short requirement will keep competitive offers from new technologies out of the market.

55. Finally, we reject New Jersey Rate Counsel's argument that, by eliminating the net-short requirement, MOPR mitigation will be applicable to net-sellers, which could provide a means for a net seller to evade the seller market power mitigation provisions and thus withhold planned new resources. Competitive entry occurs when an investor expects a project to yield a reasonable return over its life and is thus willing to accept the investment risk. In expressing a concern that a seller may exercise market power by not investing, the New Jersey Rate Counsel fails to explain how such a seller could prevent or exclude the entry of another competitive investor willing to assume the investment risk. Thus, we conclude that the New Jersey Rate Counsel's argument is without merit.

D. Impact Screen

56. Prior to the April 12 Order, a sell offer failing PJM's conduct screen would be subject to a second screen, called the impact screen. The impact screen would re-run the auction to measure the impact that a mitigated offer would have on capacity clearing prices. Offers would then be mitigated only if there was at least a $25/MW-day or a 20 to 30 percent change in clearing price, depending on the size of the zone. PJM proposed to eliminate the impact screen.

1. **April 12 Order**

57. The April 12 Order accepted PJM's proposed elimination of the impact screen.[26] The Commission noted that this provision allows offers that are indisputably uneconomic to escape mitigation. The Commission also found that eliminating the impact screen would have the ancillary benefit of simplifying the mitigation process by eliminating the need to re-run auctions.

2. **Requests for Rehearing**

58. New Jersey Rate Counsel argues that the impact screen, working in conjunction with the net-short requirement, is central to the use of the MOPR as a market-power mitigation measure because it focuses on the actual effects of an entity's actions on market prices and withholds mitigation absent a significant impact. New Jersey Rate Counsel asserts that while it proposed lowering the impact threshold (from 20-30 percent to 5-10 percent), the April 12 Order offered no reasoned basis for rejecting this proposed threshold. The Maryland Commission argues that the Commission's ruling will deter entry by new technologies.

59. New Jersey Rate Counsel adds that while the April 12 Order identified a potential weakness in PJM's then-existing screen, which considered the impact of offers individually but not cumulatively, the Commission failed to consider a rational, proportionate response to the identified concern, such as a modification to set a cumulative impact limit.

60. New Jersey Rate Counsel also challenges the Commission's finding that elimination of the impact screen was appropriate because there is no parallel screen before mitigation is applied to prevent the exercise of seller market power. New Jersey Rate Counsel responds that this was true when the MOPR and the impact screen were first adopted. New Jersey Rate Counsel adds that buyers and sellers are not similarly-situated relative to this consideration, given that on the buyers' side, the submission of price-taker offers for allegedly uneconomic resources can reflect legitimate objectives.

3. **Commission Determination**

61. The April 12 Order accepted PJM's proposed elimination of the impact screen, which sought to apply mitigation only to sell offers that would have a significant effect on the auction clearing price. We continue to conclude that PJM's proposal to eliminate the impact screen was just and reasonable, as discussed below, and we therefore deny rehearing on this matter.

---

[26] April 12 Order, 135 FERC ¶ 61,022 at P 101.

62. As explained in the April 12 Order,[27] PJM proposed this change to its tariff under section 205 of the FPA. Under section 205, filing parties do not need to demonstrate that the existing tariff is unjust and unreasonable when proposing a change. PJM met its section 205 burden by demonstrating that eliminating the impact screen would prevent uneconomic entry, particularly given its observation that even a small change in the clearing price from a below-cost offer can harm competition. Thus, we continue to agree with PJM that eliminating the impact screen is just and reasonable because doing so will prevent uneconomic offers from escaping mitigation. As noted earlier, a resource can seek to justify a lower bid using its actual costs, which will ensure that elimination of the impact screen will not result in over-mitigation.

63. New Jersey Rate Counsel argues that the Commission erred by failing to adopt alternate proposals, such as lowering the impact threshold or requiring a cumulative impact threshold. However, as the Commission found in the April 12 Order, PJM's approach appropriately recognizes that mitigating anoffer that is below the resource's actual net costs is reasonable, whether that resource lowers the ultimate auction clearing price by 25 percent or by one percent. As noted above, a small change in the clearing price from a below-cost offer may harm competition. We therefore continue to find that PJM's proposal to eliminate the impact screen, rather than modifying it, as New Jersey Rate Counsel suggests, is just and reasonable.

64. We further reject New Jersey Rate Counsel's argument that the Commission erred by relying in part on the fact that PJM imposes no impact test before mitigating seller market power. New Jersey Rate Counsel argues that, on the buyers' side, the submission of price-taker offers for allegedly uneconomic resources can reflect legitimate state objectives. As noted in the April 12 Order, however, other states may not agree with these objectives and may not be willing to bear the costs of uneconomic entry or to have such entry undermine competitive markets for those states that prefer to rely on private capacity for generation construction.[28]

E. Review of Sell Offers

65. PJM proposed to clarify its existing rules regarding Commission review of mitigated sell offers by providing that such review will be made pursuant to an FPA section 206 filing and subject to a specified test set forth at proposed Attachment DD, Section 5.14(h)(5). Specifically, PJM proposed that the seller would have to obtain a determination that its sell offer is:

---

[27] *Id.* P 108.

[28] April 12 Order, 135 FERC ¶ 61,022 at P 137, 147 (citing Pennsylvania Commission comments at 13).

> [C]onsistent with the competitive, cost-based, fixed, nominal levelized, net cost of new entry were the resource to rely solely on revenues from PJM-administered markets (i.e., were all output from the unit sold in PJM-administered spot markets, and the resource received no out-of-market payments)[.[29]]

1. April 12 Order

66. The April 12 Order rejected PJM's proposal to require an aggrieved party whose sell offer has been mitigated to seek at the outset an exception from the Commission, pursuant to FPA section 206.[30] The Commission found that such a review process could result in complex and lengthy litigation that could be avoided if such determinations are made first by the IMM or, in review of the IMM's determination, by PJM. Accordingly, the Commission directed PJM to propose tariff revisions that would allow the IMM and PJM to review such cost justifications upon request. The Commission also directed that PJM's proposed tariff provisions include an explanation of the information that will need to be submitted to the IMM and the objective standards by which such submittals will be evaluated. In addition, the Commission adopted PJM's proposed standard of review applicable to such petitions, namely, that the sell offer will be deemed permissible when such offer is consistent with the competitive, cost-based, fixed, nominal levelized, Net CONE were the resource to rely solely on revenues from PJM-administered markets.[31]

2. Requests for Rehearing

67. P3 asserts as error the April 12 Order's rejection of P3's proposal to create a MOPR exemption for any resource that can establish that it will not receive any form of subsidy or discriminatory treatment, including selective inclusion of costs in the rate base of cost-regulated load serving entities or financing through tax-preferred bonds. This proposal is referred to as a "No-Subsidy" Off Ramp.

68. PJM asks the Commission to reconsider the April 12 Order's limiting of the unit-specific review process to the nominal levelized cost recovery method. PJM argues that, while the nominal levelized cost recovery method is appropriate for the initial screen,

---

[29] OATT Attachment DD.5.14 Clearing Prices and Charges, 4.0.0, §(h)(5)(B); http://etariff.ferc.gov/TariffSectionDetails.aspx?tid=1731&sid=95412.

[30] *Id.* P 118.

[31] *Id.* P 122.

denying project developers any opportunity to show in the unit-specific review process that another cost recovery model is reasonable under their circumstances may be inappropriate.

69. NRECA argues that the Commission's requirements regarding a unit-specific review process is flawed because it will fail to take account of a company's actual costs or revenues. NRECA adds that for a company that has an obligation to serve, a capacity investment is economic if, over its life of several decades, its expected energy, ancillary services, capacity, reliability, and other internal benefits, plus expected energy, ancillary services, and capacity revenues in all markets both centralized and bilateral, exceed its expected costs.

70. PJM Load Group also seeks rehearing regarding the standard applicable to IMM/PJM review of self-supply sell offers. PJM Load Group argues that if the Commission does not grant rehearing on the self-supply issues for which technical conference procedures were established, the Commission should rule, in the alternative, that the test to be used by the IMM and PJM will not apply to self-supply and that, instead, a rebuttable presumption of legitimacy will apply to all such self-supply sell offers. In the alternative, PJM Load Group requests clarification regarding the appropriate cost justification standards required to allow legitimate self-supply offers to be used for the purpose of satisfying a load serving entity's (LSE) obligation.

71. PJM Load Group also asserts as error the Commission's adoption of a standard limiting the consideration of revenues to those attributable to the PJM markets. PJM Load Group argues that this limitation is inconsistent with the MOPR's limited purpose, i.e., protection against the exercise of buyer market power, and would unnecessarily penalize load serving entities for their practice of using traditional ratemaking for utility-owned capacity with arms-length bilateral contracts. PJM Load Group asserts that any IMM/PJM review of mitigated sell offers must consider: (i) project-specific capital costs; (ii) project-specific capital structure, including the relevant debt/equity level, long-term debt/return requirements and amortization periods; (iii) project-specific tax-status, rate and related credits or benefits; (iv) deductions for already-sunk costs; (v) favorable financing such as tax-exempt bonds or other local, state or federal laws or regulations that provide for reduced financing costs; and (vi) revenues from bilateral contracts.

72. The Maryland Commission concurs that the Commission erred in accepting PJM's proposed criteria for evaluating permissible unit-specific offers that fall below the benchmark threshold. The Maryland Commission argues that under the approach approved by the Commission, revenues from long-term contracts will be excluded, while other types of government contributions that lower costs in an almost identical fashion will be allowed (e.g., investment tax credits, cost-sharing mechanisms, property tax abatements, preferential zoning treatment, loan guarantees, or taxpayer funded upgrades to local infrastructure). The Maryland Commission asserts that neither PJM nor the

Commission provided a rationale supporting the subjective choice of subsidies to be included and/or excluded.

3. <u>Commission Determination</u>

73. We grant partial rehearing of the April 12 Order regarding the standard of review applicable to the unit-specific review process. While the Commission rejected PJM's proposal to require a section 206 filing at the outset, the Commission accepted the requirement that the seller show, in a unit-specific review, that its proposal is "consistent with the competitive, cost-based, fixed, nominal levelized, net cost of new entry." We grant rehearing of the Commission's holding that a unit-specific review must utilize a nominal levelized methodology.

74. After reviewing the public comments and upon further reflection, we conclude that the April 12 Order's implication that it would always be irrational for a new entrant to offer at a price based on the real levelized method was not justified. We agree with PJM that, while the nominal cost recovery method is appropriate for the MOPR screen, requiring that cost recovery method during the unit-specific review process is unnecessary. In making a case to the IMM, PJM, or the Commission, parties should have the opportunity to present a reasonable business case based on their individualized facts and circumstances, including the use of a different depreciation model. The case-by-case nature of the unit-specific exemption process allows for the IMM, PJM, and the Commission to consider more carefully the different circumstances of individual sellers. Thus, we grant rehearing of the April 12 Order's requirement that the standard of review applicable to the unit-specific review process reflect the use of the nominal levelized methodology, without exception. Accordingly, we direct PJM to submit a compliance filing revising its Tariff to eliminate the requirement that parties must use the nominal levelized methodology in a unit-specific review.

75. P3 asserts as error the Commission's rejection of its proposed "No-Subsidy" Off-Ramp proposal, which sought to replace any unit-specific review of net costs with a process by which resources would be exempted from mitigation if they could demonstrate that they have not received any discriminatory payments. We affirm our holding in the April 12 Order. While we do not disagree in principle with the general proposition of exempting from MOPR resources shown to not be receiving a subsidy, we are not persuaded that determining what constitutes a "subsidy" or a "discriminatory payment," as opposed to evaluating net costs, will be a less subjective and more precise means of preventing uneconomic entry.

76. On rehearing, NRECA, PJM Load Group and the Maryland Commission assert that the Commission's findings, as applied to a unit-specific review, fail to account for

the long-term cost and revenue considerations that may influence the determination to bring a new resource on line, including revenues from outside of PJM's markets.[32] The other concerns related to the unit-specific review process will be discussed in the section addressing PJM's Compliance Filing, below.

F. State Mandated Exemption

77. PJM proposed to eliminate its MOPR exception for state policy projects, which allowed for an exemption for a new entry sell offer based on a resource "that is being developed in response to a state regulatory or legislative mandate to resolve a projected shortfall," so long as that determination was made in a state evidentiary proceeding "that includes due notice, PJM participation and an opportunity to be heard." PJM proposed instead to make MOPR exemptions requested on state policy grounds subject to receipt of a section 206 ruling.[33]

1. April 12 Order

78. The April 12 Order accepted PJM's proposal to eliminate its state mandate exemption, but it rejected PJM's proposed replacement mechanism as duplicative of the existing statutory rights established under FPA section 206 of an aggrieved entity to petition the Commission for a tariff change or waiver.[34]

2. Requests for Rehearing

79. The Maryland Commission and the New Jersey Board argue that the Commission erred in approving the elimination of the state mandate exemption. These parties argue that their states face serious reliability needs, persistent congestion, and looming reliability violations that the RPM has failed to meet. The Maryland Commission adds that the April 12 Order disregarded testimony from the Maryland Commission Chairman Nazarian addressing the gravity of the reliability concerns in Maryland and approved the elimination of the state mandate exemption without due consideration of states'

---

[32] As discussed below, PJM's compliance filing generally concurs with this position, proposing that a sell offer, upon review, be found justified based on competitive cost advantages relative to the costs estimated for the MOPR screen, including costs resulting from the capacity market seller's business model, financial condition, tax status, access to capital, other similar conditions affecting the applicant's costs, and/or net revenues.

[33] P3, in its complaint, proposed to eliminate the exemption altogether.

[34] April 12 Order, 135 FERC ¶ 61,022 at P 139.

legitimate interests in assuring that sufficient resources are available to serve customers reliably.

80. The New Jersey Board asserts that the Commission's rulings exceeded the Commission's FPA section 205 and section 206 authority. The New Jersey Board argues that eliminating this exemption required the Commission to make a finding that this provision was no longer just and reasonable. The New Jersey Board adds that even if such a finding was implicit in the April 12 Order, the Commission's findings were otherwise unsupported, and will substantially impede the implementation of New Jersey's capacity procurement program. The New Jersey Board requests that the Commission direct PJM to reinstate the preexisting exemption for state sponsored projects or, alternatively, exempt from mitigation the capacity resources approved by the New Jersey Board pursuant to the state's Long-Term Capacity Agreement Pilot Program (LCAPP).

81. New Jersey Rate Counsel argues that the Commission's elimination of the state mandate exemption converts a mechanism designed to address real-world capacity deficiencies into an untenable choice requiring the state to either file a complaint at the Commission or opt out of RPM entirely.

82. A number of parties argue that the April 12 Order erred in not enumerating the specific evidence upon which it relies, merely citing the "mounting evidence of risk from what was previously only a theoretical weakness in the MOPR rules."[35] New Jersey Rate Counsel and Dominion further assert that the Commission failed to support its departure from the 2006 RPM settlement agreement,[36] of which the state mandate exemption was an important component.

83. The Maryland Commission argues that the Commission's ruling was erroneously based on the assumption that state action constitutes an impermissible exercise of buyer market power. The Maryland Commission adds that because alleged exercises of buyer market power by states do not benefit the states directly, the legitimate policy goals that state agencies are charged with fulfilling should be considered with respect to the issue of intent.

84. Petitioners also argue that the Commission's ruling was internally inconsistent. Specifically, Dominion asserts that while rejecting the state policy exemption based on economic theory and the risk to the market of allowing units with retail price support to participate, the Commission nonetheless accepted exemptions applicable to wind, solar,

---

[35] *Id.*

[36] *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006).

coal, nuclear, and hydro-electric generation, as well as integrated gasification CC generation, regardless of whether these resources do, or do not, have regulated rate support and regardless of their price impact on the market. The Maryland Commission argues that the Commission failed to explain why anticipated effects on prices, irrespective of intent, are the determinative factor when evaluating whether to mitigate offers from new resources in some instances, while in others, a developer's imputed lack of improper purpose justifies an exception. Dominion adds that the Commission's rationale for exempting these categories of resources applies equally to gas-fired facilities selected through state-sanctioned integrated resource planning.

85. Dominion argues that, if a waiver request must be made with the Commission, it should not be made pursuant to section 206, but simply as a petition or a motion. Dominion adds that an aggrieved party should not be required to demonstrate, under section 206, that PJM's existing tariff is unjust and unreasonable or that its proposed alternative is just and reasonable. The New Jersey Board argues that requiring a state entity to seek section 206 relief in order to carry out its own policies of promoting new capacity development will be unduly burdensome and will subject these entities to unwarranted delays. Regardless, the New Jersey Board argues that because a Commission determination would be made prior to the relevant RPM auction, it would be impossible for the Commission to determine whether the offer at issue will affect market-clearing prices.

86. Finally, petitioners challenge the Commission's finding that states seeking full independence in resource procurement choices can implement a form of capacity procurement that complements RPM or can opt out of the RPM market via the Fixed Resource Requirement (FRR) alternative.[37] The New Jersey Board argues that the Commission's finding was unaccompanied by any analysis or discussion explaining how, or whether, the Commission's finding could be implemented. The Maryland Commission adds that the FRR option was never intended to be a mechanism that would

[37] April 12 Order, 135 FERC ¶ 61,022 at P 141, n.76. An entity that chooses the FRR alternative submits an FRR capacity plan to PJM, a long-term plan for the commitment of capacity resources to satisfy the entity's capacity obligations. The area covered by the plan is: (i) the service territory of an investor owned utility; (ii) the service area of a public power entity or electric cooperative; or (iii) a separately identifiable geographic area that is bounded by wholesale metering, or similar appropriate multi-site aggregate metering, and for which the FRR entity has or assumes the obligation to provide capacity for all load (including load growth) within such area. *See* PJM Reliability Assurance Agreement at Schedule 8.1.

permit states to initiate procurement of new resources to address state policy goals and is otherwise incompatible with that purpose, given its restrictive rules.[38]

3. Commission Determination

87. We deny rehearing of the April 12 Order with respect to the Commission's acceptance of PJM's proposal to eliminate the state mandate exemption. We also deny rehearing with respect to the Commission's rejection of PJM's proposed replacement mechanism. PJM's filing under section 205 proposed to eliminate a provision in section 5.14(h)(1)(iv) that excluded from the MOPR: "any Planned Generation Capacity Resource being developed in response to a state regulatory or legislative mandate to resolve a projected capacity shortfall in the Delivery Year affecting that state, as determined pursuant to a state evidentiary proceeding that includes due notice, PJM participation, and an opportunity to be heard."[39] PJM also proposed to include in section 5.14(h)(5) the following provision that permitted a resource to demonstrate, under section 206, that: "the Sell Offer is based on new entry that is pursuant to a state-mandated requirement that furthers a specific legitimate state objective and that the Sell Offer would not lead to artificially depressed capacity prices or directly and adversely impact FERC's ability to set just and reasonable rates for capacity sales in the PJM Region or any affected Locational Deliverability Area."[40]

88. The Commission accepted PJM's proposal to eliminate the provision as worded in section 5.14(h)(1), but rejected PJM's revised proposal for the state exemption. The Commission reasoned that the revised "state exemption restates an affected party's right to file to prospectively change a filed rate schedule (other than its own), which is embodied in section 206 of the FPA. This is a statutory right, not a right created by contract."[41] Thus, the Commission's order did not eliminate a resource's or a state's right to petition the Commission under section 206 to permit an exemption from the MOPR rules. The order found only that such a right is statutory, and need not be included in the tariff.

89. The Maryland Commission and the New Jersey Board assert that the Commission disregarded their states' purported unmet reliability needs and did not properly consider

---

[38] *See* New Jersey Rate Counsel Rehearing Request at 79.

[39] OATT at Attachment DD,Section 5.14 Clearing Prices and Charges, 2.0.0(h)(1)(iv).

[40] *Id. at* 4.0.0, §(h)(5)(B).

[41] April 12 Order, 135 FERC ¶ 61,022 at P 140.

their legitimate interests in assuring that the reliability needs of their citizens are met. RPM is structured to allow PJM to acquire sufficient capacity resources to meet the reliability needs of the entire PJM region, including all the states in that region, on a three-year forward basis. Nevertheless, the April 12 Order found, and we reaffirm here, that the MOPR does not interfere with states or localities that, for policy reasons, seek to provide assistance for new capacity entry if they believe such expenditures are appropriate for their state. We only seek to ensure the reasonableness of the wholesale, inter-state prices determined in the markets PJM administers.

90. RPM itself, however, has no feature to explicitly recognize, for example, environmental or technological goals, nor does it contemplate reliability concerns beyond a three-year forecast. If PJM market participants agree that RPM should account for resource attributes that reflect broader objectives than three-year forward reliability, then PJM and its stakeholders should begin a process to consider how to incorporate these features into RPM's market design. In this way, all capacity resource suppliers will be able to receive a non-discriminatory market clearing price that reflects these values in addition to reliability. But allowing selected new projects to bid into RPM as price-takers because they are state-mandated would undermine the objective of RPM to procure the least-cost, competitively-priced combination of resources necessary to meet the region's reliability objectives on a three-year forward basis.

91. The MOPR helps to ensure that the wholesale capacity market prices remain at just and reasonable levels. Removal of this provision does not eliminate the ability of states to bring their concerns to the attention of the Commission. States can file under section 206, or participate in filings by generators, if they believe that the MOPR interferes with a legitimate state objective. We therefore reject the New Jersey Board's request to reinstate the state policy exemption or, in the alternative, grandfather the capacity resources approved pursuant to the state's LCAPP.

92. Several parties argue that the Commission's state mandate exemption findings were procedurally deficient. The New Jersey Board argues that the Commission erred in arbitrarily choosing to eliminate the state mandate exemption pursuant to PJM's section 205 filing rather than pursuant to P3's section 206 proposal to eliminate the same provision.[42] The New Jersey Rate Counsel argues that the Commission did not have the option of eliminating the state mandate exemption under section 205. This is because, according to the New Jersey Rate Counsel, PJM proposed to *retain* an exception for offers that are justified on state policy grounds, but to place it under the same process as any other sell offer seeking a MOPR exception. According to the New Jersey Rate Counsel, given the Commission's rejection of PJM's proposed replacement mechanism,

[42] New Jersey Board Rehearing Request at 23.

the Commission could only have eliminated the state mandate exemption by making a finding under section 206 that the existing provision was unjust, unreasonable, unduly discriminatory or preferential. The New Jersey Rate Counsel asserts that the Commission made no such finding. The New Jersey Board argues that the Commission has not supported its state policy exemption decision even under section 205 because the Commission did not provide a well reasoned explanation of its finding that the preexisting reliability-based exemption was unjust and unreasonable nor any evidence of problems created by the MOPR exemption.

93. We disagree. PJM voluntarily filed to eliminate its then-effective state exemption in section 5.14(h)(1)(iv) under section 205, and we accepted that portion of PJM's filing. Under the previously-existing provision, PJM would have to determine whether the state proceeding was based on "projected capacity shortfall in the Delivery Year affecting that state" and also required that PJM be accorded certain procedural rights. We agree with PJM that the previously-effective state exemption provision improperly required PJM to assess the adequacy of state administrative processes and determine whether an offer was legitimately intended to address a projected capacity shortfall—a task that PJM is not well-suited to perform, as PJM itself acknowledged. Thus, we found that this element of the PJM proposal was just and reasonable.

94. Under section 205, PJM proposed to include a provision that would have established certain parameters applicable to a section 206 filing with the Commission relating to a state mandate. The Commission found PJM's proposal unjust and unreasonable because it established tariff prerequisites for a section 206 filing. As noted above, states and generating resources retain their statutory right to file complaints under section 206 unencumbered by the parameters proposed by PJM.

95. We therefore find that these were two separate proposals by PJM under section 205 for two different reasons.[43] We did not seek to modify or change either of PJM's proposals under section 206; we accepted one and rejected the other and did not mandate a change in PJM's tariff. Hence, we acted pursuant to section 205 with respect to each provision.

96. Moreover, even if our action were construed as a modification to PJM's proposal, we find that our actions in the April 12 Order satisfied the requirements of section 206. First, as indicated above, PJM's tariff prior to the April 12 Order was unjust and unreasonable because the state exemption created a loophole permitting uneconomic

---

[43] PJM did not contend that its proposal to remove the existing state exemption was conditioned on acceptance of its proposed revised state exemption and it did not seek rehearing on this issue.

entry affecting the wholesale price. As the Pennsylvania Commission pointed out, and as we found in the April 12 Order, the state exemption in PJM's tariff prior to the April 12 Order may have adversely affected other states that wanted to rely on prices in the capacity market to incent new entry as opposed to relying on state funding.[44] In addition, and as discussed above, we agree with PJM that the previously-effective tariff provision was unjust and unreasonable because it would put PJM in the position of judging the quality and bases of state proceedings. We also continue to find that having no specific state exemption in PJM's tariff is just and reasonable. As a general matter, we affirm our finding that permitting a state exemption generally would be inconsistent with the rationale and basis for the MOPR:

> [W]ithout effective mitigation of state-sponsored uneconomic entry, the actions of a single state could have the effect of preventing other states from participating 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 RPM against the effects of such entry.[[45]]

97. We continue to agree with the IMM that permitting a state exemption may in fact, over the long run, result in less investment in capacity and demand-side resources and the need in the future for additional subsidies from the state.[46] Such a result would also, as we note elsewhere, impact capacity clearing prices more broadly, with the potential to impact other states that have chosen to rely on the price signals provided by the wholesale market. Our statutory responsibility here is to ensure that the markets (the rules, etc.) are just and reasonable to ensure that just and reasonable rates are produced. If a state believes that operation of the MOPR in a particular situation is unjust and unreasonable, it can file with the Commission under section 206 or 306 of the FPA.

98. The Maryland Commission argues that buyer market power and seller market power should not be treated equivalently in fashioning mitigation. Even if so, however, Commission and court precedent indicate that PJM needs to protect against both buyer market power and seller market power to ensure competitive, properly functioning

---

[44] *See* April 12 Order, 135 FERC ¶ 61,022 at P 143 ("[W]ithout effective mitigation of state-sponsored uneconomic entry, the actions of a single state could have the effect of preventing other states from participating in wholesale markets.").

[45] *Id.* P 143.

[46] IMM's March 4, 2011 Comments at 2, 8-9

markets.[47] The Maryland Commission has not justified any relevant disparate treatment on this record.

99. The New Jersey Rate Counsel, the New Jersey Board and Dominion argue that the Commission erred in requiring a party seeking an exemption on state policy grounds to file a section 206 complaint; the latter two parties claim that such a procedure is unduly burdensome and will engender delay. In response to concerns about timing, we note that nothing prevents a state party from filing prior to initiating the administrative process necessary to solicit new resources. We further clarify that the April 12 Order did not limit the right of a state, or a state agency, under the FPA. Nothing precludes a state party from filing a petition for declaratory order with the Commission, but the ultimate vehicle that will be required to establish that mitigation rules are unjust and unreasonable as applied to a particular project is a section 206 complaint.

100. Some parties argue that the FRR alternative may not be a viable substitute for many RPM participants. But this is an individual determination to be made by each state and distribution company. PJM’s tariff provides this alternative method of satisfying resource requirements while preserving wholesale market prices, and states and distribution companies can make this choice based on their individual circumstances.

101. Finally, we reject the rehearing arguments of New Jersey Rate Counsel and Dominion regarding the Commission’s acceptance of a proposal (the elimination of the state mandate exemption) that departs from the 2006 RPM Settlement. The Commission has modified provisions of the 2006 RPM Settlement in the past, both when proposed by PJM and on the Commission's own motion, where circumstances and the record presented warranted those changes.[48] Here, PJM itself argued that the state mandate exemption required revision because it could negatively affect the wholesale price in the capacity market.

---

[47] *See Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) (characterizing a competitive market as one in which neither the buyer nor seller has significant market power); *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086, at P 31 (2007) (“The direction in which the manipulative conduct moves the price is immaterial to its legality.”).

[48] *See, e.g.*, *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 36 (2009) (accepting, among other things, new CONE values to be used in PJM’s MOPR); *Pepco Energy Services, Inc. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,051 (2009) (finding PJM’s RPM rules governing the peak-hour period availability charge for infrequently run generators to be unjust and unreasonable).

G. Resources Subject to Mitigation

102. PJM proposed to retain the MOPR's existing allowance of zero-price offers for nuclear, coal and integrated gasification CC facilities, but proposed to drop from this allowance "base load" resources and facilities "that require a period of development greater than three years." PJM also proposed to add wind and solar facilities to its list of resources allowed to submit zero-price offers and proposed to eliminate the allowance for upgrades or additions to an existing capacity resource.

1. April 12 Order

103. The April 12 Order accepted PJM's proposal to add wind and solar generation to its list of generator types that are not required to offer into the RPM base residual auction at a price higher than zero.[49] The Commission also accepted PJM's proposal to eliminate the zero-price exemption for upgrades and additions to an existing capacity resource. In addition, the Commission accepted PJM's proposal to eliminate from its tariff references to "base-load" and facilities "that require a period of development greater than three years."

2. Requests for Rehearing

104. New Jersey Rate Counsel asserts that the Commission erred, in the April 12 Order, in accepting PJM's proposal to single out certain new resources to be made subject to a MOPR that will no longer focus on intent while simultaneously exempting other resource-types categorically based on inferences of intent. New Jersey Rate Counsel argues that the result of tightening the MOPR in some ways and loosening it in others is to target squarely, and without cause, a subset of resources that includes the very gas-fired CC resources that New Jersey has determined that it needs for reliability. New Jersey Rate Counsel argues that, under the authorizations approved in the April 12 Order, a CT plant and a wind farm with equal capacity could produce the same price impact, with the former resource being mitigated and the latter accepted.

105. New Jersey Rate Counsel also objects to the cited characteristics relied upon by PJM and the Commission as a basis for inferring intent to suppress prices, including the large size of CT and CC units relative to wind or solar resources and the speed by which these resource-types can be brought on line. New Jersey Rate Counsel argues that these same traits are equally important to fulfilling other, legitimate aims, i.e., avoiding New Jersey's impending capacity deficiency. In addition, New Jersey Rate Counsel asserts that these cited inferences ignore the express legislative intent embodied in the

[49] April 12 Order, 135 FERC ¶ 61,022 at P 47.

New Jersey legislation giving rise to these proceedings,[50] and the Commission's own precedent.[51]

106. Hess also asserts as error the April 12 Order's acceptance of PJM's proposal limiting the resource types subject to the MOPR. Hess characterizes this limitation as unduly discriminatory at a time when natural gas is being increasingly relied upon as a source of cleaner domestic energy. Hess states that with an examination based only on a unit's economics, the Commission concluded without justification or proof that gas-fired resources lack legitimate intentions.

107. Hess also challenges the Commission's assumption that a gas plant can be brought on line in a relatively short period of time. Hess argues, to the contrary, that it is erroneous to assume that, in all cases, a gas-fired base load plant will have a shorter lead time as compared to other resources. Hess adds that it is also erroneous to assume that a gas plant developer can determine all material costs at an early stage. Hess concludes that the application of the MOPR should be consistent, regardless of resource type.

108. PPL argues that the Commission erred in expanding the allowance of zero-price offers to include wind and solar facilities. PPL argues that no entity, regardless of asset type, should be permitted to escape mitigation if it exercises market power. PPL adds, moreover, that wind and solar facilities, because they can be constructed relatively quickly, could be used for the purpose of suppressing prices and therefore should be subject to the MOPR.

3. Commission Determination

109. We deny rehearing of the April 12 Order regarding the Commission's acceptance of PJM's proposal addressing resource types permitted to submit zero price offers into PJM's base residual auctions. New Jersey Rate Counsel and Hess argue that the Commission erred in the April 12 Order by unfairly subjecting to the MOPR certain resources, gas-fired CC and CT plants, while categorically exempting other resources based on a different standard, i.e., the consideration of intent. However, according different treatment to different classes of entities subject to our jurisdiction does not amount to undue discrimination under the FPA when the classes are not similarly-situated. Here, wind and solar resources have different characteristics than CTs and CCs

---

[50] New Jersey Rate Counsel Rehearing Request at 37, *citing* the New Jersey statute establishing LCAPP. *See supra* note 5.

[51] *See id.* at 39, *citing New York Independent System Operator, Inc.*, 124 FERC ¶ 61,301, at P 37 (2008) (explaining why individual states in multi-state RTOs are unlikely to subsidize new generation for price-suppression reasons).

and thus cannot always be regarded as interchangeable, and we continue to find PJM's proposal to exempt certain resource types from MOPR to be a pragmatic and reasonable approach.

110. While capacity can generally be regarded as an undifferentiated product, different resource types used to provide this product are not the same and do not necessarily have the same characteristics. As the Commission found in the April 12 Order, while "CTs and CCs have the shortest development time to respond to capacity needs and thus are more efficient resources to suppress capacity market prices . . . wind and solar resources are a poor choice if a developer's primary purpose is to suppress capacity market prices."[52] In addition, capacity values also differ by resource. Specifically, wind and solar resources produce variable energy output. Therefore, the dependable amount of capacity that can be counted on for capacity market purposes, and thus, the amount of capacity that can be sold into the capacity market, is typically much lower than the maximum potential output of the wind or solar resource. As a result, these resources are a poor choice for any entity attempting to suppress capacity prices.

111. We also reject New Jersey Rate Counsel's argument that the Commission failed to consider the legitimate state interests that may exist in promoting the development of large CT and CC plants that can be brought on line relatively quickly.[53] In accepting PJM's proposal to subject CT and CC resources to the MOPR, the Commission's focus was on those factors that could contribute to price suppression. In making that case, it was sufficient to find that the attributes of CT and CC resources could trigger the concern for which the MOPR exists, while other resources would not, leaving to a unit-specific review process, discussed below, the consideration of individual offers. As such, the fact that a gas-fired plant may not always have a shorter lead time relative to other resources and may have other attributes that make it an outlier relative to other CT and CC plants, does not thwart state interests in promoting competitive CT and CC plants. For this same reason we also reject Hess' argument that, in focusing on the economics presented, the Commission ignored the issue of intent and PPL's argument that, in a given case, a wind or solar resource may be capable of being built relatively quickly.

112. We also reject Hess' argument that the markets need to be identical vis-à-vis resource exemptions. We recognize that each market is developed individually through its stakeholder process, and we do not see the need to require complete uniformity in this regard.

[52] April 12 Order, 135 FERC ¶ 61,022 at P 153; *see also* PJM answer at 28-29.

[53] Hess makes a similar argument, stating that the Commission failed to consider the negative impact of its ruling on the different resource types at issue.

H. Duration of Mitigation

113. PJM proposed to apply its MOPR to a planned capacity resource in all base residual auctions up to and including the second successive base residual auction after the base residual auction in which the new entrant's resource clears.

1. April 12 Order

114. As discussed below, the April 12 Order rejected PJM's proposed duration of mitigation provision. The April 12 Order noted that under PJM's then-existing tariff, the MOPR was applied only once to the offer made in the base residual auction for the first delivery year in which the resource qualifies as a capacity resource. The Commission found, however, that this allowance permitted a resource to submit a less than competitive bid in the second auction that could result in an unjust and unreasonable reduction in price. The Commission found on this basis that PJM's then-existing provision was unjust and unreasonable and must be revised.

115. As a replacement mechanism, the Commission found that a MOPR offer floor would be required for each new resource in the base residual and each incremental auction until such time as the resource demonstrates that its capacity is needed by the market at a price near its full entry cost by clearing in one of the PJM capacity auctions (base residual or incremental) at an offer price near its full cost of entry.

2. Requests for Rehearing

116. Hess asserts as error the April 12 Order's requirement that the MOPR offer floor apply to new resources in the RPM base residual and incremental auctions until such time as the resource submits an offer price that clears. Hess argues that the MOPR could be applied to a new resource in perpetuity and is unsupported and otherwise unjust, unreasonable and anticompetitive. Hess adds that such a requirement will deter entry of new resources, including economic new entry. In particular, Hess argues that the Commission failed to consider the impact of its ruling on developers that have invested time over the years in their projects based on reliance on the previously-effective MOPR requirement. Hess asserts that market participants that have relied in good faith on PJM's prior rule should be exempted from PJM's new requirement.

117. Hess also argues that the Commission exceeded its statutory authority under FPA section 205 and failed to satisfy the requirements of FPA section 206 when it rejected PJM's proposal but then issued its own mandate (based on a proposal made by the IMM, an entity that lacks section 205 filing rights).

118. NCEMC notes that while the April 12 Order, found that "the MOPR offer floor should apply to each new resource [until the resource has] clear[ed] one of the PJM capacity auction[s]," the Commission failed to define its use of the term "new resource."

NCEMC therefore requests that this term be clarified, on rehearing, by finding that the MOPR does not apply to existing capacity resources, as defined in the PJM tariff, regardless of whether these resources have, or have not, cleared in (or previously bid into) an RPM auction. NCEMC argues that, absent this clarification, PJM's tariff could be interpreted in a way that could have an adverse effect on load serving entities (LSE) seeking to self-supply their RPM capacity obligations by use of existing resources. NCEMC also points out that an LSE may, for example, seek to use an existing resource from an external control area and that such a resource may have never before offered into PJM auction, thus subjecting it to the MOPR.

119. First Energy, P3 and PPL argue that the Commission's requirement that a resource remain subject to the MOPR until it has cleared in one capacity auction, without more, will be insufficient to ensure that the resource is economic.[54]

120. PPL argues that for an entity seeking to artificially depress capacity prices over the long run, the occurrence of price swings coupled with the MOPR duration requirement adopted in the April 12 Order will create a substantial opportunity for evading mitigation.[55]

121. P3 asserts as error the April 12 Order's rejection of P3's proposal to subject a resource to mitigation for three years after it first clears and requiring the resource to either clear twice or a demonstrate that it is not receiving any subsidies, which it calls the "No Subsidy" off-ramp.

3. <u>Commission Determination</u>

122. For the reasons discussed below, we deny rehearing of the April 12 Order addressing the Commission's conditional acceptance of PJM's proposed duration of mitigation. We also grant, in part, and deny, in part, petitioners' clarification requests.

123. We reject Hess' argument that the MOPR duration period approved in the April 12 Order will discourage efficient new entry. Hess' concern about discouraging offers of new entry appears to be based on the assumption that the developer would need to incur significant costs to make its offer—costs that would not be recovered if the offer does not clear. But new resources will not be required to incur the majority of their costs before they clear in an RPM auction and can begin receiving capacity revenues. Gas resources (the only resources subject to the MOPR) typically can be constructed within three years.

---

[54] PSEG Rehearing Request at 10.

[55] *See id.* at 13-15 (arguing that this appears to be the precise strategy employed by the State of New Jersey under LCAPP).

Thus, the construction of any such resource need not begin until it has cleared in the base residual auction, which is held three years in advance of the delivery year.

124. Hess is also concerned about the impact of the duration period on a resource that began construction prior to the effective date of PJM's February 11, 2011 Filing, in reliance on PJM's previous MOPR requirements, but did not clear a base residual auction in the first delivery year. Hess argues that subjecting such a resource to the new MOPR requirements is unfair. However, if the resource is not needed by the market (based on the going-forward costs that would be incurred under PJM's new requirements), its entry would inefficiently suppress capacity market prices. Under these circumstances, we conclude that subjecting such a resource to the MOPR is reasonable. We further note, however, that such a resource could seek a unit-specific, cost-justified reduction in its offer floor under the MOPR requirements, as the April 12 Order provides and as described in more detail in PJM's May 12, 2011 Compliance Filing proposal (discussed below).

125. Hess maintains that the Commission exceeded its statutory authority under FPA section 205 in requiring PJM to revise its provision. In this case, the Commission acted pursuant to the section 206 complaint.[56] PJM voluntarily filed to eliminate its existing tariff because it contained a loophole: it applied only once, for the first delivery year in which the resource could be offered, so that a resource by sitting out one auction, could depress prices in a second auction without mitigation. The Commission agreed with PJM that its existing tariff was unjust and unreasonable. However, the Commission found that PJM's proposed replacement also was deficient and rejected it,[57] because it too would unreasonably remove the offer floor before the resource has demonstrated that it is needed by the market and also would mitigate resources for which mitigation was not required. The Commission agreed with the IMM that the appropriate duration is to apply the MOPR offer floor to each new resource in the base residual and each incremental auction until the resource demonstrates that its capacity is needed by the market at a price near its full entry cost—by clearing one of the PJM capacity auctions (base residual or incremental) at an offer price near its full cost of entry. The Commission required PJM to adopt this approach.[58]

126. Hess argues that the MOPR could be applied to a new resource in perpetuity. However, the MOPR requirements are in place to ensure that a resource does not submit

---

[56] P3 also raised this issue in its February 1, 2011 section 206 complaint, arguing that mitigation should continue at least until the entrant clears in two auctions.

[57] April 12 Order, 135 FERC ¶ 61,022 at P 174.

[58] *Id.* P 178.

a less than competitive bid that results in an unjust and unreasonable reduction in price. PJM's preexisting tariff applied the MOPR only once—namely, to the offer made in the base residual auction for the first delivery year in which the resource qualified as a capacity resource. PJM's prior rule permitted a resource to submit an uncompetitive bid in the second and subsequent auctions, the result of which could lead to an unjust and unreasonable reduction in price. As such, the April 12 Order found, and we reaffirm here, that the MOPR should apply until the resource demonstrates that its capacity is needed by the market at a price near its full entry cost, by clearing one RPM auction at an offer price near its full cost of entry.

127. Under this requirement, we acknowledge that a new resource, at least in theory, could be subject to the MOPR for a number of years. But this result could occur only if the market had a sufficient supply of low-cost capacity such that the new resource would not be needed over this period of years.

128. We deny, in part, NCEMC's request for clarification regarding the application of the MOPR to existing resources. NCEMC argues the MOPR should not apply to any existing resource[59] as defined in the PJM tariff regardless of whether it clears in an RPM auction. We find that the MOPR properly applies to existing resources that have failed to clear a capacity auction. Under PJM's tariff, a resource becomes an "Existing Generation Capacity Resource" under the Reliability Assurance Agreement (RAA) once it commences interconnection service. But for any resource, interconnection service could commence without the resource clearing in an RPM auction. Under NCMEC's position, an uneconomic new resource could be built and begin receiving interconnection service, thereby becoming an Existing Generation Capacity Resource. It would then permanently escape the MOPR offer floor, and could subsequently offer at an artificially low offer price into RPM auctions, thereby suppressing the capacity price. Such an outcome would not be just and reasonable. As the Commission stated in the April 12 Order, the MOPR offer floor should apply to any resource until it has proven that it is needed by the market.[60]

129. We will grant, however, NCMEC's request for clarification with respect to imports. NCMEC notes that an LSE may seek to use an existing resource from an

[59] An Existing Generation Capacity Resource shall be deemed to be in service if interconnection service has ever commenced (for resources located in the PJM Region), or if it is physically and electrically interconnected to an external Control Area and is in full commercial operation (for resources not located in the PJM Region). *See* RAA at Section 1.20B.

[60] April 12 Order, 135 FERC ¶ 61,022 at P 176.

external control area and that such a resource may have never before offered into a PJM auction. As we noted in a case involving ISO-NE, when capacity and energy are imported from an external balancing area, determining the identity of the resource (or portfolio of resources) that is supporting the import is often difficult.[61] In addressing those circumstances, the Commission concluded that it is reasonable to treat capacity imports as existing capacity, and thereby not subject them to the MOPR offer floor, except where a specific new external resource is identified as the sole support for the import and where a significant investment, such as a new transmission line, is made to provide capacity to the importing RTO.[62] Here, for the same reason, we conclude that treating capacity imports into PJM similarly would be reasonable. Accordingly, we direct PJM to submit a compliance filing, within 30 days of the date of this order, to revise its tariff with respect to this issue.

130. We reject P3's and PPL's argument that clearing in one capacity auction is insufficient to prove that resources are economic. P3 and PPL assert that prices in a constrained capacity zone could temporarily rise above the offer floor for a single year based on temporary market conditions that would not continue over a sustained period. P3 and PPL claim that, as a result, clearing for a single year when prices are only temporarily above the offer floor would not indicate that a new resource was actually needed by the market over the long term. We are not persuaded by this argument. While predicting future market conditions is necessarily uncertain, and it is possible that capacity prices in a given zone may rise above Net CONE for only a year and then remain below that level for many subsequent years, such a price scenario is only one of many possibilities. Other outcomes are also possible, where prices rise above Net CONE in one or more years, then fall below Net CONE for one or more years to reflect an increase in supply due to new entry, and then rise above Net CONE as demand growth "catches up" with the added supply. Moreover, a load serving entity may legitimately believe that the higher prices will continue and its investment would be a legitimate response to the prices it perceives.

131. Were we to adopt P3's suggestion, a new resource that was needed by the market over the long term might clear in one auction, but then fail to clear for one or more years (when prices are slightly below the offer floor) before prices resume levels above Net CONE thereby allowing the resource to clear again. In this latter scenario, the new resource would fail to receive capacity revenues during the second and perhaps other subsequent years, even though the resource cleared in its first auction and even though the average capacity price over time approximated Net CONE. Such an outcome could

[61] *ISO New England, Inc.*, 135 FERC ¶ 61,029 at P 191 (2011).

[62] *Id.*

discourage economic entry. We conclude that clearing in one auction, whether the base residual auction or in an incremental auction, and committing to provide capacity for a full year, reasonably demonstrates that a new resource is needed by the market at a price near its full cost of entry and that it is reasonable not to subsequently apply the MOPR to such a resource.

132. We deny FirstEnergy's request to extend the MOPR beyond the first year that a resource clears for resources that receive any kind of out-of-market subsidy payments. As discussed above, a competitive offer would reflect the incremental, going-forward cost that the supplier would incur if its offer is accepted and its resource takes on a capacity obligation. For a potential new resource that has not yet been built, going-forward costs reflect the full cost of construction. Hence, a reasonable offer floor for a new resource would be near the full Net CONE. But once a new resource has cleared an auction and its construction is completed, construction costs become sunk. At that point, the incremental costs of taking on a capacity obligation become much smaller, often approximating zero (possibly until near the end of the resource's useful life, when substantial maintenance and refurbishment costs may be necessary). Thus, once a resource clears an RPM auction at a price above its offer floor, a competitive offer would typically be very low, and often close to zero—regardless of whether the resource receives any out-of-market payments. Therefore, we find that not imposing an offer floor on any resource that has cleared an RPM auction at a competitive price is reasonable, even if the resource receives out-of-market payments.

133. Finally, we reject P3's argument that the MOPR should be revised to require resources to demonstrate that the unit is not receiving any subsidies or has not contracted to receive any subsidies. It defines the term "subsidy" to include any revenues from outside the organized PJM markets. Regardless of whether discriminatory subsidies are being received, a resource that has cleared an RPM auction at a price above its offer floor is needed and considered a competitive resource and should be permitted to participate in the auction without an offer floor regardless of whether it also receives a subsidy.

I. Additional Rehearing Issues

1. Whether the MOPR Should Apply to Unconstrained Regions

134. P3 seeks clarification regarding the application of the MOPR to both constrained and unconstrained regions.[63] P3 notes that, in the April 12 Order, the Commission appears to have assumed, and expected, that all sell offers by new entrants, even in the large unconstrained area of PJM, are either currently subject to mitigation or will be with

[63] PPL Rehearing Request at 14.

the implementation of the revisions accepted by the Commission.[64] P3 asserts, however, that PJM's filing proposed to retain its existing MOPR exemption applicable to all resources in unconstrained regions.[65] PPL adds that confusion arises, given PJM's OATT's use of the term "for which a separate VRR Curve has been established" at Attachment DD, Section 5.14(h)(4).[66]

135. PPL requests clarification that attempts to exercise buyer market power outside of load deliverability areas will not be permitted but that the MOPR will be applied to thwart such attempts. PPL requests, in the alternative, that PJM be required to remove, from its OATT, the above-referenced language addressing the need for a separate VRR curve.

136. P3 requests clarification that the Commission did not intend to resolve this issue or, alternatively, that the Commission intended to require PJM to apply its MOPR on a region-wide basis. P3 further argues that large or unconstrained zones, including the rest-of-pool zone, are susceptible to the exercise of buyer-side market power just like small or constrained zones. P3 adds that applying MOPR region-wide, as it proposes, would not be burdensome, given that PJM receives relatively few sell offers in the RPM base auctions each year that are based on new CC or CT plants.

---

[64] P3 Request For Rehearing at 27, *citing* April 12 Order, 135 FERC ¶ 61,022 at P 52, 75, and 95.

[65] Specifically, PJM proposed that the MOPR apply only in Locational Deliverability Areas (LDA) for which PJM had established a separate VRR Curve. *See* PJM February 11, 2011 Filing at 18.

[66] The provision at issue (with the relevant language shown in italics) provides in pertinent part as follows:

> Any Sell Offer that is based on a Planned Generation Capacity Resource submitted in a Base Residual Auction for the first Delivery Year in which such resource qualifies as such a resource, or submitted in any Base Residual Auction up to and including the second successive Base Residual Auction after the Base Residual Auction in which such resource first clears, *in any LDA for which a separate VRR Curve has been established*, and that is less than 90 percent of the applicable Net Asset Class [CONE], less than 70 percent of the Net Asset Class [CONE] for a [CT] generator as provided in subsection (h)(1) above shall be set to equal 90 percent of the applicable Net Asset Class [CONE] (or set equal to 70 percent of such cost for a [CT], where there is no otherwise applicable net asset class figure)[.]

137. We clarify that the April 12 Order did not make any findings on the applicability of MOPR to unconstrained regions. In addressing PJM's proposal and P3's complaint, we were not required to address this concern.

2. Whether the April 12 Order Erred in Accepting PJM's Proposal to Eliminate its MOPR Sunset Provisions

138. PJM, in its filing, proposed to delete a sunset provision, pursuant to which the MOPR automatically terminated in the event of a positive net demand for new resources over a period of consecutive years beginning with the first RPM delivery year in a specified portion of the PJM region that is not capacity-constrained at the time RPM was implemented. The April 12 Order accepted PJM's proposal, finding that the objectives of the MOPR are not time-limited and that the sunset provision at issue was not necessary to the extent it relied upon a term ("net demand for new resources") no longer defined in the PJM OATT.[67]

139. The Maryland Commission asserts that the Commission erred, in the April 12 Order, by accepting PJM's proposal to remove the MOPR sunset provision. The Maryland Commission argues that the Commission failed to carefully and meaningfully assess the need for this provision, given its reliability function. The Maryland Commission adds that, instead, the Commission eliminated the provision merely because a corollary, supporting definition had been removed from the PJM OATT.

140. We deny the Maryland Commission's request for rehearing on the elimination of the sunset provision. The Maryland Commission, which did not oppose the elimination of this provision in the underlying proceeding, argues that the Commission should have more carefully assessed whether this provision is necessary. The Commission in fact stated in the April 12 Order that we accepted eliminating the sunset provision because we agreed with PJM that the objectives of the MOPR are not time-limited.[68] Further, in response to the Maryland Commission's concern that the sunset provision played an important reliability role by eliminating an offer floor in times of capacity shortfalls, we note that the MOPR would not prevent resources needed for reliability from clearing in RPM. If the market shows a need for new resources, the market clearing price would be above the mitigated price (i.e. 90 percent of Net CONE), and any such mitigated offer would clear.

---

[67] April 12 Order, 135 FERC ¶ 61,022 at P 182.

[68] *Id.*

3. **Whether the April 12 Order Erred in Deferring Consideration of the New Entry Price Adjustment**

141. CPV asserts that the Commission erred, in the April 12 Order, in deferring consideration of the New Entry Price Adjustment (NEPA)[69] term to a future stakeholder process.[70] CPV argues that the MOPR and the NEPA were inextricably linked in the Commission's orders accepting PJM's RPM protocols and that the NEPA mechanism, like the MOPR, warrants immediate revision, given its inability to support meaningful new investment in critical base load capacity resources. CPV requests that the Commission approve an increase in the NEPA term for the purpose of removing existing barriers to new entry.

142. PPL asserts as error the Commission's acceptance of PJM's proposal to insert, in its tariff, a date certain for NEPA reform. PPL argues that this proposal reflects price discrimination and was not broadly supported. PPL adds that the Commission's ruling may be used by PJM to make a filing that does not have appropriate levels of stakeholder endorsement and would not otherwise be permitted to be made as a section 205 filing.

143. We deny rehearing of the April 12 Order regarding the Commission's determination not to address NEPA reform issues in conjunction with PJM's section 205 proposal. CPV argues, in effect, that the Commission should have acted under section 206 for the purpose of reaching these issues. These issues, however, are beyond the scope of this proceeding. Regardless, CPV failed to demonstrate, on the record presented here, that PJM's exiting OATT is unjust or unreasonable or unduly discriminatory as it relates to these issues. We do not intend to preclude PJM stakeholders from discussing this issue, however.

144. We also reject PPL's rehearing request. PPL argues that PJM's procedural placeholder, a provision in its tariff specifying a date-certain to address NEPA issues, somehow prejudges these issues on the merits. PPL's concerns, in this regard, are speculative at this time.

4. **Whether the April 12 Order Erred by Accepting PJM's Proposed Changes Without Establishing Additional Procedures**

145. PJM Load Group, the Maryland Commission, and NRECA assert as error the Commission's acceptance of PJM's proposed MOPR revisions in the absence of

---

[69] NEPA allows qualifying generators to lock in capacity revenues for up to three years.

[70] April 12 Order, 135 FREC ¶ 61,022 at P 205.

additional evidentiary procedures.[71] PJM Load Group argues that the need for further process was well established given the scope of PJM's proposed changes and the lack of an adequate prior stakeholder proceeding. The Maryland Commission asserts that the Commission unreasonably rejected, or disregarded, intervenors' requests for adequate time to prepare their evidence and foreclosed opportunities to develop alternative MOPR provisions.

146. The Maryland Commission asserts as error the Commission's failure to establish a paper hearing. NRECA argues that if the Commission rejects NRECA's request to reinstate the clearing exemption for self-supply (discussed below) and/or NRECA's rebuttable presumption standard relating to this issue (also discussed below), the Commission should require the establishment of a stakeholder proceeding to develop a viable self-supply alternative.

147. We dismiss petitioners' rehearing requests. First, with respect to self-supply, the Commission did provide for additional procedures by establishing a technical conference. Second, with respect to other issues, the contentions of the parties were laid out in their filings and there were no material issues of disputed fact that required further procedures.

5. **Whether Commissioner Moeller's Failure to Recuse Himself Warrants the Grant of Rehearing and/or Additional Relief**

a. **Request for Rehearing**

148. The Maryland Commission asserts as error Commissioner Moeller's failure to recuse himself from participation in these proceedings, following pre-filing remarks, made January 27, 2011, regarding the then-pending New Jersey statute establishing LCAPP.[72] The Maryland Commission argues that a Commission Staff memorandum (Staff Memo), on which Commissioner Moeller relied in declining to recuse himself, erroneously concluded that the remarks at issue constituted an "impromptu" statement that did not demonstrate that Commissioner Moeller had a "closed mind" with respect to the issues presented by PJM's filing and P3's complaint.[73] The Maryland Commission

---

[71] *See also* New Jersey Rate Counsel Rehearing Request at 78 (arguing that absent a demonstration of imminent harm, the Commission should not have considered the adoption of a proposal that represented an end-run of PJM's stakeholder processes).

[72] *See supra* note 5. In a motion filed in these proceedings on March 4, 2011, the Maryland Commission argued that recusal was required.

[73] The Staff Memo was appended to Commissioner's Moeller's memorandum to file, announcing his determination not to recuse himself, and was made a part of the record in these proceedings.

argues that, in reaching this conclusion, the Staff Memo erroneously relied on two precedents: *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995) (*Metropolitan Counsel*) and *Nuclear Information and Resource Service v. NRC*, 509 F.3d 562 (D.C. Cir. 2007) (*NIRS*).

149. The Maryland Commission argues that *Metropolitan Counsel* is inapposite because, in that case, the court found that the underlying recusal request was based on unattributed comments that could not be assumed to have been made by the Chairman of the Federal Communications Commission (the subject of the underlying recusal request). The Maryland Commission argues that here, by contrast, the statements at issue were undeniably attributable to Commissioner Moeller. The Maryland Commission argues that *NIRS* is also distinguishable, given that the comments at issue in that case were found by the court to have been made in an entirely separate proceeding and were found not to support the conclusion that, in that case, the commissioner "had adjudged the facts and law regarding the particular license application at issue[.]"[74]

150. The Maryland Commission argues that Commissioner Moeller, prior to making the public remarks at issue, also met with entities contemplating the initiation of these proceedings, such that his later-made public remarks could not have been characterized as impromptu. The Maryland Commission argues that, as such, Commissioner Moeller's remarks were analogous to the "planned remarks" found to be disqualifying in *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970) (*Cinderella*). The Maryland Commission concludes that the standard for disqualification set forth in *Cinderella* has been clearly met here, i.e., "a disinterested observer may conclude that [the commissioner] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[75]

b. <u>Commission Determination</u>

151. We deny rehearing of the April 12 Order insofar as the Maryland Commission argues that Commissioner's Moeller's determination not to recuse himself requires that the Commission grant rehearing and invalidate its order.[76] The statements on which the Maryland Commission relies as its basis for recusal, as reported in the Staff Memo, were made during a question and answer session, following a speech delivered by Commissioner Moeller at a breakfast attended by industry representatives and the press

---

[74] *NIRS,* 509 F.3d 571.

[75] *Cinderella*, 425 F.2d 583 at 591 (internal quotations omitted).

[76] Four other Commissioners voted for this order so that Commissioner Moeller's vote was not dispositive.

and hosted by ICF International, an energy consulting firm. In response to a question regarding the then-pending LCAPP bill, Commissioner Moeller, as quoted in a trade press article published the following day, was reported to have said that the bill "would crater the capacity market," if it became law, and was "an attempt to disrupt a regional market." Commission Moeller was also quoted as saying that "how that plays out politically and legislatively -- and possibly in the regulatory arena before FERC -- is something I think, at a minimum, will be very good theater." These comments were made *prior to* the passage of the New Jersey legislation, the submission of P3's complaint and request for PJM OATT changes, in Docket No. EL11-20-000, and *prior to* PJM's section 205 rate change filing, in Docket No. ER11-2875-000.

152. Based on these facts, we are not persuaded that Commissioner Moeller's determination not to recuse himself represented an abuse of discretion warranting our grant of rehearing on this issue. A Commissioner, when called upon to consider a matter brought before this agency, is "presumed objective and 'capable of judging a particular controversy fairly on the basis of its circumstances.'" *NIRS*, 509 F.3d at 571, *citing United States v. Morgan*, 313 U.S. 409, 421 (1941). This presumption, moreover, cannot be overcome "with a mere showing that an official 'has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute.'" *Id., citing United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1981) (*United Steelworkers*). As the courts have recognized, "agency officials may meet with members of the industry both to facilitate settlement and to maintain the agency's knowledge of the industry it regulates [and] such informal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness."[77]

153. The contacts of which the Maryland Commission complain all took place prior to *any* proceeding filed at the Commission,[78] and do not indicate that the Commissioner had pre-judged any of the specific legal or factual issues faced by the Commission in this proceeding. This situation is unlike the *Cinderella* case in which the statements made were about the illegality of specific facts relating directly to an adjudicative matter that was already pending before the FTC at that time. As the court explained in *Association*

[77] *Louisiana Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992) (*Louisiana*).

[78] *Cf. MidAmerican Energy Holdings Co.*, 118 FERC ¶ 61,003 (2007) (explaining that meetings that occur *before* a filing is made do not violate the Administrative Procedure Act or the Commission's regulations).

of Nat'l Advertisers, Inc. v. FTC,[79] the *Cinderella* case involved specific references "to the adjudication pending before the Commission" which indicated that the Commissioner "had prejudged precise factual issues."[80]

154. In contrast, Commissioner Moeller's observations were of a general nature concerning an issue of great interest to the industry at large and did not indicate any prejudgment of the specific legal and factual issues raised by the subsequent section 205 tariff filing in this case. Rather than indicating that his mind was made up, Commissioner Moeller's statements indicate that his mind was open rather than closed, in that he recognized that how the legal and political battles "play out" including "in the regulatory arena before FERC" would be "very good theater." Indeed, since many, and likely most, issues of interest to the industry at large could ultimately come before the Commission, the Maryland Commission's interpretation, if adopted, would mean that in practice a Commissioner could never speak out on any issue. As the court further stated in *Association of Nat'l Advertisers*: "this court has never suggested that the interchange between rulemaker and the public should be limited prior to the initiation of agency action."[81] Informal communication is important to the Commission having an understanding of emerging policy issues that are of interest to the industry at large and the public.[82]

155. We therefore conclude that Commissioner Moeller's impromptu response to a hypothetical question regarding a state matter, i.e., a then-still-pending bill in

---

[79] 627 F.2d 1151, 1172-73 (D.C. Cir. 1979). Though the dispute in *Association of Nat'l Advertisers, Inc. v. FTC* concerned a rulemaking, the court's explanation regarding the timing of the comments at issue in *Cinderella* would still have applicability and provide support in this context.

[80] *Id*. at 1171 & n.52. As the Supreme Court stated in *FTC v. Cement Institute,* "the fact that the commission had entertained … views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed." 333 U.S. 683, 701 (1948).

[81] *Association of Nat'l Advertisers, Inc. v. FTC,* 627 F.2d at 1173.

[82] *See Louisiana*, 958 F.2d 1101 at 1113 (informal contacts with the industry are the "bread and butter" of the administrative process and are "completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness"); *accord* 18 C.F.R. §§ 35.6, 388.104 (2011) (authorizing Commission staff suggestions and comments, advice and assistance on proposed filings).

New Jersey, which had not yet been brought before this Commission in any filing does not represent a sufficiently demonstrable showing that Commissioner Moeller had made up his mind regarding two as-yet-to-be filed proceedings concerning a related, but very separate matter—the specific, region-wide operation of PJM's MOPR, related wholesale rate issues over which this Commission has jurisdiction, or the specific issue of whether and to what extent PJM's proposed revisions were just and reasonable under FPA section 205. We find that Commissioner Moeller's broad, but qualified statement of opinion was preliminary in nature and otherwise limited by the recognition that how and whether New Jersey's then-still-pending bill would play out before the Commission remained unclear. None of these facts suggest that Commissioner Moeller had in any measure adjudged the fact-specific tariff issues raised here in advance of reviewing the arguments presented.

156. We also reject the Maryland Commission argument that the instant case is distinguishable from *Metropolitan Counsel* where the court found that the underlying recusal request was based on unattributed comments. Regardless of whether the statements at issue here are attributable to Commissioner Moeller, it is the substance and import of these reported statements, as discussed above, that supports our finding, here, that Commissioner Moeller, like the FCC Chairman in *Metropolitan Counsel*, retained an open mind. We also reject the Maryland Commission's argument that the instant case is distinguishable from *NIRS*, given that the comments at issue in that case were found by the court to have been made in an entirely separate proceeding. *NIRS* was based not on a consideration of whether the comments at issue were, or were not, made in and during the course of a pending proceeding, but on the court's characterization of the remarks as purposely colorful, intended to spark debate, but not to prejudge. We find that this characterization closely fits the facts presented here.

157. Finally, we reject the Maryland Commission's argument that because Commissioner Moeller, prior to making the public remarks at issue, met with the entities contemplating the initiation of these proceedings, his brief, unscripted answer to a question at the ICF breakfast cannot be characterized as impromptu. The Maryland Commission argues, instead, that Commissioner Moeller's remarks are analogous to the "planned remarks" (a prepared speech) found to be disqualifying in *Cinderella*. We disagree that the speech made by FTC Chairman Dixon, in *Cinderella*, in which the ultimate issue in a then-pending FTC proceeding was directly addressed and judged, is analogous to Commissioner Moeller's brief, preliminary observations about a then-still-pending New Jersey bill, offered in response to a question and prior to the filing of the instant proceedings.

IV. <u>Rehearing and Technical Conference on Self-Supply Issues</u>

158. On June 13, 2011, the Commission issued an order granting rehearing of the April 12 Order for further consideration and establishing a technical conference

proceeding to address a subset of arguments raised on rehearing.[83] Specifically, the Commission established technical conference procedures to further consider petitioners' challenges to the April 12 Order's acceptance of PJM's proposed clarification that self-supply sell offers for planned capacity resources submitted into PJM's RPM base residual auction are subject to the MOPR.[84]

A. April 12 Order

159. The April 12 Order accepted PJM's proposed clarification that planned capacity resources designated by a load serving entity as self-supply are subject to an offer floor based on their entry costs until clearing in the base residual auction.[85] PJM, in support of its proposed clarification, stated that it had never intended to exempt self-supply offers from the MOPR.

160. The April 12 Order further noted that, under PJM's tariff, an alternative is provided through the FRR allowance for those load serving entities seeking to bring new capacity resources into the PJM capacity market without risk of being mitigated under the MOPR.[86] The April 12 Order explained that the FRR option is the alternative for load serving entities that wish to secure their own capacity resources outside of a competitive market, whether as directed by state-authorized integrated resource plans or pursuant to other considerations. The April 12 Order concluded, however, that to protect the integrity of PJM's wholesale capacity markets under RPM, new self supply seeking to

---

[83] *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,228 (2011).

[84] April 12 Order, 135 FERC ¶ 61,022 at P 191.

[85] PJM's then-existing MOPR provided that PJM "shall accept Sell Offers . . . in accordance with the following priority and criteria for allocation: (i) first, all Sell Offers in their entirety designated as self supply[.]"

[86] April 12 Order, 135 FERC ¶ 61,022 at P 192. An entity that chooses the FRR alternative submits an FRR capacity plan to PJM, a long-term plan for the commitment of capacity resources to satisfy the entity's capacity obligations. The area covered by the plan is: (i) the service territory of an investor-owned utility; (ii) the service area of a public power entity or electric cooperative; or (iii) a separately identifiable geographic area that is bounded by wholesale metering, or similar appropriate multi-site aggregate metering, and for which the FRR entity has or assumes the obligation to provide capacity for all load (including load growth) within such area. *See* PJM Reliability Assurance Agreement at Schedule 8.1.

participate in the RPM market must compete with other planned capacity on the same competitive basis.[87]

B. Arguments Raised on Rehearing

161. New Jersey Rate Counsel asserts that the Commission lacks jurisdiction to subject new self-supply capacity resources to a mitigated price determination that may prevent the resource from being used to satisfy a load serving entity's capacity obligation. New Jersey Rate Counsel argues that the designation of specific resources and resource types to be used to satisfy applicable capacity requirements constitutes a prohibited exercise of jurisdiction over electric generating facilities under FPA section 201(b)(1).[88] New Jersey Rate Counsel further argues that the April 12 Order unlawfully encroaches on traditional state authority to conduct integrated resource planning and to oversee the resource mix that load serving entities use to provide reliable service to their customers in violation of FPA section 201(a).[89] In addition, New Jersey Rate Counsel argues that the April 12 Order compels the enlargement of generating facilities, in violation of FPA section 202(b) and (d), given that load serving entities with planned self-supplied resources that PJM deems uneconomic will be forced to procure duplicative RPM resources.[90]

162. Petitioners also argue that the April 12 Order failed to consider, or explain, why it would be reasonable to force a load serving entity to incur additional capacity charges in those circumstances where a new resource fails to clear in the RPM auction and the load serving entity, as a result, is required to buy replacement capacity.[91] NRECA argues that,

---

[87] As noted above, the April 12 Order also specified the standard that would apply to a unit-specific review process—a standard that we have modified, on rehearing, to acknowledge the individualized facts and circumstances that may warrant consideration in the unit-specific review process. *See supra* Section III.E.

[88] 16 U.S.C. § 824(b)(1).

[89] *Id*. § 824(a).

[90] *Id.* § 824a(b) and (f).

[91] *See* Maryland Commission Rehearing Request at 26-27 (arguing that if the effect of the Commission's ruling is to require customers to pay twice for capacity, the benefits of long-term power purchase agreements will be jeopardized, including benefits attributable to: (i) offering greater assurance of longer-term reliability; (ii) providing a longer-term hedge against price volatility; (iii) improving the environmental profile of utilities' supply portfolios; (iv) providing for fuel-diversity; (v) increasing competition through new entry into constrained areas; and (vi) lowering risk premiums); *see also*

(continued…)

absent the grant of a self-supply MOPR exemption, the Commission must, in the alternative, adopt a rebuttable presumption whereby a self-supply sell offer will be presumed to be competitive and economic unless the IMM or PJM demonstrates otherwise to the Commission prior to the relevant base residual auction.

163. NRECA requests, alternatively, that the Commission clarify that the test applied in the review of a mitigated sell offer, allows for consideration of the true costs incurred and all revenues reasonably expected to be received by the load serving entity investing in the new resource over the long term. Specifically, NRECA requests clarification that a load serving entity's costs of capital will not be artificially increased to make them more "competitive" with those available to independent power produces and that the revenues load serving entities anticipate receiving from a new resource will not require a discount relative to revenues received in the bilateral market. NRECA also seeks clarification that revenues from long-term contracts and traditional cost recovery mechanisms available to regulated utilities will not be treated as out-of-market subsidies.

164. The Maryland Commission argues that were it to consider developing new capacity resources to achieve legitimate policy objectives, it must now take into account the probability that any such resource will have its sell offers mitigated to a level that cannot clear in the RPM base residual auction and thus cannot be relied upon to meet Maryland's load serving entities' RPM capacity obligations.

165. NRECA agues that by subjecting self-supply to the MOPR, the April 12 Order, without justification, fundamentally overhauled the operation and reach of the RPM market, a market originally established for the limited purpose of addressing residual capacity needs. New Jersey Rate Counsel concurs, noting that an important corollary to RPM's role as a residual market was the assumption that RPM prices were to be affected by supply and demand changes resulting from decisions made outside the RPM market. New Jersey Rate Counsel argues that the April 12 Order, however, turns this historical structure and purpose on its head by declaring, in effect, that participation in RPM is an all-or-nothing choice. New Jersey Rate Counsel adds that RPM has failed to sufficiently incent the addition of intermediate or base load resources in New Jersey, where the in-state capacity fleet is aging and where the state's dependence on imported capacity is also at risk due to coal-fired generation subject to retirement.

NRECA Rehearing Request at 8 (arguing that it is unlawful to subject load serving entities to the risk that they could be obligated to purchase capacity twice, citing *Natural Gas Pipeline Co. of America*, 65 FERC ¶ 61,361 (1993) and *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,144 (2007)).

166. New Jersey Rate Counsel also challenges the Commission's finding that permitting new self-supply to participate in RPM as a price-taker would impede competition from all types of private investment and shift long-term investment risk from private investors to captive customers.[92] New Jersey Rate Counsel responds that permitting new self-supply to participate in RPM as a price-taker is consistent with RPM's design, pursuant to which it is the captive customers, or their representatives (a load serving entity and the states), who decide how much capacity to procure outside of RPM, through, for example, self-build construction, bilateral contracts, etc., and how much to procure through the auction.

167. The Maryland Commission argues that if it is unable to promote new entrants through state initiatives, Maryland's electric customers will be required to pay through RPM for marginal capacity resources – typically older, less efficient generators that should otherwise be retired.

168. PJM Load Group asserts as error the Commission's reliance on PJM's position that self-supply resources should not be exempt from the MOPR because the relevant provision, subsection 5.14(h)(4), was never intended to exempt self-supply. PJM Load Group argues that PJM failed to corroborate its claim and that no supporting evidence was cited by the Commission in adopting PJM's position.

169. Petitioners also assert that the Commission erred, in the April 12 Order, by assuming that the FRR option offers a reasonable alternative for those load serving entities who self-supply. Dominion argues that while the FRR option may be viable for load serving entities seeking to opt out of RPM entirely, it is not a replacement for flexible participation in the market by state regulated, vertically-integrated utilities, including utilities that own enough resources to meet their capacity obligation and may desire to cover the remainder of their obligation through RPM. PJM Load Group agrees that the FRR option, as a practical matter, is viable only for large, vertically-integrated utilities that have diverse resource portfolios with which to serve their loads. The New Jersey Board concurs, noting that the FRR option involves a complicated and lengthy process for restructured retail markets and would not address the immediate concerns presented, in New Jersey, by a lack of new generating capacity.[93]

170. Dominion challenges the Commission's finding that "the FRR option does not (and should not) give the participating FRR load serving entities an opportunity to defray

[92] April 12 Order, 135 FERC ¶ 61,022 at P 195.

[93] *See* Maryland Commission Rehearing Request at 12 (arguing that the FRR option is effectively unavailable to any state such as Maryland or New Jersey that has adopted retail supply choice).

the costs of new resources that they do not need by offering them into the RPM auctions."[94] Dominion argues that the Commission provided no basis for a conclusion that is at odds with the economic underpinnings of RPM. Dominion asserts that, in fact, PJM has recognized the benefits of bringing parties into RPM, not excluding them. Dominion further asserts that the Commission should have taken all necessary steps to encourage flexible participation by vertically-integrated utilities in RPM, rather than offering an all-or-nothing choice.

171. Finally, PJM acknowledges intervenors' legitimate concerns regarding the need for additional flexibility in reviewing self-supply sell offers but requests that the Commission defer ruling on this issue, subject to PJM's submission of its compliance filing proposal (discussed below).[95]

C. Arguments Raised in the Technical Conference Proceeding

172. On July 28, 2011, Commission Staff convened a technical conference to address, among other issues: (i) whether exempting self-supply resources from PJM's MOPR presents an opportunity to exercise buyer market power; (ii) whether the FRR alternative is a viable option for those wishing to self-supply; and (iii) whether there are alternatives to the FRR option that allow parties to self-supply while deterring buyer market power.[96]

---

[94] April 12 Order, 135 FERC ¶ 61,022 at P 195, n.98.

[95] PJM's compliance filing proposal, as it relates to the unit-specific exceptions process and self-supply resources, is also generally supportive of the rehearing requests addressed above at Section III.E ("Review of Sell Offers").

[96] The following entities participated as panelists: PJM; P3; APPA; Dominion; the Maryland Commission; the IMM; NRECA; the New Jersey Board; PJM Load Group; and PSEG. Position papers and/or supporting documents were submitted at, or prior to the technical conference, by PJM; P3; PSEG; APPA; Dominion; and PJM Load Group. Post-technical conference comments were submitted by PJM; P3; APPA; the Public Power Association of New Jersey (PPANJ); New Jersey Board; the IMM; Pennsylvania Public Utilities Commission (Pennsylvania Commission); Hess; Maryland Commission; Shell Energy North America (US), L.P. (Shell); Joint Commenters (ODEC; NCEMC; PJM ICC; Blue Ridge; Chambersburg; and the Pennsylvania Office of Consumer Advocate); New Jersey Rate Counsel; Dominion; NRECA;Electric Power Supply Association (EPSA); and AMP. These comments, to the extent not already summarized above regarding petitioners' rehearing arguments, are summarized below.

1. **PJM's Comments**

173. PJM argues that, subject to an exceptions process (discussed below), the MOPR must apply to self-supply. PJM argues that when a new entrant's sell offer depends on out-of-market revenues and then sets the market clearing price, such a clearing price will not support new entry by competing sellers that do not have access to these same out-of-market revenues. PJM argues that, as such, the issue here is how best to determine whether a sell offer reflects a reasonable measure of the net avoidable costs of competitive new entry, consistent with the business model of the seller.

174. PJM recognizes, however, that exceptions must be considered for the purpose of ensuring that legitimate new entry is not deterred, as discussed by PJM's in its compliance filing.[97] With respect to the FRR option, PJM asserts that there must be some substantial minimum time period associated with electing this alternative to deter market participants from switching between RPM and FRR simply to take advantage of price differences between the two constructs. PJM notes that the currently existing five-year minimum commitment could be revised, subject to stakeholder review.

175. PJM also explains that, due to the nature of RPM and the FRR option, load serving entities should not be able to serve their load partially through RPM and partially through the FRR option. PJM argues that such an allowance could give rise to gaming opportunities. PJM explains that RPM uses a downward-sloping demand curve, meaning that RPM can commit a quantity of capacity that is either higher, or lower, than the target reliability requirement during a given year. PJM notes that the premise underlying this approach is that the auction will clear above the target installed reserve margin in some years, during a construction cycle, and below the target in other years, but that over time, the auction will provide a high overall assurance that reliability requirements will be met.

176. PJM asserts that the FRR option, by contrast, uses a fixed resource requirement, so that resources choosing this alternative can avoid the possibility that they may have to pay for capacity above the target during some years. PJM explains that, if an FRR entity could place only part of its load in an FRR plan and then satisfy the remainder in RPM, it could obtain the long-term reliability benefits of the VRR curve while protecting most of its load from the short-term economic costs of the VRR curve. PJM notes that such a result would be unfair to load serving entities that continue to participate in RPM and

---

[97] *See* Section III.E of this order, above, addressing Review of Sell Offers. PJM notes that, under its compliance filing proposal, the unit-specific exceptions review process will appropriately recognize that different projects use different business models and have differing legitimate determinations of costs and revenues.

would encourage other load serving entities to follow the same approach, leaving only part of their loads in RPM and degrading the reliability assurances of the VRR curve.

177. PJM states that the FRR option expressly accommodates retail choice jurisdictions. PJM states that the FRR rules provide that, when the FRR alternative is elected in a retail choice state, a competitive alternative supplier takes responsibility for the capacity needs of the loads it serve, either by obtaining its own capacity resources and including them in the FRR plan of the incumbent utility, or by compensating the incumbent utility for providing capacity to back the alternative supplier's loads.

178. Finally, PJM argues that trying to carve out additional exceptions to the MOPR for entities that largely, or totally, self-supply is problematic. PJM explains that parties can easily evade such a provision through contracts with third parties. PJM also argues that the question about whether small load serving entities have the same incentive to exercise market power raises similar issues. PJM states that, due to the steep VRR curve, even small changes in cleared quantities can lead to large changes in the clearing price.

2. Intervenor Comments

179. The IMM recommends a self-supply MOPR exemption based on a demonstration that the self-supply resource was acquired under a competitive, non-discriminatory process. The IMM defines non-discriminatory, in this context, as permitting competition from all capacity deliverable to the Locational Deliverability Area at issue.[98] The IMM recommends a settlement process to define the structure of such procurements, including the appropriate provisions to address the requirements of public power entities, which could include voluntary auctions for longer-term capacity operated by PJM.

180. With respect to the New Jersey LCAPP initiative, the IMM argues that there is no evidence that New Jersey is short of capacity. The IMM acknowledges, however, that New Jersey has legitimate reliability concerns, including delays affecting the development of the Susquehanna-Roseland transmission line, the existence of the Hudson Unit No. 1 Reliability Must Run contract, state and federal environmental requirements, potential retirements, and siting issues for both resource and transmission facilities. The IMM argues that to address these concerns, New Jersey should act directly. The IMM notes, for example, that if New Jersey wants to retire older units for environmental reasons, it could take actions that directly produce that result. The IMM notes that when information relating to reduced capacity is incorporated into the capacity market, the economic fundamentals will change correspondingly and the market will address any resulting shortfall in capacity.

---

[98] Thus, under the IMM's standard, the New Jersey LCAPP initiative, which excludes existing generation from consideration, would be deemed discriminatory.

181. Finally, the IMM argues that the impact of self-supply does not depend on the portion of a load serving entities' load that is met by self-supply or by the size of the load serving entity. The IMM states that a small portion of load could affect the market price and that the impacts of self-supply do not depend on intent. The IMM asserts that, regardless of intent, in no instance would the exemption of self-supply not present the opportunity to exercise buyer market power.

182. AMP argues that subjecting self-supply to the MOPR overreaches and will over-mitigate by essentially eliminating the ability of load serving entities to self-supply all or a portion of their capacity needs. AMP also argues that the need to subject self supply to the MOPR was unsupported, given that there was no proof offered that any load serving entity has developed and bid a resource based on artificial cost determinations with the intent to suppress clearing prices. NRECA generally concurs, relying on its arguments raised on rehearing.[99]

183. EPSA notes that the FRR alternative is currently the subject of a PJM stakeholder review process and adds that it is willing to lend its support to possible revisions designed to make the FRR option more viable as an alternative to self-supply. EPSA notes, however, that there are fundamental, necessary features that must be retained to ensure the viability of the RPM construct and ensure long-term resource adequacy in the PJM region, including a minimum time period associated with the FRR election and the requirement that all capacity obligations be fully secured outside of RPM for all load in the area covered by the FRR plan. EPSA notes that an FRR entity should not be allowed to game the market or potentially distort market pricing by toggling between the FRR option (and obligation levels) and RPM participation.

184. EPSA agrees with the IMM's proposal that a viable alternative for load serving entities seeking to utilize self-supply as a long-term contracting strategy would be an allowance exempting these resources from the MOPR floor if they have been obtained through a competitive, non-discriminatory and transparent procurement process overseen

[99] NRECA argues, for example, that under the 2006 RPM Settlement, the MOPR appropriately recognized that self-supply must clear in the RPM auction regardless of price, given that entities engaging in self-supply have not based their capacity investment decisions on the outcome of the auction. NRECA adds that absent the grant of rehearing on this issue, investments in new long-term capacity will be inhibited while costs to consumers will rise. NRECA asserts that when an electric utility cooperative builds, or buys, capacity, it is not engaging in the short-term objective of market manipulation, or the exercise of buyer market power. NRECA adds that if prices do fall in the RPM base residual auction, based on the participation of self-supply, any such price drop is simply attributable to the natural, competitive effect that increased, legitimate supply represents.

by PJM. EPSA states, however, that for this approach to be feasible, clear and objective tariff criteria must be specified to ensure that there are no loopholes created to avoid mitigation. EPSA adds that the recent New Jersey LCAPP auction process, which excluded existing capacity and established other limiting parameters, would not qualify as an open, non-discriminatory competitive procurement process.

185. The Pennsylvania Commission argues that the creation of a blanket exemption from the MOPR for self-supply would undermine the purpose of the MOPR, opening the door for market manipulation. The Pennsylvania Commission adds that the asserted justification for this exemption, the need to attract new capacity in a way that RPM has failed to accomplish, is speculative.

186. The Pennsylvania Commission also takes issue with the alternatives proposed by Dr. Hogan and the IMM at the technical conference.[100] The Pennsylvania Commission argues that both approaches would involve significant changes to PJM's capacity market and fall outside of the scope of this proceeding. With respect to the Alternative Capacity Pricing Rule (ACPR) suggested by Dr. Hogan, the Pennsylvania Commission notes that this approach was rejected by the Commission, as to ISO-NE, in favor of a MOPR-like rule.[101] With respect to the IMM's self-supply exception proposal , the Pennsylvania Commission notes that such approach assumes that clear and objective criteria could be established to implement this standard. The Pennsylvania Commission asserts that, regardless, such a standard would be more complicated than PJM's proposal, and may unnecessarily restrict the options of load serving entities during their procurement process.

187. Hess urges the Commission to exempt self-supply from the MOPR and to permit load serving entities to satisfy their capacity requirements through bilateral arrangements and/or through their own capacity. Hess argues that the right to self-supply is central to both load serving entities and capacity developers. Hess states that self-supply is not only consistent with RPM's original design, but that the Commission has relied upon the options of self-supply and bilateral contracting to save the RPM structure from jurisdictional challenge.[102] Hess asserts that by effectively prohibiting self-supply by removing the financial hedge associated with bidding in the base residual auctions as a

---

[100] The IMM's proposal is summarized above. *See also* Initial Statement of William W. Hogan, on behalf of PSEG (recommending that PJM adopt a two-tiered alternative price rule).

[101] *ISO New England, Inc.*, 135 FERC ¶ 61,029 (2011).

[102] Hess Post-Technical Conference Comments at 5 citing *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079, at P 172 (2006).

price taker, PJM will, in effect, force load serving entities to satisfy their capacity obligations with only those capacity resources that RPM selects. Hess states that the result is the creation of jurisdictional issues and the placing of the Commission in the position of picking winners and losers in the capacity markets.

188. The Maryland Commission states that it is currently considering an RFP procedure requiring utilities in Maryland to enter into long term contracts with new resources as a way to assure the long-term reliability of the grid. The Maryland Commission notes that such an initiative may be required given that potential new entrants cannot rely on RPM revenue streams to obtain financing. The Maryland Commission states that Maryland may also be required to direct the development of new capacity for the purpose of developing renewable and technologically innovative resources.

189. The Maryland Commission argues that the FRR option is not a viable alternative for Maryland's regulated utilities because (i) it is incompatible with Maryland's retail choice paradigm; and (ii) the FRR's all or nothing construct potentially exposes load serving entities to risk of paying punitive FRR penalties for failing to comply with stringent requirements even in circumstances beyond their control. The Maryland Commission states that while it welcomes discussions with PJM regarding PJM's FRR proposals, the Commission should refrain from revising the FRR provision on rehearing. With respect to the IMM proposal, the Maryland Commission argues that the evidentiary record is not sufficiently developed to address these proposals on the merits on rehearing. The Maryland Commission argues that, regardless, these proposals are beyond the scope of this proceeding.

190. Shell argues that participation in both RPM and the FRR alternative (a proposal sponsored by Dominion) is untenable. Shell argues that flexible participation of this sort could not be reconciled with RPM's core principle, i.e., the pricing of capacity to reflect the cost of competitive new entry. Shell argues that, under Dominion's proposal, non-competitive, subsidized units would be allowed to suppress capacity clearing prices below the cost of new entry. Shell also argues that bidding capacity from non-competitive processes into the RPM without MOPR mitigation will suppress RPM prices below the cost of competitive new entry.

191. Joint Commenters argue that restoring the clearing assurance for self-supply is necessary to ensure that legitimate self-supply will be accepted to meet load serving entities' capacity obligations. In the alternative, Joint Commenters argue that PJM's compliance filing proposal (discussed below) should be accepted as a reasonable exceptions review process, subject to modification to allow for a multi-year review, with the ability to submit a zero sell offer. Joint Commenters argue that such a modification appropriately recognizes that the IMM would be required to consider all reasonable costs and revenues over a reasonable timeframe and that those whose offers pass the test can submit a zero bid.

192. Joint Commenters argue that neither the FRR alternative nor the proposals offered at the technical conference by the IMM and Dr. Hogan are viable. Joint Commenters argue that the FRR option is not a viable alternative for small load serving entities because: (i) the FRR option presents an all-or-nothing alternative; (ii) the penalties for non-compliance are high; and (iii) capacity investment is lumpy (i.e. there is a risk to a load serving entity that excess capacity in the early life of a resource will become stranded given the significant restriction under the FRR rules on a load serving entity's ability to sell that excess capacity into the RPM auctions). Joint Commenters argue that the IMM's proposed competitive procurement process lacks critical details, and is otherwise an intrusion into load serving entity investment decisions. Joint Commenters argue that Dr. Hogan's proposal to implement an alternative pricing rule should be rejected for the same reasons as those stated by the Commission in an ISO-NE proceeding in Docket No. ER10-787-000, *et al.*[103]

193. With respect to the incentive that a load serving entity self-supplying its capacity obligations may have to exercise buyer market power, Joint Commenters argue that this potential, to the extent it exists, depends on the magnitude of the load serving entity's net-short position relative to the size of the LDA rather than the size of the load serving entity or the size of the load serving entity's net-short position.

194. P3 also addresses APPA's statements at the technical conference, regarding the recent planning decisions made by the Delaware Municipal Electric Corporation (DEMEC) prior to the last auction to self-build and its subsequent negotiations with the IMM and PJM regarding its justification of a bid that fell below the 90 percent CONE.[104] P3 argues that DEMEC suffered no injury other than the time it spent justifying its offer and that DEMEC experienced nothing different than the risks that other existing suppliers face.

195. P3 cautions against making substantial modifications to the existing FRR allowance, arguing that allowing partial FRR participation would allow suppliers to designate any uneconomic new entry as FRR resources while offering the remaining existing capacity into RPM. P3 also disagrees with the assertion that the Commission has prohibited states from procuring long-term resources needs. P3 argues that nothing in the MOPR prohibits a state from developing new resources. P3 asserts, however, that individual state decisions should not be permitted to distort the operation of an interstate market over which the Commission has jurisdiction. P3 argues that RPM has attracted

---

[103] Joint Commenters post-technical conference comments at 22-25 *citing ISO-New England, Inc.*, 135 FERC ¶ 61,029, at P 160 (2011).

[104] DEMEC ultimately received a bid cap that allowed it to clear the auction.

and retained sufficient capacity to meet or exceed reliability requirements and that the fundamentals of RPM are strong, as confirmed by the Brattle Report.[105]

196. P3 supports the IMM's proposal exempting from the MOPR capacity procured through an open, transparent, non-discriminatory and competitive procurement process. P3 states that PJM could administer any such process so that it can determine whether the procurement was non-discriminatory. P3 states that such a process must allow all capacity that is deliverable to the LDA to participate.

197. APPA urges the Commission to take action to ensure that needed new capacity is constructed, especially natural gas-fired resources. APPA notes the likely retirement of many coal-fired units, due to environmental regulations, and argues that, with the current MOPR in place, new gas-fired units will not be built.

198. PPANJ addresses the planned construction of a new power plant by the municipality of Vineland, New Jersey (a 57 MW CT unit). PPANJ states that, unless Vineland can be assured that its planned unit will clear in the RPM auction, it will be required to delay or cancel the unit, despite the municipality's need for capacity, because it cannot pass through to its customers the cost of paying for both RPM capacity and a new unit that may be stranded.

199. The New Jersey Board argues that self-supply is consistent with the principles of competitive procurement of capacity and is an effective mechanism for hedging against and mitigating seller market power. The New Jersey Board argues that the April 12 Order's ruling on self-supply, if not reversed, will discourage long-term resource planning by increasing the likelihood that new gas generation, in LDAs with high market concentration ratios, will not clear in the RPM auction.

200. The New Jersey Board notes that there has been little or no new capacity added to New Jersey's infrastructure and that prices are now higher and more volatile than before. The New Jersey Board argues that this failure to induce entry exposes New Jersey consumers to reliability risks. The New Jersey Board notes that new entry is not occurring in constrained LDAs where capacity prices are the highest.

201. The New Jersey Board states that it would support the IMM's proposal for exempting competitive and non-discriminatory capacity procurement processes, with a modification providing that long-term auctions for capacity deliverable to constrained local markets, or physically located within constrained markets, require the selection of

[105] *See* Second Performance Assessment and CONE Study, prepared for PJM Interconnection, L.L.C. by The Brattle Group (August 18, 2011); Brattle Report Second Performance Assessment of PJM Reliability Pricing Model (August 26, 2011).

offers that reduce structural market power within the constrained local market. The New Jersey Board suggests using the HHI metric to assess the effects of individual offers on structural local market power. The New Jersey Board argues that this proposal, as modified, would help redress the present failures of RPM and would ameliorate structural market power.

202. The New Jersey Board states that Dr. Hogan's suggestion that PJM adopt a two-tiered alternative price rule has already been considered and rejected by the Commission.[106] The New Jersey Board agrees with the Commission's prior conclusions regarding this proposal, including its finding that the requisite purchase of excess capacity under such a scheme is unjust and unreasonable. While acknowledging that the amount of excess capacity would differ in PJM, due to PJM's sloped demand curve, the New Jersey Board argues that excess procurement would nevertheless occur to the extent that state-sponsored capacity clears the auction.

203. Finally, the New Jersey Board argues that undue reliance on the FRR Alternative may have unintended consequences. The New Jersey Board asserts that if load serving entities and states decide that FRR is the best option, the proliferation of FRR service areas could reduce the auction clearing price and accelerate capacity retirements.

D. Commission Determination

204. For the reasons discussed below, and upon our further review of the record, as supplemented, we deny rehearing of the April 12 Order with respect to the general applicability of the MOPR to new resources designated as self-supply. In response to the many proposals at the technical conference regarding methods for handling self-supply short of an outright exemption, however, we find that the unit-specific review process PJM has proposed in its compliance filing is the most appropriate means of addressing this issue.

205. As a threshold matter, we reaffirm the Commission's finding in the April 12 Order that a blanket, across-the-board MOPR exemption for resources designated as self-supply would allow for an unacceptable opportunity to exercise buyer market power and thus could inhibit competitive investment. For a competitive market like RPM to function as intended, i.e., to ensure that capacity prices will elicit new entry when new capacity is needed, offers submitted into PJM's capacity auctions must accurately reflect avoidable net costs.[107] New resources designated as self-supply, however, may not generally have

---

[106] *ISO New England, Inc.*, 135 FERC ¶ 61,029 (2011).

[107] *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, at P 165 (2007) (Settlement Rehearing Order).

the incentive to bid their true avoidable net costs into PJM's capacity auctions. If loads purchased capacity from the auction in addition to their self supply resource, they would have an incentive to bid in their self-supply in a manner that would lower the prices paid for capacity in the auction.[108] Moreover, the Commission originally accepted the MOPR provision as "a reasonable method of assuring that net buyers [will] not exercise monopsony power by seeking to lower prices *through self-supply*."[109] Providing a blanket exemption for resources designated as self-supply would therefore directly contradict this precedent and the very basis upon which the Commission approved the MOPR. Accordingly, we deny rehearing of the April 12 Order insofar as parties seek such a blanket exemption.

206. We also reject the New Jersey Rate Counsel argument that the Commission lacks jurisdiction to subject new self-supply to a mitigated price determination that may prevent the resource from being used to satisfy a load serving entity's capacity. As pointed out with respect to the state exemption, the Commission is not infringing on the sovereignty of the state, but is merely regulating the wholesale prices charged in the capacity market. Load serving entities are free to contract with any generator they choose to supply power. The MOPR affects only the price that such a generator will be permitted to bid into the capacity market, which may affect the ultimate wholesale price to be paid to all resources, including generation, demand response, and energy efficiency.

207. We deny NRECA's request that a rebuttable presumption should apply whereby a self-supply offer will be presumed competitive unless the IMM or PJM demonstrate otherwise. The very purpose of the conduct screen, which is already discounted at 10 percent of the estimated Net CONE, is to determine the point at which a sell offer is presumptively economic. When a sell offer falls below that pre-determined threshold, the presumption is therefore that the offer may not be competitive. Furthermore, the party making the sell offer is in the better position to demonstrate the reasonableness of its offer. We are therefore not persuaded by NRECA's assertion that the burden to demonstrate that a below-threshold offer is or is not economic should fall on PJM or the IMM.

---

[108] *See id.* P 165, *citing FCM Order, Devon Power LLC*, 115 FERC ¶ 61,340 at P 113 (2006) ("New resources that are under contract to load may have no interest in compensatory auction prices because their revenues have already been determined by contract. And when loads own new resources, they may have an interest in depressing the auction price, since doing so could reduce the prices they must pay for existing capacity procured in the auction.").

[109] *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 103 (2006) (emphasis added).

208. However, we agree with the position taken by petitioners, on rehearing, and supported by PJM in its post-technical conference comments (and in its compliance filing), that the purpose and function of the MOPR is not to unreasonably impede the efforts of resources choosing to procure or build capacity under long-standing business models. We agree with PJM that certain advantages associated with long-standing and well-recognized business models should not be deemed automatically suspect (or summarily barred) when determining whether a particular sell offer accurately reflects a resource's net costs. As a result, we considered the various proposals made to accommodate these considerations.

209. As discussed below, we find that PJM's proposal for consideration of unit-specific factors on a case-by-case basis is just and reasonable, and we will accept that approach. While this process will not guarantee that all resources designated as self-supply will clear in the auction, we find that it appropriately balances the need to protect against uneconomic entry while also mitigating parties' concerns about having to pay twice for capacity as a result of failing to clear in RPM. Such a process is addressed below in the context of PJM's compliance filing proposal, and thus requests for rehearing pertaining to the details of how PJM's unit-specific review process will function are discussed therein.

210. We are not persuaded to adopt the IMM's proposal to grant a self-supply MOPR exemption to resources that have been acquired under a competitive, non-discriminatory process. Such a process would not prevent a resource from acquiring a discriminatory subsidy prior to the non-discriminatory process, thereby allowing a non-competitively low offer price into an RPM auction. For example, in advance of a non-discriminatory procurement conducted by a load serving entity, a resource could obtain a contract through a state-sponsored program that provides for a subsidy payment on condition that the resource be accepted in the subsequent load serving entity's non-discriminatory process. Such a resource could then have the incentive and ability to submit an artificially low offer price in the load serving entity's non-discriminatory procurement process. Having been selected in the load serving entity's non-discriminatory procurement process, the resource would be allowed to self-supply into an RPM auction without being subject to a MOPR offer floor, thereby exercising buyer market power and suppressing the RPM auction price.

V. <u>Compliance Filing</u>

211. On May 12, 2011, PJM submitted a compliance filing in response to the April 12 Order. The April 12 Order required PJM to, among other things, propose tariff revisions that would allow for the IMM and PJM to review unit-specific cost justifications for sell offers that would not clear the MOPR conduct screen. For the reasons discussed below, we accept, in part, and reject, in part, PJM's compliance filing. We also require PJM to submit an additional compliance filing within 30 days of the date of this order.

A. PJM's Proposed Revisions

212. PJM states it has complied with the April 12 Order's requirement obligating PJM to submit tariff revisions authorizing the IMM and PJM to review cost justifications submitted by resources whose sell offers have been mitigated.[110] PJM states that it has also complied with the requirement that its tariff identify the information that will be considered as part of this review process. PJM states that, consistent with the April 12 Order, a sell offer falling below the MOPR screen will nonetheless be permissible if it is shown that the offer is consistent with the competitive, cost-based, fixed, nominal levelized, net cost of new entry were the resource to rely solely on revenues from PJM-administered markets.

213. PJM also proposes to clarify that a sell offer below the MOPR screen can be justified based on competitive cost advantages relative to the costs estimated for the MOPR screen, including costs resulting from the capacity market seller's business model, financial condition, tax status, access to capital or other similar conditions affecting the applicant's costs. PJM states that, in addition (or in the alternative), offers below the MOPR screen can be justified based on net revenues that are reasonably demonstrated, under the MOPR, to be higher than estimated for the MOPR screen. PJM notes that the review process will place the burden of demonstrating the appropriateness of cost advantages and revenues on the seller, and the reviewing entities (i.e. the IMM and PJM) will be alert to claimed cost savings or revenue sources that appear "irregular or anomalous, that do not reflect arm's-length transactions, or that are not in the ordinary course of the seller's business."[111]

---

[110] April 12 Order, 135 FERC ¶ 61,022 at P 121.

[111] *See* proposed PJM OATT, section 5.14(h)(5)(iii):

> A Sell Offer evaluated hereunder shall be permitted if the information provided reasonably demonstrates that the Sell Offer's competitive, cost-based, fixed, nominal levelized, net cost of new entry is below the minimum offer level prescribed by subsection (4), based on competitive cost advantages relative to the costs estimated for subsection (4), including, without limitation, competitive cost advantages resulting from the Capacity Market Seller's business model, financial condition, tax status, access to capital or other similar conditions affecting the applicant's costs, or based on net revenues that are reasonably demonstrated hereunder to be higher than estimated for subsection (4). Capacity Market Sellers shall be asked to demonstrate that claimed cost advantages or sources of net revenue that are irregular or anomalous, that do not reflect arm's-length transactions, or that

(continued…)

214. PJM states that, to implement these requirements, it is proposing to revise its OATT at Attachment DD, Section 5.14(h)(5) to allow a capacity market seller to request a MOPR exception up to 60 days before the auction in which it seeks to submit its sell offer. PJM states that this proposed time allowance corresponds to the current deadline for sellers to provide data to the IMM to support their proposed offer ceilings. PJM states, however, that for those sellers contemplating new entry who may wish to obtain assurance on their contemplated sell offers on a more expedited basis, an exception request may be submitted even before the minimum offer level is established under the MOPR for a delivery year. PJM also proposes to clarify, in its tariff, that if a seller submits an early request and PJM subsequently announces a minimum offer level for the delivery year that is lower than the seller's contemplated offer, then its offer will be permitted and the seller will need no exception.

215. PJM states that the seller will initiate the review process by submitting its request simultaneously to both PJM and the IMM. PJM states that the IMM will be required to provide its findings both to PJM and the seller within 30 days of receipt of the request. PJM adds that if the seller is adversely affected by the IMM's findings, it may request review by PJM, and that PJM may also elect to review the IMM's on its own initiative. PJM states that it will be required to provide its determination no later than 45 days after receipt of the request.

216. With respect to required information, PJM states that a seller, in its review request, must include documentation to support the fixed development, construction, operation, and maintenance costs of the planned resource, as well as estimates of offsetting net revenues.[112] PJM states that this information generally tracks the information included in

---

> are not in the ordinary course of the Capacity Market Seller's business are consistent with the standards of this subsection. Failure to adequately support such costs or revenues so as to enable [PJM] to make the determination required in this section will result in denial of an exception hereunder by [PJM.].

[112] PJM states that supporting documentation for project costs may include, as applicable and available: (i) a complete project description; (ii) environmental permits; (iii) vendor quotes for plant or equipment; (iv) evidence of actual costs of recent comparable projects; (v) bases for electric and gas interconnection costs and any cost contingencies; (vi) bases and support for property taxes, insurance, operations and maintenance contractor costs, and other fixed operating and maintenance and administrative or general costs; (vii) financing documents for construction-period and permanent financing or evidence of recent debt costs of the seller for comparable investments; (viii) the bases and support for the claimed capitalization ratio, rate of return, cost-recovery period, inflation rate, or other parameters used in financial

(continued…)

PJM's submissions to the Commission supporting its gross cost of new entry calculations both for the RPM demand curve and the MOPR and the MOPR exception request submitted by West Deptford Energy, LLC in Docket No. ER11-2936-000. PJM states, however, that a seller is not required to comply with this checklist, provided that the seller's submissions are adequately supported. With respect to the relevant time period a seller must use to make its showing, PJM proposes "a reasonable time period identified by the seller."

217. In addition to cost verification, PJM states that a review request must identify all revenue sources relied upon in the sell offer to offset the claimed fixed costs. PJM states that consistent with the April 12 Order's assurance that rate-base, or other self-supply new entry projects, are permissible, so long as they show that the project is viable under a competitive revenue scenario, sellers will be required to demonstrate that such offsetting revenues are consistent over a reasonable time period identified by the seller, with the standard prescribed by the Commission for review of MOPR exceptions.[113]

218. PJM states that its compliance filing also responds to the April 12 Order's requirement that the MOPR apply until such time as a resource demonstrates that its capacity is needed by the market, at a price near its full entry cost, by clearing in the RPM auction at an offer price near its full cost of entry.[114] PJM states that, as directed by the April 12 Order, it has deleted the language of section 5.14(h)(4) that applies the MOPR to offers based on a planned resource "up to and including the second successive Base Residual Auction in which such resource first clears." PJM states that it has replaced this language with new language applying the MOPR to a resource in the auctions for delivery year in which it first qualifies as a planned resource and in the auctions for "any subsequent Delivery Year until the offer first clears an RPM Auction."

219. PJM states that it has also complied with the April 12 Order's requirement that the MOPR apply to both the base residual auction and in PJM's incremental auctions.[115]

---

modeling; and (ix) identification and support for any sunk costs that the capacity market seller has reflected as a reduction to its sell offer.

[113] PJM notes that such demonstration may include forecasts of competitive electricity prices in the PJM region based on well-defined models that include fully documented estimates of future fuel prices, variable operation and maintenance expenses, energy demand, emissions allowance prices, and expected environmental or energy policies that affect the seller's forecast of electricity prices in such region, employing input data from sources readily available to PJM and the IMM.

[114] April 12 Order, 135 FERC ¶ 61,022 at P 176.

[115] *Id*.

Specifically, PJM states that it has revised section 5.14(h)(4) of Attachment DD to replace references to "Base Residual Auction" with "RPM Auction," which is the previously defined term used to refer generically to a base residual auction or any of the incremental auction.

220. Finally, PJM states that it has complied with the April 12 Order's requirement that the state-policy exemption be eliminated. Specifically, PJM states that it has removed from Section 5.14(h)(5) the option for justifying a sell offer "based on new entry that is pursuant to a state-mandated requirement that furthers a specific legitimate state objective" and that "would not lead to artificially depressed capacity prices or directly and adversely impact FERC's ability to set just and reasonable rates" for relevant capacity sales.

B. Notice of Filing and Responsive Pleadings

221. Notice of PJM's compliance filing was published in the *Federal Register*, 76 Fed. Reg. 46,793 (2011), with interventions and protests due on or before June 2, 2011. Timely-filed motions to intervene were filed by the IMM and NRG Companies (NRG). Protests and comments were submitted by Hess Corporation (Hess), PJM Load Group,[116] the IMM, and P3. Answers were submitted on June 24, 2011, by PJM and Joint Parties,[117] and on July 11, 2011, by Hess.

1. Protests and Comments

222. PJM Load Group states PJM's self-supply pricing proposal provides a realistic analysis of sell offers that it can support. PJM Load Group notes that a number of generators receive revenues from sources outside the PJM markets that are legitimate and free from any attempt to depress prices. It further notes that the documentation PJM has proposed to require resources to provide appropriately includes documentation relating to vendor quotes for plant or equipment, actual costs for comparable projects, property taxes, insurance, financial modeling information, and revenue sources. With respect to revenues, PJM Load Group notes that there are legitimate payments, such as those attributable to long-term contracts outside of PJM's markets, that have nothing to do with the exercise of monopsony power and thus must be considered in the unit-specific exceptions process. PJM Load Group also argues that PJM's proposal is consistent with

---

[116] The PJM Load Group, on compliance, consists of: AMP; Blue Ridge; NCEMC; ODEC; PJMICC; Duquesne; and PPANJ.

[117] Comprised of the PJM Load Group compliance entities (non-inclusive of Duquesne and PPANJ) and Chambersburg.

the Commission's recent NYISO order holding that property tax abatement may be included in the calculation of Net CONE.[118]

223. PJM Load Group argues that PJM's proposal to retain a *sua sponte* right to review any IMM MOPR determination is beyond the scope of this compliance proceeding and should be rejected.[119] PJM Load Group also seeks clarification that PJM's proposal, specifying that a seller will receive a written determination no later than 45 days after the receipt of the request, refers to the receipt of the seller's submittal to the IMM and PJM, such that the 45-day window includes the 30-days allowed for the IMM's review plus the 15-day supplemental review by PJM.

224. The IMM argues PJM's self-supply pricing proposal fails to comply with the April 12 Order's requirement obligating a resource, in a review proceeding, to demonstrate the economic viability of its sell offer based on revenues from PJM's markets. The IMM argues that consideration of the non-PJM market factors proposed by PJM lacks merit and introduces subjective and inconsistent standards of review.[120] P3 and Hess agree that PJM's unit-specific cost justification standard fails to comply with the April 12 Order. P3 adds that PJM's proposal also relies on ambiguous terms that would require clarification (e.g., "long-term power supply contracts," "business model," "financial condition," and "tax status"). Hess asserts that the proposed tariff language fails to state with sufficient specificity what PJM market revenue streams will be considered in connection with a sell offer. Hess requests that PJM's tariff be required to specify that, if a capacity market seller is making a transmission investment that will result in any financial transmission rights, or auction revenue rights, PJM will consider a reasonable forecast of the associated revenues.

225. P3 also argues that PJM's proposed tariff language fails to make clear that the Net CONE setting the offer-price floor for a proposed new resource will be the Net CONE applicable for the relevant RPM auction delivery year. P3 asserts that the offer price of the unit itself must remain indicative of the class asset or unit costs for the relevant delivery year until it clears. P3 adds that PJM's proposed tariff language could

---

[118] *See New York Independent System Operator, Inc.*, 135 FERC ¶ 61,170 (2011).

[119] The IMM and Hess also object to PJM's proposal to retain the right to review the IMM's MOPR determinations.

[120] The IMM proposes, instead, the application of a "no-subsidy off-ramp," which would grant an exemption to any resource demonstrating that its self-supply was acquired under a competitive and non-discriminatory procurement process. A procurement process would be discriminatory if, for example, it accepted offers solely from new units and not from existing units.

be read to permit uneconomic entry into the market without the MOPR applying in the manner envisioned by the April 12 Order. Specifically, P3 states that there is a class of resources beyond "Planned Generation Capacity Resources" to which the MOPR should apply, and yet the proposed tariff language suggests that the MOPR only apply to Planned Generation Capacity Resources. Finally, P3 argues that PJM's proposed tariff revisions fail to immediately apply the MOPR to new-entry offers in incremental auctions, as well as offers in base residual auctions, as directed by the April 12 Order. P3 notes that, under PJM's proposal, the MOPR would apply only to those incremental auctions associated with the 2014-15 delivery year and beyond, ignoring the incremental auctions for the next two delivery years.

226. Hess argues that some of the proposed documentation PJM proposes to require sellers to provide is inappropriate or inconsistent with the April 12 Order. Hess notes, for example, that evidence of actual costs of recent comparable projects is not appropriate support for a project's costs when determining whether a project should be exempt from the MOPR; preferably, if the seller has an actual signed vendor contract, that should be used as support for the project's costs.[121]

227. Hess further argues that PJM's proposal to more fully explain the unit-specific determination process in the PJM Manuals, as opposed to its Tariff, is not compliant with the April 12 Order. Hess requests tariff language stating that non-speculative headroom payments that would reduce electric interconnection costs will be considered in analyzing a project's unit-specific Net CONE. In addition, Hess requests tariff language stating that sellers seeking an exemption must provide documentation demonstrating gas interconnection, transportation, and delivery charges or costs.

228. Hess also states that, rather than requiring that an exemption request simply be denied if a seller does not provide adequate information to support a cost or revenue item, the consequence should be that PJM will not consider that particular item in making the exemption determination. Hess argues that PJM and the IMM are not in the position of judging a seller's intent without objective basis for doing so. Hess also requests that the Commission require PJM to modify its phrase requiring "any additional supporting information requested by [PJM] or the [IMM] to evaluate the Sell Offer," to add the

[121] Hess explains that allowing "comparable" project costs opens the door to gaming based on projects that procured major equipment when the market was "softer." Further, Hess argues, if a developer does not have a signed contract or firm quote from a vendor, it should be precluded from obtaining a MOPR exemption. Specifically, Hess states, "evidence of actual costs of recent comparable projects" should be deleted from the proposed tariff language.

modifier “reasonably,” so that the phrase reads: “any additional supporting information *reasonably* requested by [PJM] or the [IMM] to evaluate the Sell Offer.”

229. Finally, Hess argues that consideration of financing costs and capital structure are open to a variety of inventive transaction structures and non-market arrangements, including affiliate transactions, which can create the erroneous impression that a project is more economic that it is. Hess therefore supports the use of reference unit finance structure (capital structure, cost of debt, and return on equity) rather than allowing project developers to put forth their individual financing structures.

2. Answers

230. As noted above, answers to protests were submitted on June 24, 2011, by PJM and Joint Parties, and on July 11, 2011, by Hess. PJM, in its answer, responds to the IMM’s proposal requesting that PJM’s compliance tariff changes expressly set forth the prospect of an IMM filing with the Commission in the event that the IMM identifies a market power issue with an offer that is submitted by a participant and accepted by PJM. PJM argues that the IMM’s proposal for a mandatory IMM filing (and the possible delay of the associated RPM auction) are beyond the scope of this compliance proceeding. PJM notes that the April 12 Order states only that “if the IMM’s findings are adverse to [the] interests” of the market seller seeking a MOPR exception, then the seller should have an opportunity to “receive a determination from PJM.”[122] PJM adds that, regardless, the tariff requirement proposed by the IMM is unnecessary, given that the tariff already provides for IMM referrals to the Commission when the IMM has evidence of possible exercises of market power or market rule violations.[123]

231. PJM also responds to the IMM’s proposal to eliminate clear deadlines for the IMM and PJM action on a MOPR exception request. PJM argues that its proposed deadlines allow a seller that has submitted its request in sufficient time, prior to the associated RPM auction, to receive a determination well in advance of the auction.

232. PJM also challenges the IMM’s suggestion that PJM not be permitted to review the IMM’s findings on a MOPR exception request in their entirety. PJM argues that the April 12 Order did not define any broader role for the IMM, other than providing input to the MOPR exception process under the explicit Tariff standard that the Commission ordered and PJM adopted; nor did the Commission say that PJM should review only some IMM determinations, while the Commission reviews other IMM findings. PJM states that the Commission should reject the IMM’s proposed tariff language.

[122] April 12 Order, 135 FERC ¶ 61,022 at P 121.

[123] *See* PJM OATT at Attachment M, Section IV.1.1.

233. PJM argues that, contrary to the argument of the IMM, Hess, and PJM Load Group, its compliance filing correctly reflects its responsibility for determining whether sell offers are permissible under its tariff. PJM further states that its compliance filing correctly interprets the intent of the April 12 Order as it relates to Order No. 719.[124] Specifically, PJM states that, in Order No. 719, the Commission established that RTOs are responsible for tariff administration, including prospective mitigation; that market monitors are not properly assigned that function; and that while RTOs may use their market monitors to provide inputs to perspective mitigation, Order No. 719 requires that the RTO make the final determination regarding offers and rates.

234. Additionally, PJM asserts that its compliance filing reflects the appropriate governing standard required by the April 12 Order and properly codifies additional guidance in the tariff to provide greater certainty to market participants. First, PJM states that its compliance filing adopts, verbatim, from the April 12 Order, the governing standard by which MOPR exceptions will be evaluated.[125] Second, PJM argues that the additional guidance included in PJM's compliance tariff revisions does not alter this standard, as alleged by the IMM, P3 and Hess. PJM argues that the additional guidance is consistent with the Commission's overarching standard and benefits sellers and other stakeholders by providing further explanation of permissible costs and revenues.

235. PJM further states that its compliance filing properly describes the revenue information that can be submitted in support of a MOPR exception request. PJM contends that Hess, in its argument that new entry project sell offers may rely only on PJM market revenues, misreads both the April 12 Order and PJM's compliance filing. PJM states that the April 12 Order requires that the seller show that revenues from other sources are "consistent with" those its project would receive under competitive conditions in the PJM region.

236. In response to P3's contention that the MOPR should be applied to the incremental auctions for delivery years preceding that addressed in the recent base residual auction. PJM argues that its compliance filing reasonably applies the revised MOPR to the incremental auctions beginning with the delivery year for which the revised MOPR is applied to the base residual auction.

---

[124] *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 at P 375, *et seq.* (2008) (Order No. 719), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 (2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

[125] April 12 Order, 135 FERC ¶ 61,022 at P 122.

237. PJM also disagrees with Hess' argument that, rather than requiring the denial of an exemption request, if a seller does not provide adequate information to support a cost or revenue item, the consequence should be that PJM will not consider that particular item in making the exemption determination. PJM responds that sellers will still have recourse with the Commission to challenge any adverse finding by PJM and/or the IMM. PJM adds that the Commission is in the proper position to assess whether a novel approach should be permitted. PJM further disagrees with Hess' idea that any costs or revenues should be allowed so long as there is documentation to support them. PJM argues that documentation is not enough; instead, the seller needs to show that the offer does not rely on an uncompetitive subsidy, cost reduction, or revenue guarantee.

238. Joint Parties, in its answer, argue that PJM's proposed unit-specific review process complies with the April 12 Order. In addition, Joint Parties characterize as inappropriate the IMM's proposal to require a "competitive and non-discriminatory" procurement process as a prerequisite to a MOPR exception and P3's proposed "no-subsidy off ramp." Joint Parties argue that these proposals are beyond the scope of this compliance proceeding.

239. Hess, in its answer, renews its argument that the applicable PJM reference unit capital structure and cost of debt should be used in making MOPR exemption determinations. Hess asserts that PJM should be required to use a reference unit capital structure and cost of capital to avoid the influence of out-of-market revenues or cost recovery from captive customers. Hess further argues that the use of a reference unit financing structure is consistent with the purpose of the buyer side mitigation rules to prevent buyers from crashing capacity prices below competitive levels. Hess requests that PJM be required to modify its tariff to provide the applicable reference unit financing structure to be used, rather than relying on developers to submit a unit-specific financing structure that can be gamed or reflect the same out-of-market compensation the Commission refused to use for revenue in exemption determinations.

C. **Procedural Matters**

240. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceedings in which these interventions were filed. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest and an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed by PJM, Joint Parties and Hess, because they have provided information that assisted us in our decision-making process.

D. Commission Determination

241. As discussed below, PJM's compliance filing is accepted in part and rejected in part. PJM is directed to make a further compliance filing within thirty days of the date of this order.

1. Criteria and Procedures Applicable to the Unit-Specific Review Process

242. We find that PJM's compliance filing proposal for a unit-specific review process appropriately addresses concerns from load serving entities developing resources through arrangements outside of RPM. As PJM notes, and as stated above, the MOPR was not intended to change the long-standing business models parties use to support investment in specific capacity procurement projects. We agree with PJM that its proposal will accommodate reasonable estimates of the costs and revenues of specific projects and will recognize business practices that may vary from the model embedded in the MOPR's CONE estimate.

243. Some intervenors object to PJM's proposal to permit certain cost advantages or revenues that occur in the ordinary course of a market participant's business—but which are not available to the benchmark unit—to be reflected in the resource's bid. P3 and the IMM, for example, argue that these proposed allowances are inconsistent with the April 12 Order's directive requiring that sell offers be consistent with the competitive, cost-based cost of new entry if the resource were to rely solely on revenues from PJM-administered markets.

244. We reject these arguments. The April 12 Order required sell offers to be "consistent with" the competitive, cost-based cost of new entry were the resource to rely on PJM market revenues; it did not require that such offers be "equal to" that standard or dictate that no cost advantages or revenues outside of the PJM markets can be included in a sell offer. We find that PJM's proposed tariff language appropriately recognizes varying long-standing business structures and practices while also protecting against attempts to exercise buyer market power.

245. Another concern raised by intervenors with respect to PJM's May 12 Compliance Filing is that it injects substantial subjectivity into the unit-specific review process. Protesters argue that the proposed tariff changes grant PJM and/or the IMM too much discretion in assessing whether "competitive cost advantages" are legitimate and determining whether there are "irregular or anomalous" cost advantages or sources of revenue that "do not reflect arm's-length transactions, or that are not in ordinary course of [business]." Decisions based on these considerations will obviously involve the exercise of judgment and discretion on the part of the IMM and PJM. We find, however, that while such discretion should be minimized to the extent possible, some amount of discretion is unavoidable and perhaps even necessary when making the types of

determinations proposed by PJM in its compliance filing. We agree with PJM that the guidance it provides on this process, including its plan to evaluate whether a subsidy, grant, or revenue is of the type customarily enjoyed by the type of seller at issue and whether the cost or revenue item pre-existed RPM, provides a more objective standard than evaluating whether a cost or revenue is simply "competitive."

246. The IMM also protests PJM's proposal to have sell offers sent simultaneously to both PJM and the IMM for review, arguing that this requirement contradicts the April 12 Order's clear direction that the IMM reviews the sell offers first. We do not find this argument persuasive. PJM's compliance filing merely proposes that the seller seeking a unit-specific review send its offer documentation to both PJM and the IMM so that, in the event the IMM's finding is adverse to the seller's interests and it cares to appeal the finding to PJM, PJM will already be familiar with the documentation and can carry out its duties expeditiously. We find this proposal to be reasonable and consistent with the April 12 Order. We also find reasonable PJM's proposal to allow itself to elect to review the IMM's findings on its own initiative. As the administrator of its tariff, PJM is responsible for the integrity of the PJM markets, and thus we clarify that we did not intend in the April 12 Order to remove PJM's ability to carry out its duties.

247. The IMM argues that the compliance filing fails to explicitly set forth the Commission's potential involvement in the review process if called upon to settle disputes. The April 12 Order, however, did not require PJM to identify any role for the Commission. As we stated in the April 12 Order, dissatisfied parties possess their statutory rights under section 206 to seek relief from the Commission. PJM therefore does not need to propose tariff revisions detailing this statutory procedure.

248. Hess protests PJM's proposal to allow sellers to use evidence of actual costs of recent comparable projects when supporting its sell offer. It argues that allowing market participants to use "comparable" project costs to support their sell offers could lead to gaming because other projects could have involved procurement of major equipment when prices were lower. We do not find this argument persuasive. Allowing sellers the flexibility of using comparable project costs does not mean that the IMM or PJM has to ultimately accept such estimates as reasonable. A primary benefit of the unit-specific review is that it both allows for the seller to justify its bid based on its particular circumstances while also allowing the IMM and PJM to evaluate the reasonableness of each source of costs and revenues.

249. Hess states that it strongly supports the use of reference unit financing structure (capital structure, cost of debt, and return on equity) rather than allowing project developers to put forth their individual financing structures. The Commission rejects Hess' proposal to require PJM to adopt a reference unit financing structure as part of its unit-specific review process. Such a requirement would not allow PJM to recognize the

lower financing costs of sellers that are especially creditworthy or that have negotiated contracts that have enabled them to secure favorable credit terms.

250. Hess further argues that, rather than requiring that an exemption request simply be denied if a seller does not provide adequate information to support a cost or revenue item, the consequence should be that PJM will not consider that particular item in making the individual cost review. We reject this suggested change. PJM's proposal to require the seller to justify its cost items is just and reasonable.

251. We disagree with Hess' assertion that PJM should be required to include all details of the types of supporting documentation sellers can provide to justify their offers in the PJM OATT as opposed to PJM's proposal to include some information in its manuals. PJM has complied with the April 12 Order's conditional acceptance of its filing by proposing tariff revisions that allow the IMM and PJM to review unit-specific cost justifications. Providing additional guidance in its manuals does not render its filing non-compliant. Parties are free to supply to the IMM and PJM other information supporting their offers, including documentation demonstrating headroom payments that would reduce interconnection costs or other interconnection transportation and delivery costs. We will not require, however, that PJM mandate in its OATT that all sell offers seeking unit-specific review include this information, nor will we require that any and all guidance on the unit-specific review process be placed in the OATT.

252. We agree with Hess that PJM should limit its requests to reasonable information and will accept PJM's filing subject to the condition that the provision be revised to include "any additional, *reasonable* supporting information requested by [PJM] or the [IMM] to evaluate the Sell Offer" and require PJM to reflect this revision in its subsequent compliance filing to be submitted within 30 days of the date of this order.

253. Finally, we clarify, in response to PJM Load Group, that the 45-day time period in which PJM's proposed tariff language requires a determination from PJM on a unit-specific review request includes the 30 days the IMM has to review the offer and PJM's subsequent review, if the seller should choose to seek it. These deadlines will help provide reasonable certainty to market participants before the auction.

2. <u>Duration of Mitigation</u>

254. For the reasons discussed below, we find that PJM has not fully complied with the April 12 Order regarding PJM's duration of mitigation proposal. The Commission directed PJM to revise its tariff so that a resource would be subject to the MOPR offer floor until the resource clears one of the PJM capacity auctions at an offer price near its full cost of entry.[126] The Commission noted that PJM's original proposal, to apply the

[126] April 12 Order, 135 FERC ¶ 61,022 at P 174-178.

MOPR offer floor only to Planned Generation Capacity Resources (which are resources participating in the interconnection process), was not reasonable. Specifically, the Commission found that a new resource could escape the MOPR offer floor by completing the interconnection process, beginning to receive interconnection service, and thus losing its status as a Planned Generation Capacity Resource, without having ever cleared in an RPM auction.

255. In its compliance filing, PJM proposes to revise Attachment DD of its OATT, at Section 5.14(h)(4), to apply the MOPR offer floor to "a Planned Generation Capacity Resource submitted in an RPM Auction for the first Delivery Year in which such resource qualifies as a Planned Generation Capacity Resource, or submitted in any RPM Auction for that or any subsequent Delivery Year until the offer first clears an RPM Auction[.]"

256. PJM's proposed revision, however, does not comply with the April 12 Order, because it continues to limit the application of the MOPR offer floor to Planned Generation Capacity Resources. Under PJM's tariff and RAA, a resource will cease to be a Planned Generation Capacity Resource on the date Interconnection service commences.[127] Thus, a new resource could permanently escape the MOPR offer floor, for example, by completing construction and beginning to receive interconnection service (thereby ending its status as a Planned Generation Capacity Resource) prior to offering into an RPM auction. We also agree with P3 that the proposed tariff revisions fail to immediately apply the MOPR to new-entry offers in incremental auctions; instead, PJM proposes to apply the MOPR only to incremental auctions beginning with the 2014-15 delivery year. Accordingly, we direct PJM to submit a compliance filing, within 30 days of the date of this order, revising its tariff, as directed.

<u>The Commission orders</u>:

(A) Requests for rehearing and clarification of the April 12 Order are hereby granted, in part, and denied, in part, as discussed in the body of this order.

(B) PJM's compliance filing in hereby accepted, in part, and rejected, in part, as discussed in the body of this order.

---

[127] *See* RAA at Section 3.0.0 ("[A] Generation Capacity Resource shall cease to be considered a Planned Generation Capacity Resource as of the earlier of (i) the date that Interconnection Service commences as to such resource[.]").

(C) PJM is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.