UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, LLC) ER18-1314-000

PROTEST OF THE CLEAN ENERGY INDUSTRY ASSOCIATIONS

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission" or "FERC"),[1] the Advanced Energy Economy,[2] American Council on Renewable Energy,[3] American Wind Energy Association,[4] and Solar Energy Industries Association[5] (collectively, "Clean Energy Industry Associations")[6] respectfully submit this protest on PJM Interconnection, LLC's ("PJM") Capacity Repricing or in the Alternative MOPR-Ex Proposal: Tariff Revisions to Address Impacts of State Public Policies on the PJM Capacity Market.[7] PJM has failed to present sufficient evidence to carry its burden to demonstrate that either its Capacity Repricing or MOPR-Ex proposal (collectively, the "Proposals") is just and reasonable and not unduly discriminatory or preferential.[8] Further, it is clear that adoption of either of the Proposals would undermine legitimate state renewable and advanced energy policies, produce excessive costs to end users (through procurement of duplicative and unnecessary capacity resources), result in unjust and unreasonable rates, and be

[1] 18 C.F.R. §§ 385.211, 214 (2018).
[2] Advanced Energy Economy is a national association that advocates for energy efficiency, demand response, energy storage, natural gas electric generation, solar, wind, hydro, nuclear, electric vehicles, biofuels and smart grid.
[3] American Council on Renewable Energy is a national non-profit organization dedicated to advancing the renewable energy sector through market development, policy changes and financial innovation.
[4] American Wind Energy Association is the national trade association that represents the interests of the nation's wind energy industry.
[5] The Solar Energy Industries Association is national trade association of the U.S. solar energy industry.
[6] This protest reflects the views of the trade associations generally; individual member companies may file additional protests or comments that reflect the company's views more granularly.
[7] PJM Interconnection, LLC, *Capacity Repricing or in the Alternative MOPR-Ex Proposal: Tariff Revisions to Address Impacts of State Public Policies on the PJM Capacity Market*, Docket No. ER18-1314-000 (Apr. 9, 2018) ("PJM Repricing Proposal").
[8] In point of fact, as we later discuss, it is important to note that PJM has actually offered Capacity Repricing and two variations of MOPR-Ex, plus an open-ended invitation to the Commission to modify the market design subject to settlement proceedings.

administratively unworkable. For the foregoing reasons and those discussed further herein, the Clean Energy Industry Associations encourage the Commission to reject both Proposals in their entirety.

I. INTRODUCTION

The Clean Energy Industry Associations recognize that significant work has gone into PJM's Proposals, both through the stakeholder process beginning in January of 2016 and up to the point of their filing in this docket. The Clean Energy Industry Associations also recognize that the Commission has put significant thought and effort into assessing the potential impacts of state energy and environmental policies on the wholesale markets and providing a framework for PJM and other Regional Transmission Organizations/ Independent System Operators ("RTOs/ISOs") to propose mechanisms to address those potential impacts.

However, for the reasons discussed below, we conclude that PJM's filing here fails to demonstrate either that legitimate state action is causing a market problem or, more importantly for purposes of Federal Power Act section 205 ("FPA section 205"),9 that either of the Proposals are just and reasonable and not unduly discriminatory or preferential. As discussed below, PJM's filing fails to provide significant and necessary details about the Proposals and how they are expected to impact the PJM markets and market participants, most notably the impact of the Proposals on market prices and costs to consumers. For these reasons, they give the Commission an insufficient evidentiary basis on which to make a reasoned decision to adopt either Proposal, including to determine that the costs of the Proposals are appropriate and necessary to be incurred.

[9] 16 U.S.C. § 824d.

Further, PJM's Proposals cannot be properly considered under FPA section 205. As explained below, PJM's decision to provide the Commission with choices here (including the two Proposals and a third route of settlement procedures) provides inadequate notice to both the Commission and consumers of the tariff proposed to be adopted, and seeks to put the Commission in the inappropriate role of designing PJM's ultimate tariff rate. But under FPA section 205, the Commission has only a "'passive and reactive'" role in reviewing a proposed rate.

In addition, PJM does not explain or provide evidence regarding the impact of either Proposal on both entry and exit decisions by suppliers in the PJM capacity market. To the extent the Proposals would raise prices and encourage new entry and the retention of existing uneconomic capacity (which is reasonable to assume despite the lack of evidence provided on these key factors), they are likely to discourage economic exit of aging resources and continue a capacity oversupply problem that has plagued PJM for several years.

Such a result fails the test of economic logic and the Commission's recently pronounced "first principles" of capacity markets. It would also erode – rather than enhance – investor confidence in the markets. Investors expect the market to produce price signals that facilitate orderly entry and exit, not the implementation of artificial price increases during a time of market oversupply.

Finally, the Commission should be mindful of the results of the stakeholder process that led to PJM's filing. Stakeholders overwhelmingly determined that the status quo, rather than either of PJM's Proposals, was the preferred outcome. While the results of stakeholder processes are certainly not determinative, ignoring the breadth of opposition (from suppliers, consumers, and state policymakers alike) demonstrated in that process with respect to this filing risks further

diminishing the value of the stakeholder process in being responsive to stakeholders, ensuring RTO/ISO independence, and facilitating the achievement of balanced outcomes.

II. PROTEST

A. PJM Has Failed to Provide Sufficient Evidence to Meet Its Burden Under Section 205 of the FPA.

PJM has tasked the Commission with deciding between one of two courses of action that PJM incorrectly asserts are each a just and reasonable approach for addressing the impact of state "subsidies" provided under state policies on PJM's capacity market.[10] In order to meet its statutory burden under FPA section 205, however, PJM must present "necessary information" to allow the Commission to reach an "informed and equitable decision" on which to accept one of the Proposals.[11] That section requires public utilities filing changes to rates or terms and conditions of jurisdictional electric service to demonstrate affirmatively that the proposed changes are just and reasonable,[12] especially when determining whether any increase in customers' rates (which either Proposal is expected to result in) is commensurate with the benefits that ratepayers will receive.[13]

PJM, however, has not provided the Commission quantitative evidence or analysis discussing each Proposal's expected impacts on PJM's markets and market participants that would allow the Commission to make a reasoned decision as to which of the two Proposals

[10] *See e.g.* PJM Repricing Proposal at 16-18.
[11] *See Mun. Light Bds. of Reading & Wakefield, Mass. v. Fed. Power Comm'n*, 450 F.2d 1341, 1348 (D.C. Cir. 1971).; *see also* 16 U.S.C. § 824d (2012).
[12] *See e.g. Nantahala Power & Light Co. v. Fed. Energy Reg. Comm'n*, 727 F.2d 1342, 1351 (4th Cir. 1984) (stating that a proponent of a rate change "bears the burden of justifying each component of a rate increase"); *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,128 at P 25 (2006), *reh'g denied*, 119 FERC ¶ 61,097 at P 18 (2007) (holding that proponent "must demonstrate that the revision meets the just and reasonable standard under section 205").
[13] *Compare K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992) (setting forth the basic principles of cost caustion); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (same); *Illinois Commerce Commission v. FERC*, 576 F.3d 470 (7th Cir. 2009) (same).

better balances the "federal policy question" that PJM claims exists. No cost estimate of either Proposal is provided, nor any assessment of the benefits consumers would experience in return for expected costs. In particular, PJM does not provide any evidence or analysis related to the expected impact of either Proposal on capacity market prices going forward, on energy and ancillary services market prices, or the overall cost impact on consumers of either Proposal.

The failure to provide any evidence regarding the expected costs to consumers of either the Proposals alone requires rejection of the Proposals. Without such evidence, the Commission cannot make a reasoned decision that weighs the various cost and non-cost considerations underlying the Proposals and the impacts they would have on the PJM capacity market, PJM market participants, and consumers.[14]

PJM also fails to provide other necessary analytical evidence to demonstrate how either Proposal would affect the PJM markets (including the energy, capacity, and ancillary services markets) and market participant behavior in those markets.[15] For example, PJM provides almost no analysis of the potential impact of each Proposal on potential market participant behavior. Nor has it demonstrated why a variety of technologies that have been previously shown to have little to no impact on capacity prices – especially wind and solar resources – should now be targeted for repricing or mitigation under the Proposals.[16] Such an analysis is essential to determining whether the capacity market will meet its objectives, including facilitating robust

[14] *See Advanced Energy Management Alliance et al. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) (*citing Michigan v. EPA.*, 135 S. Ct. 2699, 2707(2015) and *TransCanada Power Marketing Ltd. v. FERC*, 811 F.3d 1, 11-12, 421 U.S. App. D.C. 1 (D.C. Cir. 2015)) (noting that the Commission must at a minimum acknowledge the cost impacts of its actions and weigh whether those costs are justified when making policy judgments).

[15] *See, e.g.*, William Hogan, *Getting the Prices Right in PJM* at 6 (April 1999) (explaining the relationship between locational marginal prices and market participant behavior).

[16] In fact, as discussed below, available evidence suggests that the entry of such resources into the PJM markets has had little to no impact on investor confidence in RPM and the prices it is producing. For that reason, PJM's Proposals to target these resources is an overreach if low prices is the problem it seeks to solve.

competition, selecting the least-cost set of resources, and mitigating market power.[17] Without that evidence in the record, the Commission cannot make a determination based on substantial evidence that the markets will produce just and reasonable rates and avoid undue discrimination or preference under either Proposal.

In short, because PJM has simply failed to present sufficient evidence to justify either Proposal, it has failed to meet its statutory burden under FPA section 205. The Commission has rejected proposed tariff revisions when they have failed to offer any quantitative data to support them,[18] and should do so here.

B. The Proposals Fail to Meet the Requirements of Section 205, and if not Rejected Thereunder, Should Only Be Properly Considered under Section 206.

PJM's filing also fails to satisfy the requirements of FPA section 205 because it provides inadequate notice to both the Commission and consumers and seeks to put the Commission in the inappropriate role of designing PJM's ultimate tariff rate. Under FPA section 205, FERC must have a "'passive and reactive'" role in reviewing the proposed rate,[19] and the proposal at issue must provide adequate notice to consumers,[20] "plainly" state the change sought,[21] and be

[17] For example, the likelihood of repricing in a Base Residual Auction could impact the bidding behavior of a unit that expects to offer at a level close to the marginal unit setting the market clearing price. That unit could have the incentive to offer lower than it otherwise might in the first stage of the auction to ensure that it clears and receives the higher "repriced" market clearing price.

[18] *See, e.g., PJM Interconnection, LLC*, 162 FERC ¶ 61,019, at P 45 (2018) (rejecting a proposed change to PJM's cost allocation methodology for allocating uplift to Up-to-Congestion transactions because PJM had "not attempted to quantify the approximate magnitude of UTCs' impact on commitment decisions or uplift costs, nor shown that this amount justifies the proposed allocation of costs to UTCs"); *Southwest Power Pool*, 161 FERC ¶ 61,039 at PP 25-26 (2017) (rejecting SPP's proposal because it failed to offer more than "anecdotal evidence" in support of its proposal); *Midcontinent Independent System Operator, Inc.*, 160 FERC ¶ 61,059 at P 26 (2017) (finding that MISO had not provided sufficient support to demonstrate its proposed revisions to its Generator Interconnection Procedures and its *pro forma* Generator Interconnection Agreement were just and reasonable).

[19] *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108, 114 (D.C. Cir. 2017) (quoting *Advanced Energy Management Alliance v FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017)). *See also City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (Scalia, J.) (noting that FPA section 205 envisions "an essentially passive and reactive role" for the Commission).

[20] *NRG Power Marketing, LLC*, 862 F.3d at 116.

[21] 16 U.S.C. § 824d(d).

sufficiently definite to take effect by operation of law.[22] PJM's filing, by submitting two vague Proposals and asking the Commission to "pick one," fails to meet each of those requirements.

PJM's filing is more properly characterized as a filing under FPA section 206 than a FPA section 205 filing. Under FPA section 206, the current rate must be shown to be unjust and unreasonable and the proposed rate just and reasonable. However, PJM has not alleged that its current capacity construct is unjust and unreasonable and, in any event, cannot meet its burden under either prong of FPA section 206.

An examination of the FPA's requirements establishes why PJM's filing is deficient under FPA section 205. As the courts have repeatedly held that FPA "[s]ection 205 puts the Commission in a 'passive and reactive role.'"[23] In contrast, the Commission has a "more active role . . . under § 206."[24] This distinction is important for several reasons.

Under FPA section 205, "FERC must accept proposed rate changes . . . as long as the changes are just and reasonable."[25] On the other hand, under FPA section 206, the Commission must find the current rate unjust and unreasonable and the proposed rate just and reasonable. "It is the Commission's job – not the petitioner's – to find a just and reasonable rate."[26] Here, PJM has asked the Commission to go far beyond a "passive and reactive role" and to choose among a variety of competing Proposals or to modify them as it sees fit subject to a settlement proceeding. Making FERC an active, hands-on policymaker is the antithesis of "passive and reactive."

[22] *Id.*
[23] *NRG Power Marketing, LLC*, 862 F.3d at 114.
[24] *City of Winnfield*, 744 F.2d at 876.
[25] *NRG Power Marketing*, 862 F.3d at 113.
[26] *Maryland Public Service Com'n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011).

PJM's filing actually offers a multitude of options—not a jump ball between two competing positions. Capacity repricing is one option, and MOPR-Ex offers two other dramatically different alternatives. One has an exemption for Renewable Portfolio Standards ("RPS"). The other does not.[27] Then, there are countless permutations among those three options—for which the public has received no conceivable notice—in which PJM has suggested sending the matter to a settlement judge for resolution if there is an undefined "subset of issues" that require acceptance "subject to suspension and further proceedings."[28]

A February 16, 2018, letter from Andrew L. Ott, the President and CEO of PJM, also suggests it is PJM's plan to give the Commission a more active, hands-on policymaking role in this process than is afforded under FPA section 205. According to Mr. Ott, because the choice among policy options involves "a balancing of federal and state interests," the PJM Board "concluded that this question should fall to the Commission as the federal policymaker not to the PJM Board."[29] Mr. Ott's letter even contemplates continuing stakeholder engagement at the Commission after the Commission makes a policy call through the use of "a time-bound settlement judge proceeding, with expectation that such a process will bring refinement, compromise and more consensus support for what ultimately will be presented to the Commission later this year as a package of changes."[30]

Other hallmarks of a proper FPA section 205 filing are conspicuously absent, and PJM's filing fails to provide adequate notice of either of its Proposals. Under FPA section 205, notice is

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[27] PJM Interconnection, L.L.C., *Capacity Repricing or in the Alternative MOPR-Ex Proposal: Tariff Revisions to Address Impacts of State Public Policies on the PJM Capacity Market*, Docket No. ER18-1314-000, at 114 (April 9, 2018).

[28] *Id.* at 5.

[29] Andrew L. Ott, Letter to PJM Stakeholders, at 1 (Feb. 16, 2018), *available at* http://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/20180216-letter-from-pjm-president-and-ceo-on-behalf-of-the-board-of-managers-regarding-capacity-market-reforms.ashx?la=en.

[30] *Id.*

intended to protect the utility as well as ratepayers. *NRG Power Marketing, LLC* emphasizes this point:

> Section 205 protects the utility's customers by ensuring 'early notice – in the rate proposal itself – of the sort of rate increase that is sought.' When FERC 'imposes an entirely new rate scheme' in response to a utility's proposal, the utility's customers do not have adequate notice of the proposed rate changes or an adequate opportunity to comment on the proposed changes.[31]

Here, consumers do not have adequate notice of what the rate will be. As noted, PJM has filed capacity re-pricing, two different versions of MOPR-Ex, and invited the Commission to send the matter to a settlement judge for any variation thereof. PJM encourages the Commission to do so even though the jump ball failed to receive the necessary support in PJM's stakeholder processes. Indeed, after the failed votes, over stakeholder objections, PJM's Board decided to file the Proposals with the Commission.

PJM's filing fails to meet other requirements of FPA section 205. The language of the statute requires a public utility to provide notice to the Commission and the public that "plainly" states the changes to be made to any rate, charge, or service.[32] This is important because, absent FERC action, a proposed rate under FPA section 205 takes effect by operation of law in 60 days.[33] As a result, the clear implication from the FPA's language and structure is that a FPA section 205 filing must be sufficiently plain or definite that the proposed rate could take effect by operation of law if the Commission fails to act. Here, it is impossible for that to happen, because while PJM has expressed a preference for capacity repricing it has also proposed other options that it asserts are just and reasonable. If the Commission fails to act within 60 days, it is unclear

[31] *Id*. at 116 (quoting *City of Winnfield*, 744 F.2d at 876.

[32] 16 U.S.C. § 824d(d).

[33] *Id*.

which capacity construct would take effect by operation of law. This uncertainty in and of itself betrays PJM's assertion that it is making a FPA section 205 filing.

PJM's attempt to rely on past Commission orders in which a utility presented the Commission with two or three options under FPA section 205 or section 4 of the Natural Gas Act is distinguishable.[34] Each of the orders cited by PJM preceded *NRG Power Marketing,* when the law was less clear on the Commission's role in reviewing a proposed rate and whether the Commission could approve a rate subject to conditions that the utility could accept or reject. Moreover, in each of the orders cited by PJM, no party appears to have objected to the fact that options were presented to the Commission. Nor, apparently, was there an open-ended invitation to the Commission to submit the matter to a settlement judge for resolution of an undefined and potentially boundless "subset of issues" relating to the proposed rate. Finally, none of the proposed rates asked FERC to choose or modify a market design on a matter that involves billions of dollars. Instead, the past orders address far more limited issues (such as cost recovery), not the structure of the market itself. Far from supporting PJM's request, a comparison of the orders and PJM's filing underscores the unprecedented nature of PJM's request under FPA section 205.

Because PJM's filing has plainly failed to meet the requirements of FPA section 205, it should be rejected.[35] Even if it is not rejected, it can only be properly considered under FPA section 206. As discussed below, under FPA section 206, PJM's jump ball Proposals fails because PJM has not shown that its current rules are unjust and unreasonable.

C. The Current Functioning of PJM's Current Capacity Market and Reliability Metrics Show that There is No Need for Action at this Time.

[34] PJM Interconnection, L.L.C., *Capacity Repricing or in the Alternative MOPR-Ex Proposal: Tariff Revisions to Address Impacts of State Public Policies on the PJM Capacity Market*, at 48-49.

[35] 18 C.F.R. § 35.5 (requiring the Secretary of the Commission to reject deficient filings).

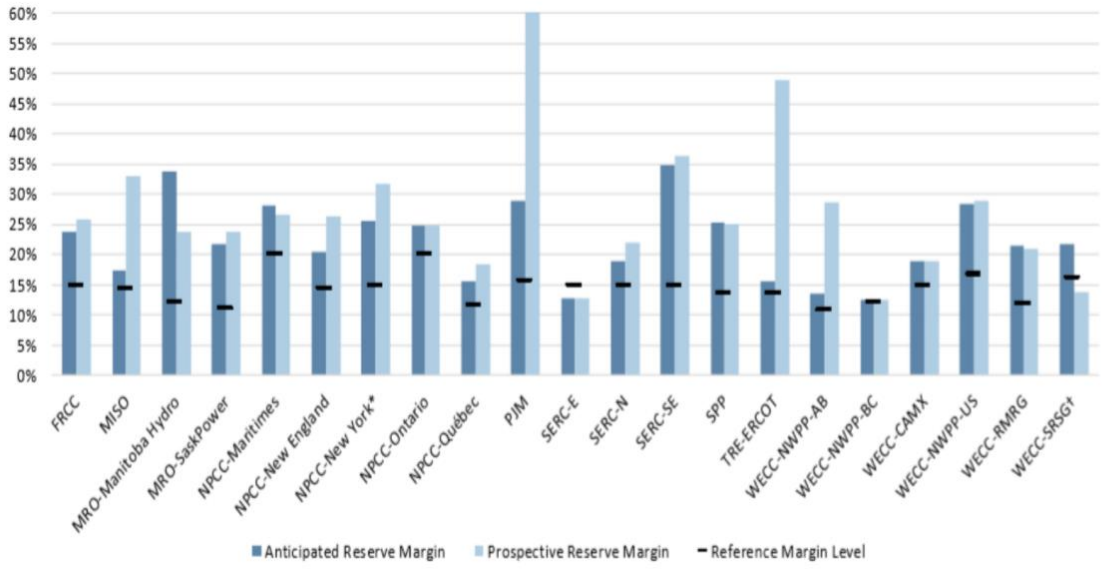
PJM claims, without providing sufficient evidence, that a growing number of out-of-market state actions are affecting the integrity of its competitive markets (*i.e.*, the price signals sent by PJM's capacity market) and, in turn, threatening reliability. To address that alleged situation, the grid operator claims that the Commission must now act to address whether PJM's capacity market should accommodate state policy choices to promote and rely upon particular resources. PJM is simply wrong that state policies are as a general matter threatening competitive markets or reliability.

While price integrity is necessary, it is not currently being compromised, especially not by legitimate state policy programs. The PJM Independent Market Monitor's Report for 2017 states: "The results of the energy market and the results of the capacity market were competitive in 2017."[36] For example, the load-weighted average LMP for the region was $30.99/MWh in 2017,[37] compared to 2007, when it was nearly double that, $57.58/MWh.[38]

The record does not establish a pressing need to act out of a concern for the reliability of PJM's system and the prospect that the retirement of uneconomic generation resources could create reliability concerns. PJM has said that its system is "safe and reliable today—it has been designed and is operated to meet all applicable reliability standards."[39] PJM currently has sufficient reserve margins, and it is nearly impossible that PJM will face a near-term shortfall given these reserve margins. The record does not provide any reliability metrics for action at this time. The table below shows PJM's reserve margin is well above its target, projected to rise

[36] PJM State of the Market 2017 Report, at 1, *available* at http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2007/2007-som-volume1.pdf.
[37] *Id.* at 6.
[38] *Id.* at 15.
[39] *Comments and Responses of PJM Interconnection, L.L.C.,* Docket No. AD18-7-000, at 4 (March 9, 2018). *See also* PJM Interconnection, L.L.C., *Generation Deactivation Notification Update*, at 3 (May 3, 2018) ("Units can retire as scheduled"), *available at http://www.pjm.com/-/media/committees-groups/committees/teac/20180503/20180503-teac-generation-deactivation-notification.ashx.*

significantly, and well above other regions. PJM's State of the Market Report recently projected that PJM will have 17,000 MW of excess reserves on June 1, 2018.[40]



Further, capacity markets are working to secure investment. There is no problem with competitive entry in PJM that would justify action at this time; in fact, entry into PJM's market continues at a strong pace. PJM has asserted that since 2007 its capacity construct has "facilitated a[n] impressive degree of resource entry and exit in a relatively short time," including the addition of more than 60 gigawatts of new resources and the retirement of almost 40 gigawatts of inefficient resources.[41] For instance, there were more than 18,000 MW of new units added for the 2017/18 through 2020/2021 delivery years.[42] PJM states in its Resource Investment white paper, "Given the level of capital being attracted to PJM, it seems highly

[40] *Id.* at 3.

[41] *Id.* at 2.

[42] PJM State of the Market 2017 Report, at 3, *available* at http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2007/2007-som-volume1.pdf.

implausible to claim the market is not compensating merchant investors enough for risks they assume."[43]

The record does not indicate that the entry of clean energy and advanced technologies into PJM's capacity market has any material impact on market/investor confidence, nor does it materially affect prices. For state policies to have some impact on wholesale power prices is to be expected. As the U.S. Supreme Court has noted, organized wholesale electricity markets cannot expect to be "hermetically sealed" from all outside sources that might make prices imperfectly competitive.[44]

PJM is wrong to suggest that legitimate state clean and advanced energy policies have a harmful spillover on consumers. If anything, consumers benefit from state clean energy policies, gaining more affordable capacity, lower energy prices, and public health benefits, as well as reaping the benefits of innovation in products and services. Acting within the powers reserved to them under the FPA and their independent constitutional authority to address a variety of state interests, states have enacted policies to promote clean energy and advanced technologies in order to diversify their energy mix and further security of the system.[45]

State RPSs have been established in large part due to states' interests in addressing negative environmental and economic externalities associated with the production of electricity from generation resources that utilize fossil fuels. States across the nation have been actively adopting RPSs, with 29 states having some sort of standard as of August 2017.[46] RPSs have been

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[43] PJM, *Resource Investment in Competitive Markets*, at 24, available at http://www.pjm.com/~/media/library/reports-notices/special-reports/20160505-resource-investment-in-competitive-markets-paper.ashx.
[44] *See id.* at 15 (citing *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016).
[45] *See Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F. 3d 393, 417 (2d Cir. 2013) ("States have broad powers…to direct the planning and resource decisions of utilities under [their] jurisdiction," including by "order[ing] utilities to… purchase renewable generation.").
[46] National Conference of State Legislatures, *State Renewable Portfolio Standards and Goals*, (Aug. 1, 2017) available at http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx.

in effect and prevalent in the PJM region since the beginning of electric industry restructuring in the late 1990s. These actions are not "aimed at" the wholesale markets and do not attempt to regulate any aspect of the wholesale market; rather, they are aimed at legitimate state environmental and economic objectives.[47] And throughout this time, as PJM's filing itself demonstrates, PJM's capacity market has seen robust entry of new capacity resources of all types.

Since no harmful impacts from the extensive amount of experience with the interaction of state clean energy policies and PJM's capacity market have been demonstrated (only prospective effects have been alleged), the Proposals could serve as unduly discriminatory barriers to the entry of clean energy resources in the PJM region and, therefore, frustrate the intent of legitimate state policies.

D. Both of PJM's Proposals Will Produce Higher Prices and Perpetuate the Oversupply Problem in PJM, and Neither Have Been Shown to Produce Other Benefits That Would Make Them Just and Reasonable Regardless of These Results.

Even assuming arguendo that one of these approaches presented the necessary information to allow the Commission to reach an informed and equitable decision on which Proposal to move forward with, based on the scant data provided by PJM, it is clear that each of the Proposals will likely result in unjustifiably high rates for consumers caused due to an artificial rise in PJM's capacity market prices, without producing corresponding benefits.

It is clear from the structure of both Proposals that they are likely to artificially raise prices at a time when the market is flush with capacity resources. Capacity repricing, for example, utilizes a second run of the auction with different bids for the purpose of setting prices.

[47] *See Allco Fin. Ltd. v. Robert J. Klee, et al.*, Case No. 15-20 (2nd Cir. 2015) (upholding Connecticut's renewable procurement program).

The bids are higher in this round, which will tend to increase prices in almost all cases. MOPR-Ex excludes certain resources from participating in the capacity auction, while requiring many others to offer at significantly higher prices than they might otherwise choose to; among those excluded or impacted are renewable resources that are not part of an exemption. By excluding such resources, the remaining supply curve will tend to be higher, and the price at which supply and demand meet will be higher in almost all cases.

Such an approach, at a basic level, makes little economic sense. Higher capacity prices will encourage capacity suppliers to continue to enter the market, or stay in the market, even in the face of significant oversupply. That result will impose unnecessary increased costs on consumers, incentivize supply that is not needed, and frustrate, rather than "accommodate" or "mitigate" the impact of, legitimate state policies. And along with these higher prices come no benefits, no new supply, and no other services from which consumers benefit. In other words, neither of the Proposals is structured to incentivize market participants to provide additional supply nor any new service from which consumers might benefit, yet they both produce higher prices and that is unjust and unreasonable.

Further, each Proposal will almost certainly perpetuate the capacity oversupply that has plagued the PJM region for years and is the true cause of any alleged price suppression. It has been clear for years that the PJM region is oversupplied with generation resources. Unfortunately, the Capacity Repricing Proposal will only serve to perpetuate generation oversupply by raising capacity market revenues for all resources, which will in turn likely incentivize these resources not to retire even when the energy market is sending them a price signal to do so. Similarly, as PJM states, the "MOPR-Ex almost certainly will result in some

duplication of resources needed to serve loads."[48] Accordingly, adoption of either Proposal will perpetuate energy market price suppression in PJM that does not truly reflect supply and demand needs in the PJM region. Thus, the Proposals fail to adhere to one of the Commission's "first principles" of capacity market design which is to "provide price signals that guide the orderly entry and exit of capacity resources."

In short, both Proposals are unjust and unreasonable and must be rejected by the Commission because they would: raise rates for consumers (without producing corresponding benefits), result in further market price suppression, perpetuate generation oversupply and impede legitimate state policies.

E. PJM's Proposals Are Also Unduly Discriminatory

PJM's Proposals unduly discriminate against independent generators in the region by targeting resources with no market power for repricing or mitigation. Where the market is providing a signal to exit, the Commission should not artificially alter the price signal. The PJM region is oversupplied with generation resources, and the Proposals will only serve to perpetuate generation oversupply by raising capacity market revenues for all resources, which will in turn incentivize these resources to remain in the market. For example, PJM acknowledges that the "MOPR-Ex almost certainly will result in some duplication of resources needed to serve loads."[49] The Proposals favor incumbent generators and unduly discriminate against independent resources that lack market power. Fully formed energy prices are the clearest expression of what flexibility the system needs and what it is worth, whereas the purpose of the capacity market "is to produce a level of investor confidence that is sufficient to ensure resource

[48] PJM Proposals at 56.
[49] *Id.*

adequacy at just and reasonable rates."[50] A high clearing price in the capacity auction encourages new generators to enter the market, increasing supply and thereby lowering the clearing price in same-day and next-day auctions three years' hence; a low clearing price discourages new entry and encourages retirement of existing high-cost generators.[51] As demonstrated above, the PJM region has more than sufficient resources installed to ensure resource adequacy, and there is not a legitimate concern that there will be insufficient capacity to serve long-range system needs. There is no single pathway to a reliable power system, and as the share of variable sources of energy grows, there will be growing value in flexible load and supply resources.[52] Revising capacity market pricing to retain uneconomic and inflexible units discriminates against independent new entrants and discourages innovation in multi-use applications.

As the Commission recently explained, capacity markets should be designed to produce robust competition among resources to produce the selection of the least-cost resources that possess the attributes sought by the markets, to shift risk as appropriate to private capital, and to mitigate market power.[53] Undue discrimination arises, however, when similarly-situated classes of entities are subjected to different treatment by a Commission-regulated rate or practice.[54] While PJM attempts to define actionable state programs that will result in repricing or mitigation, its line drawing exercise fails to meaningfully distinguish (based on record evidence) between those subsidies that should trigger action and those that should not.[55] Failing to establish clear lines as to which resources will be subject to repricing or mitigation and which will not will introduce substantial uncertainty into the capital markets for both new and existing

[50] *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 21 (2018) at P 21 ("CASPR Order").
[51] *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016).
[52] *See, e.g.,* Michael Hogan, Following the Missing Money, 30 The Electricity Journal 1 (2017), *available at* https://www.sciencedirect.com/science/article/pii/S1040619016302512.
[53] CASPR Order at P 21.
[54] *Id*. at P 44.
[55] *Compare* CASPR Order at P 45 (relying record evidence to distinguish between resources.

assets, chilling investors' willingness to fund resources that rely on wholesale market revenue streams and discouraging continued innovation in multi-use installations. Rather than designing efforts to encourage competition among resources needed to support the grid of the future, PJM's Proposals focus on maintaining the status quo by unduly discriminating against new and innovative market entrants that are capable of delivering the products and services required at the least-cost to consumers.

The discriminatory nature of the Proposals is also apparent in that neither Proposal explains how the reforms will guide the orderly *exit* of existing uneconomic resources.[56] Ensuring investor confidence in capacity markets is a two-way street – investors need certainty that prices will rise in times of true scarcity of supply, and that low prices will produce meaningful exit to bring the market back to equilibrium. Tweaking the market in a manner that will prevent economic exit even in the face of oversupply will create uncertainty that in fact harms investor confidence on a macro scale. There is no credible evidence that investors lack confidence within the PJM region, and there is no indicia that investors will stop investing in resources within the region whether financed through wholesale market or state policy revenue streams. Artificially raising market clearing prices at a time when PJM has more capacity than necessary to meet reliability requirements, without any indicia that investor confidence has weakened, is not "a reasonable cost" to impose on consumers. To ensure that the PJM region continues to "attract and maintain resources investment when the system requires it, and to do so at a reasonable cost,"[57] the Commission should reject both of PJM's Proposals.

F. The Commission Should Carefully Consider the Results of the Stakeholder Process in Weighing the Proposals

[56] CASPR Order at P 21.
[57] CASPR Order at P 25.

Commission should carefully weigh the fact that during the stakeholder process, many states and stakeholders did not agree that market reforms were necessary and encouraged PJM to retain the status quo. To be sure, the outcome of stakeholder votes does not bear directly on the justness and reasonableness of a particular proposal filed with the Commission, and the stakeholder process is not determinative of whether a proposal meets the statutory standard. Nonetheless, the Commission has placed great emphasis on the importance of the stakeholder process in ensuring the independence of RTOs/ISOs from their stakeholders (or any segment of stakeholders) and arriving at outcomes that balance competing interests. The Commission has also more recently emphasized that RTO/ISO stakeholder processes must be responsive to stakeholder interests and concerns.

Here, it must be emphasized that the broad majority of PJM stakeholders voted to maintain the status quo and against both of the Proposals. Upon review of the Proposals, the Organization of PJM States, Inc. ("OPSI") voted 12-2 to urge PJM's board to "take no action," and requested that PJM re-initiate a stakeholder process that will "correct or otherwise address the lack of underlying support, flaws, and unintended consequences inherent in the repricing proposal."[58] As OPSI explained, there was not an agreement among stakeholders that state policy initiatives present an actual problem: "On January 25, 2018, the Markets and Reliability Committee voted on the January 16, 2018 version of PJM Staff's repricing proposal and the result was a voting

[58] *See* Letter to Chairman Schneider and PJM Board of Managers from John R. Rosales, President, Organization of PJM States, Inc. (Feb. 7, 2018) ("OPSI Letter"), *available at* https://citizensutilityboard.org/wp-content/uploads/2018/02/OPSI-BOD-Repricing-Letter-Final-with-vote.February.pdf. *See also.*, Bade, Gavin, *Brief: Most PJM States Oppose Capacity Repricing Proposal*, UTILITY DIVE (Feb. 9, 2018). Regulators from Delaware, D.C., Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, Pennsylvania, Virginia, North Carolina and Tennessee supported the OPSI statement. West Virginia and Ohio opposed it.

ratio of 1.07 in favor and 3.93 against."[59] This is consistent with the non-binding polling of stakeholders indicating 64% favored retaining the status quo.[60]

These results are a strong indication of fundamental flaws in both Proposals and in the rationale supporting them, and raise significant questions about both how those Proposals will impact stakeholders (and whether a minority of stakeholders stand to benefit from them at the expense of the majority who voted against them) and the responsiveness of PJM's stakeholder process. As Commissioner Powelson recently put it, the stakeholder process in PJM is rapidly reaching a "crisis of confidence".[61] Ignoring the results of that process here – and the concerns of the majority of market participants, states, and consumers – would only further exacerbate these problems.

III. CONCLUSION

For the foregoing reasons, the Clean Energy Industry Associations respectfully request that the Commission accept this protest and the arguments presented, as described herein.

Respectfully submitted,

[59] OPSI Letter at 3.
[60] *See* CCPPSTF Vote Results (Nov. 21, 2017); *available at* http://pjm.com/-/media/committees-groups/task-forces/ccppstf/20171121/20171121-ccppstf-vote-results.ashx.
[61] Heirdon, Rich Jr. and Brooks, Michael, *Powelson: 'Erosion of Confidence' in Stakeholder Process*, RTO INSIDER (May 2, 2018), *available at* https://www.rtoinsider.com/pjm-stakeholder-process-robert-powelson-capacity-repricing-91751/.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 7th day of May, 2018.