UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, Homer City Generation, L.P., NRG Power Marketing LLC, GenOn Energy Management, LLC, Carroll County Energy LLC, C.P. Crane LLC, Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean Energy, LLC and Panda Power Generation Infrastructure Fund, LLC	Docket Nos.	EL16-49-000
v.		
PJM Interconnection, L.L.C.		
PJM Interconnection, L.L.C.		ER18-1314-000 ER18-1314-001
PJM Interconnection, L.L.C.		EL18-178-000 (Consolidated)

REQUEST FOR REHEARING
OF THE ILLINOIS COMMERCE COMMISSION

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission")[1] and Section 313 of the Federal Power Act ("FPA"),[2] the Illinois Commerce Commission ("ICC") hereby submits this request for rehearing of the Commission's *Order Rejecting Proposed Tariff Revisions, Granting in Part and Denying in Part*

[1] 18 C.F.R. § 385.713.
[2] 16 U.S.C. § 8251.

Complaint and Instituting Proceeding Under Section 206 of the FPA issued on June 29, 2018 ("June 29 Order")[3] in the above-captioned dockets.

On January 24, 2017, the ICC filed a Notice of Intervention in Docket No. EL16-49-000. On April 12, 2018, the ICC filed a Notice of Intervention in Docket No. ER18-1314-000. On July 9, 2018, the ICC filed a Notice of Intervention in Docket No. EL18-178-000. The ICC is, therefore, a party to this consolidated proceeding.

I. SUMMARY OF THE JUNE 29 ORDER

The June 29 Order addresses two related proceedings. A complaint by Calpine, *et al.* in Docket No. EL16-49, which argues that the minimum offer price rule ("MOPR") currently in PJM Interconnection, L.L.C's ("PJM") tariff does not address the impacts of out-of-market payments, and tariff revisions by PJM in Docket No. ER18-1314. PJM proposed either a two-stage annual capacity auction bifurcating price setting and quantity commitment, or expanding PJM's existing MOPR to mitigate capacity offers from both new and existing resources, subject to certain proposed exemptions.

Based on the combined records of the Calpine complaint proceeding and the PJM filing, the Commission found PJM's tariff to be unjust and unreasonable, rejected the changes proposed by Calpine and PJM and initiated an FPA Section 206 proceeding in Docket No. EL18-178-000[4] to address a suggested alternative approach in which PJM would: (1) modify its existing MOPR to apply to new and existing resources that receive out-of-market payments, regardless of resource type, but would include few to no exemptions; and (2) establish a fixed resource requirement option that would allow, on a resource-specific basis, resources receiving out-of-

[3] *Calpine Corporation, et al.*, 163 FERC ¶ 61,236 (2018).
[4] June 29 Order, at P 6.

market support to choose to be removed from the PJM capacity market, along with a commensurate amount of load, for some period of time.[5]

II. STATEMENT OF ERRORS

A. THE COMMISSION ERRED IN ARBITRARILY AND CAPRICIOUSLY FINDING THAT PJM'S EXISTING TARIFF IS UNJUST AND UNREASONABLE BEFORE HOLDING ANY HEARING AS REQUIRED BY THE FEDERAL POWER ACT, 16 USC 824e(a).

B. THE COMMISSION ERRED IN ARBITRARILY AND CAPRICIOUSLY FINDING THAT PJM'S EXISTING TARIFF IS UNJUST AND UNREASONABLE WITHOUT SUBSTANTIAL SUPPORTING EVIDENCE IN THE RECORD.

C. THE COMMISSION ERRED BY IMPROPERLY INTRUDING INTO EXCLUSIVE STATE JURISDICTION OVER GENERATION RESOURCES IN VIOLATION OF THE FEDERAL POWER ACT AND UNITED STATES SUPREME COURT PRECEDENT.

D. THE COMMISSION ERRED BY MISAPPLYING, MISSTATING AND MISCHARACTERIZING STATE LAW.

E. THE COMMISSION ERRED IN UNDULY DISCRIMINATING AGAINST CERTAIN RESOURCES, STATES AND CUSTOMERS, AND DEMONSTRATING UNDUE PREFERENCE TO OTHERS.

F. THE COMMISSION ERRED IN ITS UNSUBSTANTIATED ASSERTION THAT THE ILLINOIS ZEC LAW, AND OTHERS LIKE IT, RESULTS IN IMPROPER COST SHIFTS.

G. THE COMMISSION ERRED BY PROPOSING A MOPR SOLUTION THAT IS UNJUST AND UNREASONABLE, AND IS UNDULY DISCRIMINATORY AGAINST ILLINOIS AND OTHER SIMILARLY SITUATED STATES, IN VIOLATION OF THE FEDERAL POWER ACT AND IN A MANNER THAT IS ARBITRARY AND CAPRICIOUS.

[5] June 29 Order, at P 8.

H. THE COMMISSION ERRED IN FAILING TO DETERMINE THE JUST AND REASONABLE RATE AS IS REQUIRED BY THE FEDERAL POWER ACT, 16 USC 824e(a), AND BY ARBITRARILY PROPOSING A SOLUTION THAT WOULD UNDULY DISCRIMINATE AGAINST ILLINOIS AND PROVIDES AN UNREASONABLY SHORT TIME-FRAME FOR RESOLUTION.

I. THE COMMISSION ERRED IN FAILING TO RULE ON THE ICC'S MOTION TO DISMISS FILED IN DOCKET NO. ER18-1314-000.

J. THE COMMISSION ERRED IN FAILING TO RULE ON THE ICC'S MOTION TO STRIKE FILED IN DOCKET NO. ER18-1314-000.

K. THE COMMISSION ERRED IN FAILING TO RULE ON THE MOTION TO DISMISS FILED IN DOCKET NO. EL16-49-000.

III. ARGUMENT

A. The Commission Erred In Arbitrarily and Capriciously Finding That PJM's Existing Tariff Is Unjust And Unreasonable Before Holding Any Hearing as Required By the Federal Power Act, 16 USC 824e(a).

The Commission erred in arbitrarily and capriciously finding that PJM's existing tariff is unjust and unreasonable before holding any hearing as required by the FPA, 16 USC § 824e(a), and without substantial evidence in the record. The Commission found, 'based on the record," that "it has become necessary to address the price suppressive impact of resources receiving out-of-market support."[6] As Commissioner Glick correctly states, however, "the record is devoid of evidence that the states' exercise of their authority is actually interfering with the Commission's responsibility to ensure resource adequacy at just and reasonable rates."[7] The June 29 Order suffers from both procedural and substantive defects.

In its June 29 Order, the Commission consolidated two separate proceedings and relies on those records to justify its finding that the PJM tariff is unjust and unreasonable. Both of those records are procedurally faulty and substantively devoid of any support for the Commission's

[6] June 29 Order, at P 5.
[7] June 29 Order, Glick Dissent, at 1.

finding. As noted below in sections I, J and K, the Commission failed to rule on motions to dismiss in both Docket Nos. EL16-49 and ER18-1314 and the ICC motion to strike in Docket no. ER18-1314. This failure to rule on these procedural motions calls into question the validity of the records themselves, and no hearings were held before the Commission's arbitrary finding that PJM's tariff is unjust and unreasonable.

Indeed, without any explanation, the Commission states, "based on the combined records of the Calpine Complaint proceeding and the PJM section 205 filing, we find PJM's Tariff is unjust and unreasonable."[8] The allegations of price suppression are theoretical at best and have not been subject to cross examination at hearing. Even assuming that there were any evidence in those records to support the finding, doing so before any hearing is held is effectively taking administrative notice of both of those records. Judicial or administrative notice is an exception to the requirement that decisions be based solely upon *evidence adduced at a hearing*. In determining whether administrative notice should be taken of facts, courts will look to the Federal Rules of Evidence ("FRE").[9] FRE 201 specifies, among other things, the kinds of facts that may be judicially noticed. The court may judicially notice a fact that is *not subject to reasonable dispute*.[10] This is because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.[11] Courts reason that, "[n]otice is a way to establish the existence of facts without evidence."[12] In federal courts, notice may be taken of facts relating to the particular case, though no evidence is introduced, where the fact is "not subject to reasonable dispute," either because it is "generally known within the territorial

[8] June 29 Order, at P. 6.
[9] *See, Castillo–Villagra v. Immigration and Naturalization Service*, 972 F.2d 1017, 1026 (9th Cir. 1992) (*hereinafter*, "*Castillo*").
[10] *Id.*
[11] FRE 201, 28 U.S.C., Pub. L. 93-595 §1.
[12] *Castillo*, at 1026.

jurisdiction," or is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[13]

Federal Rule 201 also requires that "a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed."[14] Parties should have an opportunity to be heard and to respond to any testimony filed in this proceeding. The Commission erred in assuming those records, faulty to begin with, should be taken as factual evidence upon which to make such a finding. In *Transmission Agency of Northern California v. Sierra Pacific Power Company*,[15] the United States Court of Appeals recognized that the Commission will take judicial notice when the existence of a fact or opinion is **not in dispute,** nor are its contents. In that case, the Court permitted judicial notice of an administrative law judge's initial decision because the existence of the decision was not in dispute, nor were its contents. That is the more appropriate use of taking judicial notice of a fact or opinion not in dispute if that was indeed what the Commission had in mind here. Holding a paper hearing now, after the ruling, for the purpose of crafting a supposed solution, is not sufficient.

B. The Commission Erred in Arbitrarily and Capriciously Finding that PJM's Existing Tariff is Unjust and Unreasonable without Substantial Supporting Evidence in the Record.

As the applicant in Docket ER18-1314, PJM had the burden to provide empirical evidence to substantiate its Section 205 application[16] and show its proposal was just and reasonable. The Commission properly found that PJM failed to meet that burden. In this Section

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[13] Fed. R. Evid. 201(b); *See* 9 John Henry Wigmore, Evidence § 2571, at 731–32 (J. Chadbourn rev. 1981).
[14] *Id.*
[15] *Transmission Agency of Northern California v. Sierra Pacific Power Company*, 295 F.3d 918, 933, fn. 3 (9th Cir. 2002) (*citing* Federal Rules of Evidence 201(a), (b) (taking judicial notice of *Sierra Pacific Power Co*., 94 FERC 63,019 (2001)).
[16] 16 USC § 824d(e); s*ee*, *New England Power Co*., 49 FERC 61,129 (1989) (power company had burden of showing that proposed rates, terms, and conditions were just and reasonable).

206 proceeding, the Commission has a burden to show that its finding that the existing tariff is unjust and unreasonable is supported by substantial evidence in the record. It has not done so. There is no evidence that any state's public policy initiative is actually preventing or frustrating the formation of just and reasonable wholesale rates as the Commission asserts.[17] Theoretical conjecture is not sufficient to justify a finding that the PJM tariff is unjust and unreasonable.

The Commission refers to "compelling evidence" presented by PJM, Calpine, and other parties for its conclusion that out-of-market payments significantly affect PJM's capacity market clearing prices and the integrity of the resulting price signals that guide the orderly entry and exit of capacity resources.[18] Yet, neither PJM nor Calpine have identified a single actual incidence of a suppressed price offer leading to a suppressed auction-clearing price. Their theoretical allegations are sheer speculation, and the Commission should have seen through it. No party in either docket has provided any such specific example. If the amount of generation resources of concern has been increasing over recent years, as the Commission asserts,[19] and has reached the range of "thousands of megawatts (MWs)" as the Commission claims,[20] then it should be simple enough for PJM, and the Commission, to cite a specific instance of a suppressed price offer or a suppressed auction-clearing price. Given that neither PJM nor the Commission has been able to cite a single instance of price suppression, it is impossible to support the Commission's implication that price suppression is now *increasing.*

The Commission expresses concern that out-of-market payments result in price distortions that will compromise the capacity market's integrity and create significant investor

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[17] *See Motion to Dismiss and Protest of the Illinois Commerce Commission*, Docket No. ER18-1314, filed May 7, 2018, at 13.
[18] June 29 Order, at P 156.
[19] June 29 Order, at P 1.
[20] June 29 Order, at P 1.

uncertainty.[21] The "price distortions" that the Commission refers to are theoretical only. No party produced any evidence of any price distortion occurring in any RPM auction due to any state law, although resources receiving what PJM terms "material subsidies" have been participating in PJM capacity auctions for many years. PJM's April 9 Filing provided no relevant evidence and no testimony to establish that state policy revenue causes generators to submit lower offers in the PJM's capacity auction or that any resulting lower or zero-bid offers suppress the auction-clearing price. Calpine's complaint failed to specifically link any actual financial impact on PJM's auctions created by any actual state policy. Likewise, the June 29 Order failed to cite any specific instance where state policy revenues made available to generation resources outside of PJM markets resulted in any resource submitting an offer into any PJM capacity auction at a lower price or any actual price suppression. All told, no party produced any evidence of any price distortion occurring in any RPM auction due to state action. When the Commission states that, "Out-of-market payments, whether made or directed by a state, allow the supported resources to reduce the price of their offers into capacity auctions below the price at which they otherwise would offer absent the payments, <u>causing lower auction clearing prices</u>,"[22] the Commission draws an impermissible conclusion, assuming facts not in evidence.

As Commissioner Glick correctly recognized, the June 29 Order is not based on any economic fact, but rather relies on "theory" to justify the finding that PJM's tariff is unjust, unreasonable and unduly discriminatory.[23] The Commission asserts that certain public policies *may* affect capacity market prices and that those public policies *may* affect the "integrity" of

[21] June 29 Order, at P 150.
[22] June 29 Order, at P 2 (emphasis added).
[23] June 29 Order, Glick Dissent, at 10.

PJM's capacity market. But critically, no evidence of any actual effect has been provided. This theory of what could or may take place in some hypothetical future, assuming certain assumptions, is not factual evidence – much less substantial evidence in the record.

The Commission further fails to support its theoretical argument. The Commission states, "With each such subsidy, the market becomes less grounded in fundamental principles of supply and demand."[24] This statement is inaccurate. Referring to these legitimate state laws pejoratively as "subsidies" disrespects state legislative authority and mischaracterizes the nature of the statutes. RPM is not fully "grounded in fundamental principles of supply and demand" because PJM's variable resource requirement curve, which is the stand-in for demand, is a purely administratively determined construct. There is no revealed preference for a product known as "capacity" and no consumer driven demand. PJM's reliability pricing model is not a free "market" in the classical sense. Its objective is reliability and it uses an administrative mechanism leavened with some centrally planned market techniques to achieve that goal. The state laws targeted by the Commission in this case address consumer demand for basic environmental and public health needs that PJM's administratively determined demand curve does not capture. Additionally, state laws addressing environmental externalities address market failures -- instances in which fundamental principles of supply and demand do not produce socially optimal results. The Commission has not only failed to rely on evidence that any out-of-market payments stemming from state laws--what the Commission calls "subsidies"-- have affected any PJM auction in any way, it has also failed to provide support for its theoretical assertions.

[24] June 29 Order, at P 2.

Even if the Commission were to point to evidence supporting the conclusion that state policy revenues are causing price suppression in the PJM capacity markets, which it has not done, the PJM markets are exhibiting plentiful supply, low price and a significant amount of new entry. While Calpine and PJM argue that the PJM markets are on the verge of collapse, they have not offered any evidence to support such assertions. Indeed, the amount of existing capacity and number of new entrants in the PJM markets contradicts the Commission's theoretical findings and PJM and Calpine's speculative arguments, as well as the unsupported conclusions of the Commission regarding the integrity of wholesale capacity prices caused by some resources receiving out-of-PJM market revenues. PJM's most recent RPM auction produced a 22 percent reserve margin for the PJM footprint, clearing over 1,400 MWs of new generation capacity. A review of PJM's generator interconnection queue indicates that there are almost 66 thousand MWs of capacity under development in PJM.[25]

In contradiction to the Commission's conclusions, the evidence in the record shows that a more than adequate number of generation resources are consistently able to recover their costs, while receiving rational price signals from PJM markets. The evidence supporting the health of PJM's markets outweighs the speculative, unsupported arguments made by Calpine, PJM and the Commission regarding price suppression. The reason that no option discussed in PJM's stakeholder process received sufficient support to pass is because PJM did not provide information and evidence sufficient to convince stakeholders that any action is needed, or at least insufficient evidence to persuade them that taking no action would lead to a worse outcome than taking any action. The evidentiary record remains insufficient to support the Commission's

[25] Includes generator interconnection requests that are either active, partially in-service, under construction or in the engineering and procurement stage. https://www.pjm.com/planning/services-requests/interconnection-queues.aspx

statements and conclusions in this proceeding. With no evidence of actual price suppression, the Commission must vacate its decision finding PJM's current tariff unjust, unreasonable and unduly discriminatory.

C. The Commission Erred by Improperly Intruding Into Exclusive State Jurisdiction Over Generation Resources in violation of the Federal Power Act and United States Supreme Court Precedent.

Under the FPA, the states have exclusive jurisdiction over facilities used for the generation of electricity.[26] While the Commission has exclusive jurisdiction over the wholesale sale of electricity,[27] it has no jurisdiction over matters left to the states.[28] State laws that do not seek to impermissibly intrude upon the wholesale electricity market or abrogate a Commission mandated rate, properly fall within the jurisdiction reserved to the states and do not violate the Supremacy Clause.[29] With that clear delineation, the Commission may not now use the June 29 Order to work around the law to circumvent the intent of the Congress to maintain that separate jurisdiction.

The June 29 Order exceeds the Commission's authority in this regard and intrudes on the states' sovereign rights under the guise of protecting the "integrity and effectiveness" of PJM's capacity market from the threat of "out-of-market payments provided or required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources."[30] Although the Commission has jurisdiction over wholesale sales of electricity, as

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[26] 16 USC § 824(b).
[27] 16 USC § 824(a).
[28] *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016) ("*Hughes*") ("Nothing in this opinion should be read to foreclose [states] from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation.'").
[29] *Hughes* at 1299.
[30] June 29 Order, at P 1.

well as rates and practices affecting those wholesale sales, the states are vested with clear and exclusive jurisdiction over those generation facilities.

The Supreme Court precedent has also left to the states the authority over determination of the generation fuel mix. As PJM highlighted in its April 9 Filing, the U.S. Supreme Court's *Hughes*[31] decision declared that "states rightly may pursue 'various … measures … to encourage development of new or clean generation' or other vital public policy goals."[32] The Commission's premise that certain state clean energy laws result in price suppression crosses the clear jurisdictional boundary between the states and the Commission set forth in the FPA as well as the legal precedent clearly established by the Supreme Court.

D. The Commission Erred by Misapplying, Misstating and Mischaracterizing State Law.

In the opening sentence of the June 29 Order, the Commission states that PJM's capacity market has become "threatened by out-of-market payments provided or required by certain states <u>for the purpose of supporting the entry or continued operation of preferred generation resources…</u>"[33] This statement illustrates the Commission's fundamental misapplication, misstating and mischaracterization of the state RPS and ZES laws targeted by the Commission's Order, and Illinois' Zero Emission Standard law in particular. The ICC has repeatedly explained that Illinois' ZES statute clearly states its purpose. Specifically:

> The General Assembly therefore finds that it is necessary to establish and implement a zero emission standard, which will increase the State's reliance on zero emission energy through the procurement of zero emission credits from zero emission facilities, <u>in order to achieve the State's environmental objectives and</u>

[31] *Hughes*, 136 S. Ct. at 1292.
[32] PJM April 9 Filing, at 4.
[33] June 29 Order, at P 1 (emphasis added).

> reduce the adverse impact of emitted air pollutants on the health and welfare of the State's citizens.[34]

The purpose of Illinois' ZES statute is, as the statute states, to achieve environmental objectives to reduce emitted air pollutants and improve the health and welfare of Illinois' citizens. The ICC has repeatedly explained that the payment for one zero emission credit ("ZEC") is set equal to the social cost of carbon and is designed to compensate the environmental attributes associated with one megawatt hour of zero emitting nuclear generation and which beneficial environmental attributes are not currently valued in PJM's markets.[35] The Commission fails to acknowledge this fact or recognize the validity of the substance of the law itself, and instead imposes a fictitious and nefarious notion that it is an instrument of price suppression. In so doing, the Commission fails in its most basic role of overseeing wholesale markets being properly implemented, but it also improperly overreaches beyond its statutory authority into matters of exclusive state jurisdiction.

Despite the zero-value placed on these environmental attributes in PJM markets, they are clearly valuable to Illinois citizens who have elected, through their political process, to compensate these beneficial attributes so as to maintain or induce resources that reflect the attributes and produce the benefits these attributes provide. While the means by which Illinois achieves its public health and welfare objectives in this regard may involve "supporting the entry or continued operation of preferred generation resources," as the Commission described it,[36] the purpose of the ZES statute (and Illinois' RPS policies) is to obtain public health and welfare objectives. Consequently, contrary to the inaccurate statements in the June 29 Order, the

[34] P.A. 99–906, §§ 1–5 (eff. June 1, 2017) (emphasis added).
[35] *Id*.
[36] June 29 Order, at P 1.

revenues that provide compensation for the beneficial clean energy generation attributes are not "subsidies" handed out arbitrarily to support certain generators. Rather, these revenues are compensation for valuable generation resource attributes that would not otherwise be procured by PJM markets because those Commission-overseen, PJM-implemented wholesale markets fail to account for negative environmental externalities, or otherwise account for beneficial resource attributes (and are, therefore, flawed). The fault for this market flaw rests with the Commission and with PJM, yet the June 29 Order selectively punishes the State of Illinois, resource owners, and the electricity consumers that benefit from the ZES and RPS statutes.

E. The Commission Erred in Unduly Discriminating against Certain Resources, States and Customers, and Demonstrating Undue Preference to Others.

Instead of positively addressing the underlying issue driving state policy initiatives, the Commission over-rides the prerogative of the state and the preference of its citizenry for clean energy; going so far as to modify PJM's auction design to prevent the selection of the types of generation resources that consumers clearly want.

While PJM's current auction design fails to place any value on clean generation attributes valued by electricity consumers, it, at least, allows those resources the opportunity to clear and be part of the supply portfolio used to serve PJM load. The June 29 Order discriminates against clean generation and makes achieving that outcome more difficult, more costly, and less likely for clean resources to clear the capacity auction. The June 29 Order goes so far as to urge clean resources to retire so as to make room in PJM's capacity supply stack for emitting resources submitting higher price offers. Specifically, the Commission states, "[t]hese resources, which should consider retiring, based on their costs, are able to displace resources that can meet PJM's

capacity needs at a lower overall cost."[37] With this statement, the Commission improperly places its undue preference for emitting resources over and above resource with attributes preferred by consumers.

Absent immediate steps to correct PJM's capacity auction design to account for resource attributes valued by electricity consumers, the Commission must at least maintain the status quo until such steps can be taken. The path initiated by the June 29 Order will decimate the viability of the clean energy resources that electricity consumers prefer. The path of mitigation and exclusion initiated by the June 29 Order will make it more difficult, or impossible, for the Commission to eventually obtain a path of facilitation of competitive processes to procure a resource portfolio with the resource attributes desired by electricity consumers.

The Commission over-simplifies the electricity resource business by categorizing all resources as either "resources that receive out-of-market support"[38] or "competitive resources."[39] Non-PJM revenue streams available to generation (and demand response) resources include: sales of generator non-electric byproducts in an open market; proceeds from bilateral contract sales; encouragement for renewable resource development; revenue from sale of carbon allowances; compensation for zero-emission benefits; ratepayer contributions to demand-side resources; and revenue from retail rates subject to a state commission-approved public utility revenue requirement, amongst others. Assessing resources as either competitive or not-competitive based <u>only</u> on whether they receive sufficient revenue to cover their costs <u>from PJM markets</u>[40] is an overly narrow and flawed view of the electricity industry.

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[37] June 29 Order, at P 154.

[38] June 29 Order, at P 68. At P 158, the Commission refers to the two categories as "subsidized and unsubsidized resources."

[39] June 29 Order, at P 68.

[40] *See*, *e.g.*, June 29 Order, at P 63, "Capacity Repricing would then adjust the clearing price paid to all resources with a capacity commitment, including resources receiving Material Subsidies, <u>while excluding other competitive resources (i.e., resources not receiving out-of-market support)</u> that offered below the adjusted clearing price but

The Commission quotes PJM's statement that, "retaining or compelling the entry of resources that the market does not regard as economic, suppresses prices for resources the market does regard as economic."[41] The Commission further states that PJM's existing tariff, "fails to protect the integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market support to keep existing uneconomic resources in operation, or to support the uneconomic entry of new resources. . ."[42] However, PJM's, and the Commission's, implicit definition of "economic" fails to account for any beneficial resource attributes and treats all capacity megawatts, regardless of source, whether emitting or clean, as equivalent. By accepting this flawed capacity product definition, the Commission rejects electricity consumers' clearly expressed preferences and desires for a differentiated valuation of the attribute set for the resources in PJM's capacity portfolio.

The June 29 Order fails to address the inability of PJM's capacity market rules to select the least-cost resources that also possess the attributes that have been identified as beneficial by the states in the PJM region. By forcing resources with beneficial environmental attributes out of PJM's capacity market (via the MOPR) the June 29 Order thwarts state and consumer preferences, forcing them to take what PJM's flawed market design gives them. Such an outcome is not just and reasonable and is unduly discriminatory against Illinois in violation of the Federal Power Act. The Commission's undue discrimination against certain of these resources and undue preferences for others as described also clearly violates the FPA.[43]

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above the stage one price." (emphasis added). *See* also, June 29 Order, at P 100, "[T]he MOPR-Ex proposal would prevent some (but not all) resources that receive Material Subsidies from obtaining capacity commitments at the expense of competitive resources." (emphasis added).

[41] June 29 Order, at P 129.

[42] June 29 Order, at P 150.

[43] 16 USC §§ 824d (a) and (b).

F. The Commission Erred in its Unsubstantiated Assertion that the Illinois ZEC law, and others like it, Results in Improper Cost Shifts.

The ICC did not support either PJM's Capacity Repricing or MOPR-Ex proposals and the Commission was correct to reject both. The Commission is incorrect in stating that a state's public policy, such as that implemented in the Illinois ZEC law, would require loads in other states to "underwrite, through capacity payments, the generation preferences that other regulatory jurisdictions have elected to impose on their own constituents."[44] Under, PJM's current tariff, there is no such underwriting between states. The unjust and unreasonable part of Capacity Repricing is that it would improperly and unnecessarily raise capacity costs for customers in all PJM states. There are no cost shifts resulting from out of market payments that Illinois customers pay directly. The Commission has no evidence that demonstrates Illinois state law and policy choices result in such cost shifts. To suggest this is to suggest that every state law and policy choice does the same and again overreaches into the state jurisdictional realm of generation.

G. The Commission Erred by Proposing a MOPR Solution that is Unjust and Unreasonable, and is Unduly Discriminatory against Illinois and other Similarly Situated States, in Violation of the Federal Power Act and in a Manner that is Arbitrary and Capricious.

The Commission erred by proposing a MOPR solution that is unjust and unreasonable, and is unduly discriminatory against Illinois and other similarly situated states, in violation of the FPA and in a manner that is arbitrary and capricious. The Commission aims to address the alleged undue discrimination it found in PJM's MOPR-Ex proposal by recommending a MOPR "with few to no exemptions."[45] However, the Commission's MOPR solution fails on the same

[44] June 29 Order, at P 67.

[45] June 29 Order, at P 8. We note that the Commission refers in Paragraphs 158 and 159 to, "few or no "exceptions." The ICC assumes and requests clarification that the Commission intended to use the term

basis as PJM's proposed MOPR-Ex – it improperly targets resources that are not exercising market power. Outside its rightful purpose as a penalty for resource owners attempting to exercise market power through manipulative price offers, the MOPR fails to produce a just and reasonable outcome.

Traditional state rate-based resources that participate in PJM's RPM capacity auctions receive the entirety of their revenue requirement through a state policy based, out-of-PJM-market revenue stream. But the June 29 Order leaves the door open to exempting these state-funded resources from the Commission's proposed mitigation. On the other hand, the June 29 Order would target all resources receiving any REC or ZEC compensation for mitigation, regardless of its magnitude, either in actual dollar terms or as a percentage of the resource's total revenue requirement. This is at best arbitrary, capricious and on its face unduly discriminatory against restructured states and their customers. Exempting a resource that participates in PJM's auction and recovers its entire revenue requirement outside of PJM markets while at the same time targeting a unit that obtains only a portion of its revenue stream from out-of-PJM market sources is illogical, arbitrary and capricious.[46]

The Commission's proposal is unduly discriminatory because out-of-market payments pervade all energy markets: all, or most, electricity resources are impacted in some way by state or federal public policies. The Commission's decision to target some sources of out-of-market revenues and ignoring other sources is arbitrary, capricious, and unduly discriminatory. In order to be non-discriminatory, the Commission would have to apply the MOPR to every resource that

"exemptions" in those instances. PJM's tariff assigns a distinctly different meaning to the terms "exception" and "exemption".

[46] This is particularly the case when the public policy-based revenues are designed to compensate beneficial clean energy attributes that have nothing to do with the recovery of energy or capacity costs. *See e.g.*, Protest of Exelon Corporation, Docket No. ER18-1314, at 27-29.

receives an out-of-market payment. But, as Commissioner Glick correctly notes, under such circumstances, few, if any, resources would qualify to participate in PJM's capacity market without being subject to the MOPR.[47] Raising most, or all, offers made into PJM's capacity auction to an administratively determined price level would result in a capacity market in name only and would provide no benefit to electricity consumers. In short, a MOPR with any exemptions would be unduly discriminatory and a MOPR with no exemptions would be unjust and unreasonable.

The Commission recognizes that the proposal in its June 29 Order is so unpalatable that it may well induce exit from the market by resource owners - both those with resources in restructured states and those in traditionally regulated states currently participating in PJM's capacity auctions.[48] The Commission notes, "the states, should they so choose, undeniably have the power simply to reregulate."[49] Such statements seemingly invite states to exit the markets that the June 29 Order is purportedly designed to preserve. The Commission errs in its conclusion that the expanded MOPR will preserve the integrity of PJM's markets. Indeed, the MOPR cannot be fashioned into a solution to the alleged auction price impact problem that the Commission determined to exist, even if the Commission were correct about the existence of that problem. If the MOPR is applied as proposed, PJM markets may well disintegrate.

In the June 29 Order, the Commission decided that a resource owner's intent with respect to resource offer price levels is not relevant either to the Commission's assessment of the impact on the wholesale market or the remedy to be applied. Specifically, the Commission agreed with PJM that, "in today's market, even if a load-serving entity's or a state's primary goal may not be

[47] June 29 Order, Glick Dissent, at 8-9.
[48] June 29 Order, at P 163.
[49] June 29 Order, at P 163.

to suppress price, the growing use of out-of-market support of renewable resources can have a significant effect on prices."[50] The Commission generically asserted that, "Price suppression stemming from state choices to support certain resources or resource types is indistinguishable from that triggered through the exercise of buyer-side market power"[51] and that the Commission will no longer assume that there "is any substantive difference among the types of resources participating in PJM's capacity market with the benefit of out-of-market support." [52] Despite the Commission's denial, the distinction between submitting an offer for the purpose of suppressing prices and submitting an offer sufficient to cover unit costs not otherwise recovered through market transactions still exists and are distinguishable. The Commission's findings and determinations otherwise are erroneous and have led the Commission to propose revisions that are unjust, unreasonable, and unduly discriminatory.

In a prior Commission Order regarding a PJM MOPR filing, the Commission stated, "a resource that can show that it does not have an incentive to exercise buyer-side market power should not be subject to market power mitigation."[53] Therein, the Commission drew the proper distinction that a resource owner who can demonstrate that it has nothing to gain from lower capacity auction clearing prices (for example, it is in a net long position) is not exercising buyer-side market power, or otherwise attempting to manipulate the market by suppressing prices, and should not be subject to MOPR. The intent or purpose behind the resource's offer level is, and remains, an important element in crafting an appropriate remedy to the exercise of market power. Generators receiving REC and ZEC revenue, which are directly targeted by the June 29 Order[54]

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[50] June 29 Order, at P 102.
[51] June 29 Order, at P 155.
[52] June 29 Order, at P 155.
[53] *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,066, at P 34 (2015).
[54] June 29 Order, at P 1, fn. 1.

are largely merchant-owned and "long" on capacity, and would gain from higher capacity auction clearing prices, not lower ones. For these reasons, application of MOPR should be limited only to instances where entities exercise market power or otherwise attempt to intentionally manipulate capacity auction clearing prices lower. The Commission's prior determination in this regard is correct and the Commission's suggestion in the June 29 Order of "changed circumstances"[55] is not sufficient to reverse the earlier determination. Treating resources that submit offers at prices intended to exercise market power the same as resources that submit offers designed to recover unit costs not otherwise recovered constitutes undue discrimination in violation of the FPA.

H. The Commission Erred in Failing to Determine the Just And Reasonable Rate as is required by the Federal Power Act, 16 USC 824e(a), and by Arbitrarily Proposing a Solution that Would Unduly Discriminate against Illinois and Provides an Unreasonably Short Time-Frame for Resolution.

The Commission erred in failing to determine the just and reasonable rate as is required by the Federal Power Act, 16 USC §824e(a), and instead arbitrarily punting that Commission requirement to the parties with vague directions to adopt its inadequately formed FRR Alternative that would unduly discriminate against Illinois and provide an unreasonably short time-frame for resolution that fails to permit the necessary engagement amongst interested parties and stakeholders. The Commission states that a resource-specific "option" with distinct characteristics referred to as the FRR Alternative would "accommodate state policy decisions and allow resources that receive out-of-market support to remain online."[56] The Commission characterizes this element of its two-part proposal as mitigating or avoiding the harmful impacts

[55] June 29 Order, at P 155.
[56] June 29 Order, at P 8.

of the MOPR element.[57] Such statements by the Commission are arbitrary and capricious, in that the Commission does not explain how it would be accommodative or how it would allow targeted resources to remain online.

The ICC has repeatedly explained that the revenue stream created by the RPS and ZES statute is designed to provide just compensation for the zero-emission benefits associated with renewable and nuclear generation, respectively. These revenue streams are not designed to compensate capacity availability, either in whole or in part. The Commission's suggestion that these revenue streams are tethered to capacity cost recovery is simply wrong. Indeed, the Commission itself said otherwise before the United States Court of Appeals for the Seventh Circuit in its Brief in Support of Defendants-Respondents, in which the Commission stated, ". . . the Illinois Statute does not require participation in FERC-jurisdictional wholesale auctions as a prerequisite to receive ZECS. [citations omitted] Rather, ZECs are available to generators regardless of whether they clear the wholesale auctions."[58]

The Commission states only that, "there are a number of details that would need to be addressed to implement this resource-specific FRR Alternative."[59] In so stating, even with the list of FRR elements in Paragraphs 165-171 of the June 29 Order that will need to be addressed, the Commission drastically understates the practical difficulties associated with its undeveloped FRR Alternative concept. The reality is that the June 29 Order provides little guidance on how to implement the Commission's proposal and what little guidance it does provide raises more

[57] June 29 Order, at P 160, ("it may be just and reasonable to accommodate resources that receive out-of-market support, and mitigate or avoid the potential for double payment and over procurement, by implementing a resource-specific FRR Alternative option.").

[58] Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae in Support of Defendants-Respondents and Affirmance, filed May 29, 2018, *Village of Old Mill Creek, et al., v. Anthony M. Star, et al.*, United States Court of Appeals for the Seventh Circuit, Case Nos. 17-2433 and 17-2445 (consolidated), at 4 (citations omitted).

[59] June 29 Order, at P 164.

questions than it answers. The Commission also erred in its arbitrary application of the inadequate timeline for resolution of this matter. As Commissioner LaFleur observed, the record before the Commission in this proceeding contains scant discussion of a resource-specific FRR alternative and the June 29 Order's proposal is "little more than a rough concept, with major design elements left unresolved."[60] The ICC agrees. Commissioner Glick also noted that:

- Requiring interested parties to decipher today's order, develop testimony, gather evidence, and meaningfully respond within 60 days is irresponsible;
- It is unreasonable to assume that PJM could implement such fundamental market changes in time for its May 2019 auction; and
- The most likely result is that PJM will have to delay its May 2019 auction and will likely over-procure capacity because states and sponsored resources will not have time to react and make alternative plans. [61]

The ICC concurs with Commissioners Glick and LaFleur's observations and concerns regarding the Commission's inadequate procedural timeline given the enormity of details yet to be determined. The statement by Commissioner Powelson that the resource-specific FRR alternative is not an entirely new concept in PJM[62] is debatable, but even if it is accurate, it fails to recognize that PJM and its stakeholders will have to address a multitude of details to make the resource-specific FRR alternative a viable reality, assuming that such a feat is even possible.

In addition to PJM and its stakeholders puzzling over how a resource-specific FRR Alternative will interact with the existing wholesale capacity market construct, the states will have to address details on the state and retail level. Commissioner LaFleur correctly notes that some of the state programs that the June 29 Order attempts to address are statutory in nature and could require legislative action to implement a resource-specific FRR Alternative.[63] Yet, the June 29 Order fails to explain its basis for believing that state legislation necessary to permit the

[60] June 29 Order, LaFleur Dissent, at 3-4.
[61] June 29 Order, Glick Dissent, at 16-17.
[62] June 29 Order, Powelson Concurrence, at 2.
[63] June 29 Order, LaFleur Dissent, at 3-4.

FRR Alternative can be put in place prior to January 4, 2019. Indeed, if the Commission does not rescind the arbitrary and capricious findings and recommendations in the June 29 Order, it is likely that some states will need to enact new legislation. The conditions of the FRR Alternative will also force many states with environmental programs to design capacity programs, which, despite the Commission's assertions to the contrary, they are not now doing.

Commissioner LaFleur also notes that the paper hearing process does not provide for the necessary engagement between interested parties to be conducted, particularly with the states.[64]

All told, the Commission's timeline is not sufficient to accomplish any of the objectives necessary to implement a resource-specific FRR Alternative. The Commission invites PJM to request waiver of the base residual auction currently scheduled for May 2019,[65] but the better solution is to rescind the June 29 Order or alternatively, aim for an effective date in 2020 or 2021, rather than January 4, 2019.

I. The Commission Erred in Failing to Rule on the ICC's Motion to Dismiss Filed in Docket No. ER18-1314-000.

On May 7, 2018, the ICC filed a Motion to Dismiss the proceeding because, among other things, PJM's request failed to meet its burden of proof under Section 205 of the Federal Power Act, was well beyond the scope of Section 205[66] and impermissibly violated Illinois and other states' rights to pursue legitimate state policy objectives. The Commission erred in failing to rule on the ICC's Motion to Dismiss. While the Commission rejected the PJM filing, the Commission, nevertheless, appears to use the record in the docket to justify opening up an investigation under Section 206 into PJM's capacity market design. That record is based on the

[64] June 29 Order, LaFleur Dissent, at 3.
[65] June 29 Order, at P 173.
[66] 16 U.S.C. § 824d(a), (b); *City of Winnfield v. FERC*, 744 F.2d 871, 875-76 (D.C. Cir. 1984).

faulty and unsubstantiated premise that somehow Illinois law causes price suppression. This is wholly unsubstantiated. The Commission should not proceed against the states based solely on hyperbole and unsubstantiated conjecture. It should not use such a faulty unsubstantiated record to justify its findings that the existing tariff is unjust and unreasonable.

J. The Commission Erred in Failing to Rule on the ICC's Motion to Strike Filed in Docket No. ER18-1314-000.

On June 14, 2018, the ICC filed a motion to strike the Answer of PJM filed May 25, 2018, ("PJM Answer") and the Answer of the Independent Market Monitor for PJM "(IMM Answer"). In its June 29 Order, the Commission failed to rule on the ICC"s Motion to Strike. Without repeating the entire motion here, PJM's untimely response to the ICC Motion to Dismiss, masked as an Answer, should be stricken from the record and not relied upon. Further, as described in the motion, the IMM Answer misrepresents the pertinent Illinois legislation and does not assist with any decision making process. It similarly should not be relied upon. The Commission erred in failing to rule on the ICC motion to strike and the relevant text should not be relied upon as evidence in the record.

K. The Commission Erred in Failing to Rule on the Motion to Dismiss the Amended Complaint Filed in Docket No. EL16-49-000.

The Commission erred in failing to rule on the Motion to Dismiss the Amended Complaint filed in Docket No. EL16-49-000 on January 24, 2017 by Dayton Power and Light. As the People of the State of Illinois indicated in their filing supporting the Motion to Dismiss, the ICC agrees that the Motion to Amend is not germane to the original Complaint in the proceeding. The ICC further agrees that even if the Motion to Amend were proper under the Commission's Rules of Procedure, there is insufficient information in the record to justify the radical and hasty relief requested by the Complainants in that proceeding. Given that the EL16-

49-000 docket should not have been allowed to proceed with its numerous procedural flaws, the Commission should not rely on that record to grant Calpine's complaint in part or to substantiate a Section 206 investigation here. The EL16-49-000 record, like the ER18-1314 record, is faulty, unreliable and based on misrepresentations. The Commission erred in its failure to rule on the motion to dismiss in that proceeding and should not now use that questionable record to justify continued attacks against states jurisdictional matters and Illinois law in particular.

IV. CONCLUSION

WHEREFORE, for the reasons discussed above, the ICC requests rehearing of the June 29 Order as discussed herein. The ICC further seeks any and all other appropriate relief.

Respectfully submitted,

/s/Christine F. Ericson

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ILLINOIS COMMERCE COMMISSION

Dated: July 30, 2018

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing document of the Illinois Commerce Commission to be served this day upon each person designated on the official service list compiled by the Secretary in this proceeding, a copy of which is attached, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Chicago, Illinois, this 30th day of July, 2018.

/s/ Christine F. Ericson

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