

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

Calpine Corporation, Dynegy Inc.)	Docket No. EL16-49-000
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,)	
)	
Movants,)	
)	
v.)	
)	
PJM Interconnection, L.L.C.)	
)	
Respondent.)	

**MOTION FOR LEAVE TO ANSWER OUT OF TIME AND ANSWER
OF THE
ILLINOIS COMMERCE COMMISSION**

I. Motion For Leave to Answer Out of Time

Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.213, the Illinois Commerce Commission (“ICC”) hereby submits this Motion for Leave to Answer Out of Time and Answer to the Motion to Lodge and Request for Expedited Action on Amended Complaint

filed on August 30, 2017, by the Electric Power Supply Association (“EPSA”) and the Indicated Complainants¹ (collectively, “Movants”) in the above-captioned docket (“Motion”).

The ICC is the state utility regulatory commission in Illinois. The ICC filed its Notice of Intervention on January 24, 2017, and, therefore, is a party to this proceeding. Given the ICC’s administrative process, limited resources, and state rules and regulations, it was unable to meet the September 14, 2017 deadline for filing an Answer to the Motion.

With this brief Answer, the ICC does not wish to disrupt or delay the proceedings. Rather, the ICC wishes to clarify the record and provide context that may be useful to the Commission in its decision making process. Therefore, and particularly in light of the significance to Illinois of the Commission’s decision in this proceeding,² good cause exists to grant this motion and leave to answer. The ICC does hereby so move.

II. Answer

Movants seek to lodge the July 14, 2017 Memorandum Opinion and Order issued by the United States District Court for the Northern District of Illinois, Eastern Division in the consolidated cases of *Village of Old Mill Creek, et al. v Star, et al.* and *EPSA, et al. v. Star, et al.*, Nos. 17 cv 1163 and 17 cv 1164 respectively, (“District Court Order”),³ which dismissed challenges to the zero emission credits (“ZECs”) legislation enacted by the State of Illinois.⁴

Movants also request expedited action on their Amended Complaint and ask the Commission to

¹ The Indicated Complainants include: 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, Nautilus Power, LLC (f/k/a Essential Power, LLC), Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P. and Oregon Clean Energy, LLC.

² See, *City of Forth Smith, Arkansas*, 47 FERC ¶ 61,432 (1989) (FERC waived the deadline for answers and permitted an answer in light of the significance and impact of the decision).

³ *Village of Old Mill Creek, et al., v. Star, et al., and Electric Power Supply Association, et al., v. Star et al.*, Nos. 17 cv 1163 and 1164, 2017 WL 3008289, at *18 (N.D. Ill. Jul. 17, 2017) (“District Court Order”).

⁴ Motion at 2.

modify the Minimum Offer Price Rule (“MOPR”) to address alleged “threat[s] from subsidized existing resources.”⁵ The ICC herein provides the following answer.

A. The Commission Can Take Notice Of The District Court Order But The Decision Does Not Support Movants’ Substantive Assertions.

Movants seek to lodge the District Court Order. The ICC does not object to the Commission’s recognition of the order, as the Commission “can take official notice of any judicial decision at any time.”⁶ However, the District Court Order should serve only informational purposes. The Commission should not consider it as record evidence supporting any of Movants’ underlying allegations.

The district court based its ruling in large measure on procedural determinations as the district court dismissed the plaintiffs’ claims in part due plaintiffs’ lack of standing.⁷ The district court also dismissed the complaints on substantive grounds for a failure to state a claim as it found, *inter alia*, that the Federal Power Act did not preempt the Illinois ZEC program as there was no conflict. The district court expressly found that “Illinois does not require participation in the wholesale auctions to receive ZECs” and although PJM generally requires available generators to participate in its capacity auctions, generators need not clear the auction to receive ZECs.⁸ The district court concluded that the Illinois ZEC program is valid and any alleged impacts on the wholesale markets are merely incidental.⁹

Contrary to Movants’ arguments, neither the timing of the District Court Order nor the court’s findings necessitate expedited relief from the Commission. The District Court Order is

⁵ Motion at 2-3.

⁶ *Pac. Gas & Elec. Co.*, 109 FERC ¶ 61205, 61,970 (2004). *See also, California Indep. Sys. Operator Corp. Pac. Gas & Elec. Co. v. California Indep. Sys. Operator Corp. the All. for Retail Energy Markets Shell Energy N. Am. (Us), L.P.*, 109 FERC ¶ 61,1033, (2016) (denying motion to lodge district court opinion).

⁷ District Court Order, at *18.

⁸ *Id.* at *13.

⁹ *Id.* at *16.

currently under review by the United States Court of Appeals for the Seventh Circuit (“Seventh Circuit”), Case no. 17-2433. The Seventh Circuit’s schedule currently requires the parties to complete all briefing by November 27, 2017, and a decision is expected long before the May 2018 base residual auction. Moreover, assuming *arguendo* that the ZEC program is in place during the May 2018 auction, movants fail to rebut the district court’s finding that the alleged harm from ZECs was not clearly excessive when balanced against Illinois’ permissible environmental regulation.¹⁰ Hence, the Commission should reject Movants’ bald claims that Illinois’ ZEC Program will result in the unjust and unreasonable suppression of wholesale prices¹¹ and Movants’ insistence on the need for a hasty response.

B. Movants’ Request for Expedited Treatment on the Amended Complaint Should be Denied

1. Movants Fail to Establish any Threat to Wholesale Markets.

In seeking expedited treatment on its amended complaint, Movants assert that “there can be no higher priority than acting promptly and decisively to protect the [Reliability Pricing Model] RPM market from the existential threat posed by subsidized existing resources.”¹² Regardless of the Commission’s priority gradients, Movants fail to establish any actual threat to any PJM market. In fact, the entire Motion is predicated on nothing more than Movants’ hyperbole and for this reason alone, the Commission should deny the Motion.

2. Movants Imprudently Seek to Amend MOPR When Its Current Parameters Are Undefined.

It is premature for the Commission to consider expanding the MOPR while this matter is still pending a remand proceeding at the Commission. On July 7, 2017, the United States Court

¹⁰ *Id.* at *17.

¹¹ Motion at 3.

¹² Motion at 3.

of Appeals for the District of Columbia (“D.C. Circuit”) granted the petitions for review and vacated FERC MOPR orders in Docket Nos. ER13-535-000, -001, -002, and -003, with respect to unit-specific review, the competitive entry exemption, the self-supply exemption, and the mitigation period, and it remanded the matter to FERC.¹³ The D.C. Circuit’s decision defined the limits of FERC’s authority under section 205 to modify MOPR and rate designs without adequate notice.¹⁴ The remand calls into question the scope and sustainability of this underlying mitigation mechanism. In light of all the unresolved issues stemming from the ER13-535 docket, the Commission should not risk exacerbating the problems with MOPR by expanding its applicability to existing units that are subject to state public policy programs.

3. Market Power Mitigation Measures Like MOPR Should Be Limited To Preventing Market Power Manipulation and Not Applied To Resources Receiving Revenues Through Lawful State Public Policy Programs.

Movants request that the Commission direct PJM to expand the MOPR to apply to “existing resources receiving ZECs and other subsidies”¹⁵ asserting that such resources are “artificially suppressing RPM clearing prices.”¹⁶ Even if Movants were correct in their assertions about such resources are “suppressing RPM clearing prices,” which they are not, application of the MOPR to existing resources would not be just and reasonable.

While the ICC originally did not object the MOPR as a mitigation measure for some new generation sources given its then-limited scope,¹⁷ time has shown that the MOPR is a draconian interference in market clearing processes and should be reserved for egregious non-competitive behavior rising to the level of market manipulation and exercise of market power. In particular,

¹³ *NRG Power Marketing, LLC, and GenOn Energy Management, LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017) (“*NRG Power Marketing*”) (petitions for panel rehearing denied).

¹⁴ *NRG Power Marketing*, at 116.

¹⁵ Motion at 5.

¹⁶ *Id.*

¹⁷ See ICC Comments, Docket No. ER13-535-001, filed March 28, 2013.

expanding the application of the MOPR to existing resources impacted by legitimate and lawful state public policy programs and absent of any purpose or intent to manipulate RPM clearing prices would be counter-productive and would increase the likelihood of market power exercise by remaining resources not so impacted.

MOPR would be particularly harmful as applied to environmental attribute credit programs which seek to address a gap in existing wholesale market design by accounting for societally beneficial attributes of lower emitting generation resources. PJM's existing wholesale market design processes and resource commitment procedures do not account for the negative societal and economic impact of certain air emissions. State environmental attribute credit programs have the effect, at least in part, of addressing this deficiency in wholesale market design. In this manner, these programs improve overall efficiency in resource commitment, and increase societal benefits.

For these reasons, the ICC recommends that the Commission reject Movants' request that MOPR be applied to existing generating resources.

4. Ongoing Capacity Construct Evaluation Initiatives Are Underway and Should not be Rushed.

PJM has facilitated the development of a stakeholder group called the Capacity Construct Public Policy Senior Task Force.¹⁸ The Task Force has already held numerous meetings and is currently working thorough details associated with a number of proposed options.¹⁹ As a result, PJM may submit a filing to the Commission including capacity construct modifications. Alternatively, PJM may conclude that significant capacity construct changes are not needed.

¹⁸ See, PJM.com; PJM Capacity Construct Public Policy Senior Task Force.

¹⁹ *Id.*

PJM also issued several policy analysis papers addressing energy market design issues.²⁰ PJM's initiatives may, taken together and in a thoughtful and reasonable time frame, provide a foundation for a more comprehensive approach to identify and implement PJM's processes (or modifications to current processes) to facilitate state public policy initiatives and help states achieve their desired resource portfolios.

Similarly, the Commission's AD17-11 initiative has gathered much helpful information associated with harmonizing "state policy goals and the wholesale markets."²¹ Stakeholders continue to submit comments for consideration in this docket.²²

Under these circumstances, Movants' precipitous request that the Commission order PJM to conduct a stakeholder process and "propose, by a date certain, a longer-term remedy"²³ would both undermine and prejudge the outcome of the stakeholder process and other PJM and Commission initiatives already taken and yet-to-be taken. Granting Movants' request, either on time-frame or substance, would be disruptive and counter-productive, and the ICC suggests that the Commission not take the bait.

III. Conclusion

WHEREFORE, the ICC respectfully requests that the commission grant the motion to file this answer out of time and consider this answer in the above-captioned proceeding. The

²⁰ See, e.g., PJM Capacity Construct Public Policy Senior Task Force; PJM Capacity Market Repricing Proposal (June 23, 2017); PJM's Evolving Resource Mix and System Reliability (March 30, 2017); Advancing Zero Emissions Objectives through PJM's Energy Markets and Price Formation in PJM's Energy Market (August 23, 2017).

²¹ See, *State Policies and Wholesale Markets Operated by ISO New England Inc., New York Independent System Operator, Inc., and PJM Interconnection, L.L.C.*, Notice Inviting Post-Tech Conference Comments, Docket No. AD17-11-000, at 1 (March 3, 2017), and subsequently filed comments in same docket.

²² See, e.g., Comment of Global Energy Institute at the U.S. Chamber of Commerce under AD17-11, filed September 19, 2017.

²³ Motion, at 6.

ICC further requests any and all other appropriate relief.

Respectfully submitted,

/s/Christine F. Ericson

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Dated: September 27, 2017

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 27th day of September, 2017.

/s/ Christine F. Ericson

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