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

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| 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<br>EL18-178-000<br>(Consolidated) |
| v. | | |
| PJM Interconnection, L.L.C. | | |
| PJM Interconnection, L.L.C. | | |

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**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" or "FERC")[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 issued on December 19, 2019 in the above-captioned consolidated dockets.[3] On January 24, 2017, the ICC filed a Notice of Intervention in Docket No. EL16-49-000. 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.

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[1] 18 C.F.R. § 385.713.
[2] 16 U.S.C. § 8251.
[3] *Calpine Corporation, et al.*, 169 FERC ¶ 61,239 (2019) ("December 19 Order").

## I. INTRODUCTION

In its December 19 Order, the Commission reaffirmed the finding from its June 29, 2018 Order[4] that "PJM should expand the MOPR to cover out-of-market support to all new and existing resources, regardless of the resource type, with few or no exceptions."[5] The Commission's December 19 Order violates the Federal Power Act by intruding into states' exclusive jurisdiction over generation and lacks substantial evidence that the targeted state policies result in any actual price suppression.[6] The Commission has not identified a single actual instance where a state policy led to a suppressed offer in any PJM capacity auction, either in the June 2018 Order or the December 19 Order. Similarly, neither the Commission, nor any party, identified a suppressed auction clearing price resulting from the state policies targeted by the Commission in its December 19 Order.

Realizing the record lacked substantial evidence, the Commission, in its June 2018 Order, acted pursuant to section 206 and initiated a paper hearing designed to develop a record which would support the Commission's determination that a Replacement Rate was needed.[7] Despite the opportunities afforded during the paper hearing, there remains an absence of evidence that any state policy targeted by the Commission suppressed prices in any PJM capacity auction. And, just as important and equally fatal to the December 19 Order, the Commission abandoned all pretense of the need to accommodate states' rights.[8] The Commission's December 19 Order

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[4] *Calpine Corporation et al. v. PJM Interconnection, L.L.C*, 163 FERC 61,236 (2018) (*hereinafter*, "June 2018 Order").

[5] December 19 Order, PP 5, 32. The ICC filed a petition for review in the United States Court of Appeals in the Seventh Circuit on December 23, 2019, Case No. 19-3495.

[6] See Section II.A below.

[7] June 2018 Order, P 160-65.

[8] *Coalition For Competitive Electricity, Dynegy Inc., v. Zibelman*, 272 F.Supp.3d 554, 576 (D. NY 2017) *quoting, Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 522 ("when the State is legitimately regulating a matter of state concern, 'FERC's exercise of its authority must accommodate' that state regulation").

establishes that its prior explanations of why such accommodations are necessary were insincere.[9]

The Commission's goals aside, its price suppression premise underlying both the June 2018 Order and the December 19 Order is wholly unsupported. There is simply no basis for the Commission's findings that state policy is preventing, or is increasingly preventing, the formation of just and reasonable wholesale rates in PJM's capacity auctions. The Commission has not demonstrated any direct link between any state policy that the Commission defines as a "State Subsidy" and clearing price suppression in a PJM capacity auction.

Moreover, the Commission's decision to apply a minimum offer price rule ("MOPR") outside the context of market manipulation by market participants exercising monopsony power is inappropriate. The original intent of the MOPR was to address the exercise of market power in the capacity market, yet the Commission's expanded MOPR now targets state policy decisions including states' efforts to address the failure of the PJM capacity market to account for environmental externalities such as carbon emissions. The Commission treats resources affected by state policy the same way that market-manipulating monopsonists are treated; both are now subjected to the MOPR. The Commission's equal treatment of these two glaringly different market participants is unduly discriminatory.

The purpose of Illinois' renewable portfolio standard and zero emission standard statutes, which the Commission targets and wrongly characterizes as "State Subsidies," is to "achieve the State's environmental objectives and reduce the adverse impact of emitted air pollutants on the health and welfare of the State's citizens."[10] These state policies are not "subsidies" as

[9] *See PJM Interconnection, LLC*, 137 FERC ¶ 61,145, at P 3 (2011) ("Our intent is not to pass judgment on state and local policies and objectives with regard to the development of new capacity resources....").
[10] P.A. 99–906, §§ 1–5 (eff. June 1, 2017).

characterized by the Commission. Instead, these policies provide compensation for valuable clean energy resource attributes that would not otherwise be procured by PJM's capacity auctions because PJM's auction design fails to account for negative environmental externalities. If anything, State policy initiatives to address the negative environmental externalities associated with pollution-emitting generation improve the efficiency and price-signaling aspects of PJM's capacity auction process by accounting for the social cost of carbon. The Commission's MOPR proposal will reduce economic efficiency and send counter-productive price signals by raising prices paid to emitting resources, thereby encouraging negative environmental externalities. Rather than correcting the obvious flaw in PJM's capacity auction design which drove state policy initiatives in the first place, the Commission instead chooses to penalize clean energy resources and nullify state policies.

There is much important work that the Commission could be doing to improve PJM's markets. For example, the ICC has previously lauded Commission initiatives to improve price formation in PJM's energy markets[11] and encourages the Commission to look further in that area. Also, the Commission has a Section 206 complaint pending which credibly asserts that PJM's capacity auction offer cap is too high and enables economic withholding market manipulation.[12] Instead, the Commission is pursuing a counter-productive crusade against the states with unsubstantiated allegations of undemonstrated clearing price suppression allegedly caused by suppressed offers submitted by resources affected by state policy. This is a waste of valuable

[11] *See,* Comments of the Illinois Commerce Commission, Docket No. RM18-1, filed October 23, 2017, at 4; Comments of the Illinois Commerce Commission, Docket No. EL16-49, et al., filed October 2, 2018, at 7-8 and ICC Reply Comments at 31.

[12] *See*, Complaint of Independent Market Monitor for PJM, Docket No. EL19-47, filed February 21, 2019.

time and resources. The ICC, again, requests rehearing and urges the Commission to turn back and instead appropriately accommodate state policies rather than attack them.

## II. STATEMENT OF ERRORS

A. The Commission Erred by Intruding on Exclusive State Jurisdiction Over Generation Resources in violation of the Federal Power Act and Failing to Demonstrate Substantial Evidence on the Record that States Policies Suppress Wholesale Market Prices.

B. By Granting Exemptions to Existing Renewables and Existing Resources of Self-Supply Entities, but not to Existing Nuclear, the Commission Unduly Discriminates Against Existing Nuclear Resources.

C. The Commission Decision to Impose MOPR on Resources Affected by State Policy While Exempting Resources Affected by Federal Policy is Unduly Discriminatory

D. The Commission's MOPR Floor Price is Unjust and Unreasonable.

1. Because the Commission's Cost and Revenue-based MOPR Calculation Method is Not a Reasonable Proxy for the Competitive Price, the Commission's MOPR is Unjust and Unreasonable.

2. Absent Proper Netting of Projected Revenues, Resources Subject to MOPR will be Over-Mitigated Resulting in Rates that are Not Just and Reasonable.

3. Failure to Cap MOPR Floors is Unjust and Unreasonable because it will Result in Absurd Outcomes and May Undermine System Reliability.

4. The Commission's Decision to Impose a Net CONE MOPR on New Resources While Existing Resources Need Only Meet a Generally Lower Net ACR MOPR is Unjust and Unreasonable Because it Create a Noncompetitive Barrier to Market Entry by New Resources.

E. The Commission Erred in setting a Replacement Rate that is Exceedingly Broad and therefore, Unjust and Unreasonable.

F. The Commission's Rejection of the Resource-Specific FRR Alternative and Any Transition Mechanism For States To Revise Their Policies and/or Implement The Existing FRR Alternative Is Arbitrary And Capricious, And Results In Rates That Are Unjust And Unreasonable.

G. The Commission Erred when it Adopted a Competitive Exemption that is Incoherent and Illogical and is, therefore, not Just and Reasonable.

## III. ARGUMENT

### A. The Commission Erred by Intruding on Exclusive State Jurisdiction Over Generation Resources in Violation of the Federal Power Act and Failing to Demonstrate Substantial Evidence on the Record that State Policies Suppress Wholesale Market Prices.

In its December 19 Order, the Commission reaffirmed the finding from its June 2018 Order that "PJM should expand the MOPR to cover out-of-market support to all new and existing resources, regardless of the resource type, with few or no exceptions."[13] The Commission's expanded MOPR improperly invades the states' exclusive jurisdiction over generation. Under the FPA, the states have exclusive jurisdiction over facilities used for the generation of electricity.[14] While the Commission has exclusive jurisdiction over the wholesale sale of electricity,[15] it has no jurisdiction over matters left to the states.[16]

The United States Supreme Court precedent indicates that all state programs are not the same and should not be lumped together as the Commission does here. For example, in *Hughes v. Talen Energy Marketing*, the Court rejected a Maryland state program for the limited reason that it disregarded an interstate wholesale rate required by FERC. The Court held that "[s]o long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's [contract for differences] program unacceptable."[17] State laws that do not 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.[18] The FPA leaves to the states

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[13] December 19 Order, PP 5, 32.
[14] 16 USC § 824(b).
[15] 16 USC § 824(a), (b).
[16] 16 USC § 824(a).
[17] *Hughes v. Talen Energy Mktg., LLC,* 136 S. Ct. 1288, 1299 (2016) ("*Hughes*").
[18] *Id.* at 1299 ("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.'").

the authority over determination of the generation fuel mix,[19] and, as the *Hughes* court made clear, "states rightly may pursue 'various … measures … to encourage development of new or clean generation' or other vital public policy goals."[20] In fact, previously the Commission itself "concluded that state programs that incentivize clean energy generation are consistent with FERC's policy objectives."[21]

But FERC has now dramatically changed course. The Commission's December 19 Order is a direct attack on the states' resource decision making and attendant policies. The Commission argues that an expanded MOPR is necessary because of "out-of-market state support for renewable and nuclear resources" and asserts that PJM's existing MOPR fails protect the "integrity of the competition in the wholesale market" from cost shifts resulting from out-of-market support.[22] As Commissioner Glick noted in dissent:

> In fact, the Commission comes right out and acknowledges that its goal is to "send price signals on which investors and consumers can rely to guide the orderly entry and exit of economically efficient capacity resources." [fn omitted] That means the Commission is attempting to establish a set of price signals for determining resource entry and exit that will supersede state resource decisionmaking and better reflect the Commission's policy priorities. It is hard to imagine how the Commission could much more directly target or aim at state authority over resource decisionmaking.[23]

The Commission sweeping intrusion into the states' right to make generation decisions violates the Federal Power.[24] As Commissioner Glick notes, the December 19 Order, "…permits the Commission to zero out any state effort to address the externalities associated with sales of electricity."[25] The Commission is attempting to establish a set of price signals to produce its

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[19] *Id*.
[20] *Id.*
[21] *Coal. for Competitive Elec., Dynegy Inc. v. Zibelman*, 272 F. Supp. 3d 554, 577 (S.D.N.Y. 2017), *aff'd sub nom*. 906 F.3d 41 (2d Cir. 2018).
[22] December 19 Order, at P 37-38, *citing* June 2018 Order, 163 FERC ¶ 61,236, PP 150-155.
[23] December 19 Order, Glick Dissent, P 12, ("Glick Dissent").
[24] December 19 Order, P 37.
[25] Glick Dissent, P 17.

preferred resource entry and exit that will supersede state resource decision-making,[26] The Commission's inappropriate attacks on state authority over resource decision-making is unlawful.[27]

The Commission claims that ". . . a State Subsidy need not be facially preempted to require corrective action by this Commission."[28] In support of this new remedial principle, the Commission relies on the Seventh Circuit's holding in *Electric Power Supply Association v. Star*,[29] where the court upheld Illinois' zero-carbon emissions (ZEC) law.[30] The Commission's reliance is misplaced. Rather than condone "corrective" action, the *EPSA* court stated any Commission initiative to make "adjustments" in light of states' exercise of their lawful powers will be subject to judicial review but that "the need to make adjustments in light of states' exercise of their lawful powers does not diminish the scope of those powers."[31] Nothing in the *EPSA* decision suggests that permitted "adjustments" allows the Commission to "zero out" states' environmental policies related to energy generation. In fact, the *EPSA* decision establishes the exact opposite. Immediately before suggesting the Commission had authority to make "adequate adjustments" the *EPSA* court quoted the Commission's previous order, "States may continue to support their preferred types of resources in pursuit of state policy goals."[32]

As the Commission discussed in its June 2018 Order, such adjustments not only contemplate, but require, accommodating states' lawful policies.[33] The Commission's far-

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[26] *Id.*
[27] 16 USC § 824(a), (b).
[28] December 19 Order, P 68.
[29] *Electric Power Supply Association v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) ("*EPSA*").
[30] December 19 Order, P 68.
[31] *EPSA*, 904 F.3d at 524.
[32] *Id.* (*quoting* June 2018 Order, P 158).
[33] *Coalition For Competitive Electricity, Dynegy Inc., v. Zibelman*, 272 F.Supp.3d 554, 576 (D. NY 2017) *quoting*, *NW. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 522, ("when the State is legitimately regulating a matter of state concern, 'FERC's exercise of its authority must accommodate' that state regulation").

sweeping mitigation measures imposed here go far beyond mere adjustments. Rather than accommodate states that are exercising their lawful powers, the Commission sets a rate designed to prevent, reduce, or stop a State from exercising its lawful powers. This is the opposite of what the courts intended.[34]

By improperly targeting state policy initiatives, the Commission intentionally thwarts the state laws and policies over which the Commission has no jurisdiction. There is neither a factual record or legal precedent that supports the Commission's Replacement Rate. The Commission's expanded MOPR will likely prevent many new capacity resources with beneficial environmental attributes from clearing PJM's capacity auctions. The December 19 Order forces states to either leave PJM's capacity market or allow the Commission and PJM to usurp the states' FPA-protected role regarding capacity resources. Because the Commission's December 19 Order is not supported by any evidence in the record and intrudes on exclusive state jurisdiction over capacity resources in violation of the Federal Power Act, the ICC requests rehearing.

### B. By Granting Exemptions to Existing Renewables and Existing Resources of Self-Supply Entities, but not to Existing Nuclear, the Commission Unduly Discriminates Against Existing Nuclear Resources.

The Commission found that existing renewables should be exempt from MOPR.[35] Similarly, the Commission found that existing resources of self-supply entities should also be exempted from MOPR.[36] The Commission provided the following rationales for granting MOPR exemption to existing renewables and existing resources of self-supply entities, respectively:

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[34] *EPSA*, 904 F.3d at 524; *Hughes*, at 1299.

[35] December 19 Order, at P 173. The ICC recommends that the Commission amend the definition of an existing renewable resource to include those that have made commitments, subject to non-performance penalties, to deliver RECs and that made these commitments prior to the Commission's issuance of the December 19 Order.

[36] December 19 Order, P 202.

> because decisions to invest in those resources were guided by our previous affirmative determinations that renewable resources had too little impact on the market to require review and mitigation[37]

and;

> because self-supply entities have made resource decisions based on affirmative guidance from the Commission indicating that those decisions would not be disruptive to competitive markets.[38]

The ICC has no quarrel with these two MOPR exemptions or the rationales provided for exempting these two resource types. However, the ICC notes that these rationales apply with equal force to existing nuclear units that fall into the Commission's definition of State Subsidies. By exempting existing renewables and existing resources of self-supply entities, while imposing the MOPR on similarly situated existing nuclear units, the Commission unduly discriminates against those nuclear units.

First, the Commission previously issued multiple orders finding that existing nuclear had too little impact on the market to require mitigation[39] and that existing nuclear would not be disruptive to competitive markets.[40] Like the existing renewables and existing resources of self-supply entities, investors in nuclear plants justifiably expected that the Commission would not subsequently impose a MOPR. The existing Illinois nuclear unit targeted by the Commission's December 19 Order satisfied the Commission's prerequisite for exempting existing renewables and existing resources of self-supply entities, namely, successfully clearing an annual or incremental capacity auction, and is similarly situated to existing renewables and existing resources of self-supply entities.

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[37] December 19 Order, P 174.
[38] December 19 Order, P 203.
[39] *See, e.g.*, 2013 MOPR Order, 143 FERC ¶ 61,090 at PP 166-167; 2011 MOPR Order, 135 FERC ¶ 61,022, PP 152-153; 2011 MOPR Rehearing Order, 137 FERC ¶ 61,145, P 111.
[40] 2013 MOPR Order, 143 FERC ¶ 61,090 at P 107 (accepting PJM's proposed self-supply exemption); 2015 MOPR Order, 153 FERC ¶ 61,066, PP 52, 56.

Second, the Commission states that it designed the Order to address "the growing impact of State-Subsidized Resources . . ."[41] The Commission expressed concern regarding "State Subsidies for capacity resources [that] continue to expand . . ."[42] The Commission's decision to grandfather existing renewables and existing resources of self-supply entities consistently reflects this expressed concern with the growing impact of additional resources affected by state policy. Notably, as with the set of existing renewables and the set of existing resources of self-supply entities (both of which the Commission grandfathered), the set of nuclear units in the PJM region currently receiving support under existing state policy is finite and is not growing (and the number is small—in Illinois, just the Quad Cities plant). Yet the Commission did not grandfather the nuclear units currently affected by existing state policies. Specifically, the Commission did not provide for an existing nuclear unit exemption analogous to the exemptions for existing renewables and existing resources of self-supply entities.

Third, the Commission's decision to grandfather existing resources of self-supply entities unduly discriminates based on a state's regulatory model. The Commission defines "self-supply entity" as including "vertically integrated utilities that receive cost of service payments for plants constructed and operated under state public utility regulation, public power, and single customer entities."[43] Grandfathering existing nuclear units owned by, or contracted to, such traditional utility entities, while subjecting existing nuclear plants owned by independent or utility-affiliated entities due to state restructuring statutes unduly discriminates based only on state's regulatory model, *i.e.*, restructured versus traditional.

[41] December 19 Order, P 17 (emphasis added).
[42] December 19 Order, P 22 (emphasis added).
[43] December 19 Order, at n.427.

For these reasons, the Commission's decision to grandfather existing renewables and existing resources of self-supply entities while applying MOPR to existing nuclear units currently affected by public policy in restructured states unduly discriminates against those nuclear units. Therefore, the ICC requests rehearing.

### C. The Commission Decision to Impose MOPR on Resources Affected by State Policy While Exempting Resources Affected by Federal Policy is Unduly Discriminatory

The Commission chose to exempt resources affected by federal subsidy,[44] stating the rationale that the Commission may not "disregard or nullify the effect of federal legislation."[45] On the other hand, the Commission is unconcerned about disregarding or nullifying state legislation. Commissioner Glick deftly points out the inconsistency of the Commission's rationale for applying the MOPR to resources affected by state policy while at the same time exempting resources affected by federal policy and argues that the Commission cannot have it both ways:

> If the MOPR disregards or nullifies federal policy, it must have the same effect on state policy. If it does not nullify or disregard state policy, then the Commission has no reasoned justification for exempting federal subsidies from the MOPR.[46]

The ICC agrees. The Commission's decision to exempt all resources receiving federal subsidies from the MOPR, while choosing to apply the MOPR to resources affected by state policy unduly discriminates against resources affected by state policy. The ICC hereby seeks rehearing.

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[44] December 19 Order, P 89.
[45] December 19 Order, P 89.
[46] Glick Dissent, P 30.

### D. The Commission's MOPR Floor Price Is Unjust and Unreasonable.

Subsection D. 1 explains why the Commission's method for MOPR floor price calculation will not produce a just and reasonable proxy for the price at which a resource would have offered into a PJM capacity auction absent the effect (if any) of state policy. If the Commission, nevertheless, retains that incorrect method, Subsections D.2, D.3, and D.4 below describe additional technical problems associated with that method which are also unjust and unreasonable.

#### 1. Because the Commission's Cost and Revenue-based MOPR Calculation Method is Not a Reasonable Proxy for the Competitive Price, the Commission's MOPR is Unjust and Unreasonable.

If a MOPR is applied, the logical floor price would be the price at which a unit would have offered into PJM's capacity auction absent the effect of state policy.[47] A reasonable MOPR approach, therefore, would be based on the impact of state policy on offers, rather than PJM's proposed resource cost and revenue factors.[48] The Commission's MOPR concept is based on administrative specifications of unit cost and administrative estimates of revenue, and, therefore, is not a reasonable proxy for the actual price at which a unit would offer into PJM's capacity auction absent the effect of state policy. The PJM-proposed concept of MOPR floor price which the Commission adopted may produce a result consistent with administrative specification or regulatory determination, but it is not a result consistent with a market minus the

[47] ICC Reply Comments, at 20.

[48] In order for a State Subsidy to suppress capacity auction clearing prices, it has to change a resource's offer (1) from being extra-marginal to being marginal or inframarginal; or (2) from being marginal to inframarginal. If the State Subsidy doesn't cause a resource to have one of those two effects in PJM's auction, then the State Subsidy doesn't have any impact of the capacity auction clearing price. Development of any minimum offer price rule should start from this kind of focus on the effect of the State Subsidy rather than building up from costs and revenues. *See,* ICC Reply Comments, at 24-25.

effect (if any) of state policy. Because this latter is the objective the Commission asserts that it is aiming for,[49] accepting the former is incorrect, and, therefore, not reasonable.

The Commission ignored the ICC's recommendation, and "adopt[ed] PJM's proposal to set the default offer price floor for certain resources that have not previously cleared the capacity market at Net CONE for each resource type"[50] and "set the default offer price floor for existing resources at the resource-type specific Net ACR."[51] The December 19 Order provides that PJM need not demonstrate that an offer from a resource receiving out-of-market support actually suppresses an offer price in order to apply MOPR.[52] Rather, the Commission found that it is sufficient that out-of-market support enables a resource to be "*capable of* suppressing market prices."[53] This premise led the Commission to improperly focus on an administratively determined proxy offer based on administratively determined resource cost and estimated revenue, rather than on the likely impact (if any) of state policy on offer prices and clearing prices.[54] The Commission's incorrect focus results in illogical and counter-productive outcomes that will wrongly disqualify resources with low costs unrelated to state policy from clearing in capacity auctions, thus reducing efficient competition and unjustly and unreasonably increasing costs to consumers.

A MOPR that is a function of an administratively determined and administratively imposed cost (either Gross CONE or Gross ACR) forces artificial precision on a complex process—seller offer price formation—that is not formulaic, but often relies upon both analytics and expert judgment. Markets are inherently complex, and a conceptually correct MOPR floor

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[49] December 19 Order, P 37-39.
[50] December 19 Order, P 138.
[51] *Id.* at P 18.
[52] *Id.* at P 72.
[53] *Id.* (emphasis added).
[54] *See also*, Glick Dissent, at P 44 "Resources are still required to bid above an administratively determined level, <u>not at the level that they would otherwise participate in the market</u>." (emphasis added).

price would make every attempt to preserve that complexity while capturing only the effect (if any) of state policy on a resource offer. To do otherwise would not be consistent with the Commission's stated objective.

There are myriad of factors that go into development of seller offer price formation decisions in a market context. There is no one single correct offer price for any particular unit, rather, there is a range of reasonable offers. For this reason, the offers from resources not targeted by the Commission's MOPR decision are freely permitted to offer within the reasonable range which is currently between $0 and the applicable offer cap.[55] But offers from resources affected by state policy will not be permitted to offer within a corresponding range. Rather, for such resources the allowable range of reasonableness will now be greatly narrowed, extending only from the MOPR floor to the offer cap.[56]

Building a MOPR from a precise specification of cost and a precise specification of revenue thereby produces a solution that over-mitigates the alleged price suppression that the Commission claims it is targeting. It forces precision on elements of price offers submitted by targeted resources that are unrelated to any state policy. It prohibits, *i.e.*, zeros out, all of the normal market downward offer price variability factors not attributable to any state policy. Because the Commission-directed method for developing the MOPR floor price cannot produce a reasonable proxy for the price which a resource would have offered into PJM's capacity auction absent the effect of state policy, that method is unjust and unreasonable and the ICC requests rehearing.

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[55] The Commission's discussion regarding construction and permitting illustrates the unduly discriminatory effect of the Commission's MOPR. December 19 Order, P 139. The Commission focuses on costs/revenues rather than the effect of state policy on offer prices and clearing prices. New resources affected by state policy must include precise specifications of these variable values in their offers, but new non-subsidized resources do not. Effectively, any low price offered by a resource affected by state policy is attributed by the Commission's framework to the state policy and not to normal offer decision variability between resource owners.

[56] As explained in Subsection 3 below, this range will be zero for some resources.

### 2. Absent Proper Netting of Projected Revenues, Resources Subject to MOPR will be Over-Mitigated Resulting in Rates that are Not Just and Reasonable.

The Commission's MOPR floor specification fails to properly net projected revenues resulting in over-mitigation and, consequently, rates that are not just and reasonable. The ICC acknowledged PJM's proposal to subtract "Projected PJM Market Revenues" from Gross CONE for new resources and from the gross avoidable cost rate ("ACR") for existing resources.[57] However, PJM defined "Projected PJM Market Revenues" as only "estimated energy and ancillary services markets revenues" from PJM-administered markets.[58] Generators have many opportunities to obtain revenue outside of PJM's energy and ancillary services markets that do not fall within the Commission's definition of "State Subsidy."[59] One such example is "revenue from the sale of non-electric byproducts,"[60] but there are many other such permissible non-PJM revenue streams such as the support provided by federal production tax credits and investment tax credits exempted from the MOPR by the Commission's December 19 Order.

To the extent that this expanded MOPR may remain, the MOPR rules should permit all non-PJM market revenue that does not derive from state policy to be subtracted off the Gross CONE or the Gross ACR, respectively, for targeted existing and new resources, particularly in the unit-specific alternative.[61] If these non-PJM market revenue sources are not subtracted from Gross CONE and Gross ACR, these permissible non-PJM market revenues will be treated no differently than the state policy revenues that the Commission now deems impermissible. To the

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[57] ICC Reply Comments, at 21.
[58] *See* ICC Reply Comments, at 21.
[59] *Id.* at 22.
[60] *Id.* at 21. These potential revenue streams include proceeds from the sales of non-electric byproducts in an open market (*e.g.*, steam) and proceeds from arms-length bilateral contract sales.
[61] The Commission incorrectly characterizes the unit-specific alternative as an "exemption" from MOPR. That characterization is incorrect. Resources choosing the mechanism that the Commission names "Unit-Specific Exemption" are not exempt from the MOPR. Rather, the offer price floor administratively determined through the Unit-Specific Exemption is merely an alternative to the default MOPR offer floor. December 19 Order, PP 202-204.

extent the Commission's Order requires only "PJM Market Revenues" to be subtracted, the Commission's MOPR solution over-mitigates its target and is unjust and unreasonable. For that reason, the ICC hereby requests rehearing.

**3. Failure to Cap MOPR Floors is Unjust and Unreasonable and will Result in Absurd Outcomes and May Undermine System Reliability.**

In the December 19 Order, the Commission adopted the perfectly reasonable proposition to "use one definition of a competitive offer to set the default capacity market seller offer cap for supplier-side market power mitigation and a different one for the different purpose of setting the default offer price floor."[62] However, the Commission did not address the absurdity resulting from setting a default offer price floor higher than the cap for supplier-side market power mitigation (offer price ceiling).[63]

The offer price ceiling is Net CONE * Average Balancing Ratio (B)[64] for all resources, and the offer price floor for planned resources affected by state policy is Net CONE. In this situation, the offer floor could exceed the allowable offer cap. If the consequence for submitting an offer in excess of the cap is mitigation down to the cap and the consequence of the MOPR is to be mitigated up to the floor, a resource that faces an offer price floor that is higher than the offer price cap faces an impermeable barrier to market participation. To avoid such an unjust and unreasonable result, offer price floors should be capped at the offer price ceiling.

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[62] December 19 Order, P 152.

[63] In reply comments, the ICC demonstrated that PJM's proposed MOPR floor prices are too high. ICC Reply Comments, at 2. In its December 19 Order, the Commission not only fails to justify the PJM-proposed floor price but raised the MOPR price beyond PJM's proposed floor. For example, the Commission raised the MOPR floor price for planned resources from 90 percent of Net CONE (as proposed by PJM) to 100 percent of Net CONE. (December 19 Order, P 138).

[64] *See* PJM OATT, Attachment DD, Sec. 6.4. B is less than one. The Commission indicated that under the Capacity Performance construct, Net CONE * B represents the opportunity cost of taking on a capacity payment. See *PJM Interconnection, LLC*, 151 FERC ¶ 61,208, P 338 n.283 (2015); December 19 Order, at n.197.

The ICC recommended that the MOPR floor price also be capped at the vertical intercept point on the variable resource requirement ("VRR") curve.[65] Offers at prices above the vertical intercept point have no chance of clearing in PJM's auction, even in cases of extreme capacity shortage (three percentage points or more below the targeted reserve margin quantity).[66]

In its December 19 Order, the Commission failed to adopt a cap stating that, "a high Net CONE value [above the vertical intercept point] simply underscores how uneconomic these resources generally are in the PJM capacity market."[67] This Commission statement represents dangerous disregard for system reliability in the PJM region. Its decision to not cap the MOPR floor price represents a willingness to permit the PJM system to endure extreme capacity scarcity, rather than permit an available resource which is affected by state policy to clear and be selected in PJM's auction.

For these reasons, the default MOPR floor price should be capped at the offer price ceiling or the vertical intercept of the VRR curve, whichever is lower. The Commission's decision to reject a reasonable MOPR floor price cap is unjust and unreasonable, and the ICC requests rehearing.

#### 4. The Commission's Decision to Impose a Net CONE MOPR On New Resources While Existing Resources Need Only Meet A Generally Lower Net ACR MOPR is Unjust and Unreasonable Because it Create a Noncompetitive Barrier to Market Entry by New Resources.

In the December 19 Order, the Commission established a MOPR floor for existing resources and new resources at Net ACR[68] and Net CONE, respectively.[69] Generally, Net

[65] ICC Reply Comments, at 23-24.
[66] *Id*.
[67] December 19 Order, P 142.
[68] December 19 Order, P 18.
[69] December 19 Order, P 138.

CONE will exceed Net ACR given the manner for which construction cost and other fixed costs are accounted.

During the paper hearing, the Independent Market Monitor ("IMM") for the PJM region asserted that "[a]ttempts to distinguish between the definitions of competitive offers of new entrants and the competitive offers of existing resources are a mistake."[70] The IMM explained that, "[a] competitive offer in the capacity market is the marginal cost of capacity, or net ACR, regardless of whether the resource is planned or existing,"[71] and concluded that "[u]se of higher offers for new resources based on the full cost of entry or net CONE . . . would constitute a noncompetitive barrier to entry and would create a noncompetitive bias in favor of existing resources and against new resources of all types, including new renewable resources . . ."[72]

The Commission disregarded the IMM's sound analysis on this issue, imposing a MOPR based on Net CONE on new resources and Net ACR on existing resources. The Commission's decision will result in over-mitigation of new resources and create a noncompetitive barrier to market entry by new resources. Accordingly, the ICC hereby requests rehearing.

### E. The Commission Erred in setting a Replacement Rate that is Overly Expansive, and is therefore, Unjust and Unreasonable.

The Commission affirmed its "initial finding that '[a]n expanded MOPR with few or no exceptions, should protect PJM's capacity market from the price-suppressive <u>effects</u> of resources <u>receiving</u> out-of-market support by ensuring that such resources are not able to offer below a competitive price."[73] However, the Commission goes well beyond its stated purpose to protect the capacity market with its over-broad definition of "State Subsidy." The Commission suggests

[70] Brief of the Independent Market Monitor for PJM, at 4, filed November 6, 2018.
[71] *Id*.
[72] *Id*.
[73] December 19 Order, P 5 (quoting the June 2018 Order) (emphasis added).

that its definition of State Subsidy "is not intended to cover every form of state financial assistance that might indirectly affect FERC-jurisdictional rates or transactions."[74] However, the definition of State Subsidy encompasses any benefit, monetary or otherwise, that any resource participating (either directly or indirectly via bilateral contracts) in a PJM auction obtains, or is eligible to obtain, as a result of any state governmental action or process.[75] The definition is so broad that it is not limited to a government policy benefit received by a resource that enables such resource to clear PJM's capacity auction, but also includes any benefit that "could have" the effect of enabling a resource to clear the auction.[76]

The Commission's Replacement Rate does not require demonstration that a state policy actually results in suppression of offer prices or auction clearing prices, or allows a resource to enter or remain in the market which otherwise would not have.[77] Rather, the Commission found it sufficient if PJM merely determines that a state policy enables a resource to be "capable of suppressing market prices."[78] Although the Commission uses the term "subsidy", a resource does not need to receive actual revenue from a state policy in order to be subjected to MOPR, rather the Commission is imposing mitigation for any benefit, monetary or otherwise, resulting from state policy. And a resource will not actually be required to receive any benefit in order to be subject to MOPR. Rather, the Commission chose to impose MOPR on a resource if it is deemed to be "entitled" [79] to receive a benefit or "eligible" [80] to receive a benefit. Finally, the

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[74] *Id.* at P 68.
[75] *Id.* at P 67 (For instance, the following would be considered a State Subsidy according to the December 19 Order: "A direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is (1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that (2). . .; or (3). . or. (4) could have the effect of allowing a resource to clear in any PJM capacity auction.").
[76] *Id.* at P 67.
[77] *Id.* at P 72.
[78] *Id*.
[79] *Id.* at P 75.
[80] *Id.* at P 67.

Commission ruled that a resource will be considered to be "entitled" to receive a subsidy even after it has finished receiving it, if the resource "has not cleared a capacity auction since that time."[81]

Indeed, the Commission even chose to apply MOPR to voluntary Renewable Energy Certificates (RECs) that are not even associated with a state-sponsored or state-mandated procurement process.[82] The Commission's stated rationale for this decision being, "it is not possible, at this time, to distinguish resources receiving privately funded voluntary RECs from state-funded or state-mandated RECs because resources typically do not know at the time of the auction qualification process how the REC will be eventually used."[83]

These examples show that, rather than protecting against price suppression, which the Commission states as its objective, the Commission's Replacement Rate reaches far beyond, improperly regulating in areas not related to the Commission's stated purpose and mitigating resources: (1) not shown to be suppressing capacity auction clearing prices; (2) not receiving revenue from state policy; (3) not receiving any benefit at all from state policy; and (4) not even affected by state policy. If it is allowed to remain in place, the Commission's Replacement Rate, including the definition of State Subsidy, must be narrowly designed only to address any actual legally impermissible effects of seller offers on suppressing the capacity auction clearing price. Going further would permit impermissible and counterproductive barriers to participation in the market itself. The expansiveness of the Commission's Replacement Rate is unjust and unreasonable and the ICC requests rehearing.

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[81] *Id.* at P 75.
[82] *Id.* at P 176.
[83] *Id*.

### F. The Commission's Rejection of the Resource-Specific FRR Alternative and any Transition Mechanism for States to Revise Their Policies and/or Implement the Existing FRR Alternative is Arbitrary and Capricious, and Results in Rates that are Unjust and Unreasonable.

The December 19 Order rejected requests for transition mechanisms or accommodative measures that would allow states with resources now facing the expanded MOPR the time necessary to adopt new rules and/or pass legislation.[84] The Commission dismissed these requests as moot, on the basis that the December 19 Order did not include the resource-specific FRR option previously proposed by the Commission.[85]

First, given the massive overhaul of PJM's capacity auction, the implications for resources which now fall into the Commission's definition of a "State Subsidy," and the challenges to states that have such resources, the Commission's refusal to accommodate state policies is unjust and unreasonable. Unless states have a reasonable and usable mechanism to modify the way in which resources affected by state policy participate in PJM's capacity auctions, the Commission's Replacement Rate will result in destructive upheaval in that market. In the June 2018 Order, the Commission suggested a resource specific FRR option and made that approach subject to paper hearing. The Commission's unceremonious rejection of that option, and new accommodative measures generally, is arbitrary and capricious and is unjust and unreasonable.

The existing PJM FRR Alternative does not represent an acceptable accommodative measure to address the disruptive aspects associated with the Commission's new Replacement Rate. Rather, that FRR Alternative was designed years ago to address the disruptive aspects of the rate that is being replaced. Because the Commission offered no such new accommodative

[84] December 19 Order, P 217-218.
[85] *Id.* at P 219.

measure, the Commission's Replacement Rate cannot be just and reasonable, and the ICC requests rehearing so that the Commission can adopt the resource-specific FRR option or to develop other usable accommodative measures.

Moreover, the Commission's rejection of the resource-specific FRR Alternative, does not negate the Commission's obligation to provide for a transition mechanism for implementing the new Replacement Rate. Given that the Commission's Replacement Rate represents a direct challenge to current state policies, states will need time to consider whether modifications to those policies are necessary and, if they are, to implement such modification to address the consequences caused by the Commission's decision.[86] Similarly, the Commission's Replacement Rate will cause numerous states and utilities to consider, for the first time, the benefits and detriments associated with the existing FRR Alternative. These considerations will require time, and, if states choose to make modifications to existing state policies or to pursue the existing FRR Alternative or other options, additional time before implementation of the Replacement Rate will be needed to address those options, such as crafting legislation and/or administrative rules and implementing those initiatives.

For these reasons, the Commission's Replacement Rate, because it rejects new accommodative measures entirely, and does not include a reasonable transition mechanism providing sufficient time for impacted parties (States and resources affected by state policy) to assess how they are impacted and develop reactive measures, is unjust and unreasonable in violation of the Federal Power Act.

[86] For example, the Commission directed PJM to include in its compliance filing a provision stating that if a new resource claims the Competitive Exemption in its first year, then subsequently elects to accept a State Subsidy, that resource may not participate in the capacity market from that point forward for a period of years equal to the applicable asset life that PJM used to set the default offer floor in the auction that the new asset first cleared, which is currently twenty years.

### G. The Commission Erred when it Adopted a Competitive Exemption that is Incoherent and Illogical, and is, therefore, not Just and Reasonable.

To qualify for the Commission's proposed "Competitive Exemption" resources must "certify to PJM that they will forego any State Subsidies."[87] The Commission states that this exemption is "based on the competitive entry exemption the Commission accepted in 2013, prior to the orders on remand from *NRG*."[88] But, the competitive exemption previously existing in PJM's tariff included provisions for a competitiveness test, specifically mentioning a competitive auction process open to all resources.[89] Despite the Commission's assurance that its new Competitive Exemption will "take into account the competitiveness of State-Subsidized Resources,"[90] the Commission's new Competitive Exemption does not provide for a competitiveness test, but, rather, involves only a certification by a resource that it will forego any State Subsidy.[91]

The Commission states that resources which certify to PJM that they will forego any State Subsidies will "avoid being subject to the applicable default offer price floor."[92] The Commission similarly states that, "[r]esources that do not wish to be mitigated or believe they will not actually receive a State Subsidy to which they are entitled may certify to PJM that they will forego any State Subsidy under the Competitive Exemption."[93] A major problem with this procedure is that the Commission's definition of a "State Subsidy" is so broad and so nebulous that a resource owner may not know if it is entitled to a State Subsidy until after the fact.

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[87] December 19 Order, at n.27.
[88] *Id.* at P 15, *citing* 2013 MOPR Order, 143 FERC ¶ 61,090 at PP 53-62; 2015 MOPR Order, 153 FERC ¶ 61,066, PP 32-41.
[89] *PJM Interconnection LLC*, 143 FERC ¶ 61,090 (2013), P 56.
[90] December 19 Order, P 73.
[91] December 19 Order, P 15.
[92] *Id.* at P 161.
[93] *Id.* at P 76.

The consequences are steep for a resource that submits a Competitive Exemption certification and subsequently learns that it received, or was merely entitled to, a State Subsidy benefit. For an existing resource, "the resource may not receive capacity market revenues for any part of that delivery year."[94] For a new resource, that resource "may not participate in the capacity market from that point forward for a period of years equal to the applicable asset life that PJM used to set the default offer floor in the auction that the new asset first cleared."[95] These extreme consequences are unreasonable, particularly in light of the difficulty in ascertaining applicability of the exemption.

Without modifications to the Competitive Exemption provision to address its lack of a competitive test, its ambiguous nature given the Commission's open-ended definition of State Subsidy, and the risk of extreme consequences associated with submitting a request for Competitive Exemption, the Commission's proposal is not just and reasonable. For this reason, the ICC requests rehearing.

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[94] *Id.* at P 162.

[95] *Id.* at n. 313. The Commission accepted PJM's 20 year proposed "applicable asset life" and noted "[i]f that value is modified in future proceedings, the period of years for which the resource may not participate in the capacity market must be modified accordingly." *Id.*

## IV. CONCLUSION

WHEREFORE, for the reasons discussed above, the ICC requests rehearing of the December 19 Order as discussed herein. The ICC further requests any and all other appropriate relief.

Respectfully submitted,

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ILLINOIS COMMERCE COMMISSION

Dated: January 21, 2020

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 in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Chicago, Illinois, this 21st day of January, 2020.

*/s/ Christine F. Ericson*

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