UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Calpine Corporation, et al.	)	Docket Nos. EL16-49-000
v.	)	
PJM Interconnection, L.L.C.	)	ER18-1314-000
PJM Interconnection, L.L.C.	)	ER18-1314-001
PJM Interconnection, L.L.C.	)	EL18-178-000 (consolidated)

REQUEST FOR REHEARING OF
THE CLEAN ENERGY ASSOCIATIONS

Pursuant to Section 313 of the Federal Power Act, 16 U.S.C. § 825l(a), and Rule 713 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2018), the Advanced Energy Economy, American Council on Renewable Energy, American Wind Energy Association, and Solar Energy Industries Association (collectively "Clean Energy Associations") hereby request rehearing of the Commission's Order Rejecting Proposed Tariff Revisions, Granting in Part and Denying in Part Complaint, and Instituting Proceeding Under Section 206 of the Federal Power Act (June 29, 2018) ("June 29 Order" or "Order").

In reaching its decision, the Commission erred in determining, absent evidentiary support in the record, that PJM's tariff is unjust and unreasonable. The Commission accordingly did not meet its burden of proof under section 206 of the Federal Power Act ("FPA"), 16 U.S.C. § 824e(b), to prove "that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential." Rather, the Commission's decision

is based on speculation that the status quo is unjust and unreasonable because of claimed effects of valid state public policies on PJM's capacity market. In mitigating those state policies, the Commission thwarts lawful state policies without the necessary supporting evidence for such a need. For these reasons and those discussed below, the Clean Energy Associations respectfully urge the Commission to grant this request for rehearing, withdraw the Order and establish more appropriate procedures that provide a sufficient opportunity to comment and ensure an adequate record is developed upon which to take action.

I. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

Pursuant to Rules 203(a)(7) and 713, 18 C.F.R. §§ 385.203(a)(7) and 385.713 (2018), Clean Energy Associations present the following identification of errors and statement of issues:

1. The June 29 Order establishes a process that forces the Commission to rush to judgment on a major redesign of the PJM capacity market without adequate opportunity to build a sufficient record, and deprives interested parties of sufficient notice of and opportunity to comment on the precise contours of the just and reasonable replacement rate that the Commission ultimately proposes to establish pursuant to FPA section 206. *See, e.g.,* 5 U.S.C. § 554 (requiring parties to be notified of "the matters of fact and law asserted"); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) ("[t]he essential requirements of due process . . . are notice and an opportunity to respond"); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (the opportunity to be heard must be "'at a meaningful time and in a meaningful manner'").

2. The June 29 Order is arbitrary and capricious because the Commission failed to rely on substantial evidence in the record to support its conclusion that PJM's capacity market rates are unjust and unreasonable in contradiction of the directive in *See, e.g., S.C. Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 54 (D.C. Cir. 2014) (the Commission must support the factual findings underpinning its determination with substantial evidence).

3. The June 29 Order is arbitrary and capricious because the Commission failed to meaningfully address evidence in the record contradicting its conclusion that capacity resources that participate in state renewable energy programs threaten the integrity of the capacity market. *See. e.g., Serv. Comm'n v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005) (the Commission must "respond meaningfully to the arguments raised before it"), *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1296 (D.C. Cir. 1992) (the Commission must make an "effort to grapple with" alternate theories).

4. The June 29 Order erred by not providing a reasoned basis to support its departure from existing precedent with respect to exempting state-supported renewable energy resources from mitigation, *See, e.g., FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) (an agency departing from a prior policy must at least "display awareness that it is changing position" and provide a "reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy").

5. The June 29 Order's finding that the unmitigated participation of certain state-supported resources renders PJM's capacity market unjust and unreasonable is contrary to law because it usurps the states' explicitly reserved authority to regulate facilities used for the generation of electric energy. 16 U.S.C. § 824(b)(1) (The FPA vests FERC exclusive jurisdiction over "the sale of electric energy at wholesale in interstate commerce"); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 205 (1983) (state regulation of the generation mix has been "characteristically governed by the States").

II. ARGUMENT

A. The Commission should withdraw its unjust and unreasonable finding and establish more appropriate procedures that provide a sufficient opportunity to comment and ensure an adequate record is developed upon which to take action.

As an initial matter, the Clean Energy Associations are concerned that the process initiated by the June 29 Order leaves little time for PJM and its stakeholders – most notably the States whose policies will be directly impacted – to analyze and provide meaningful comments and evidence regarding the replacement rate outlined by the Commission. While time is of the essence, the Commission should ensure that its actions are focused on sustainable and long-term success. The Clean Energy Associations are concerned that the process deprives interested parties of sufficient notice of and opportunity to comment on the precise contours of the just and reasonable replacement rate that the Commission ultimately puts in place. This violates the requirements of the FPA, Administrative Procedures Act ("APA"), and due process. For these reasons, as discussed in more detail below, the Commission should withdraw its unjust and unreasonable finding and instead use its typical "show cause" approach to FPA section 206 proceedings. At a minimum, however, the Commission must adjust the procedures it established in the June 29 Order to give interested parties notice and a meaningful opportunity to comment on the actual specific expanded Minimum Offer Price Rule ("MOPR") and resource-specific Fixed Resource Requirement ("FRR") alternative *before* adopting it as the just and reasonable replacement rate going forward.

The Commission's immediate finding in the June 29 Order that PJM's capacity market is unjust and unreasonable and unduly discriminatory forces the Commission to rush to judgment on a replacement market design that can be implemented by PJM in time for the next Base Residual Auction ("BRA") (currently scheduled for May 2019). Otherwise, the BRA will have to

be conducted under market rules that the Commission has determined are unjust and unreasonable, which could create significant market disruption and uncertainty. To avoid this result, the Commission appears to believe it must issue an order determining a just and reasonable replacement by early January 2019 to give PJM adequate time to implement its findings in time for the May 2019 BRA.[1]

As the June 29 Order states, however, determination of the replacement rate as laid out by the Commission is, to say the least, a "significant undertaking."[2] The Commission has provided only the broad contours of a potential replacement rate (consisting of an expanded MOPR "with few exceptions" and a resource-specific FRR alternative), and then posed numerous questions about these potential replacement mechanisms which implicate nearly every aspect of the design of Reliability Pricing Model ("RPM").[3]

The process the Commission has initiated limits the ability of PJM and interested stakeholders to provide meaningful input regarding such a massive redesign of RPM, and could leave the Commission with an inadequate record to determine the just and reasonable replacement rate. The June 29 Order gives both PJM and all interested parties just 60 days to "submit an initial round of testimony, evidence, and/or argument" regarding the proposed expanded MOPR and resource-specific FRR alternative, and provides 30 days thereafter for

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[1] It must be noted that this is likely to prove challenging in any event given the close vote among the Commissioners to issue the June 29 Order and the impending departure of one of the three Commissioners in the majority. There is a real risk that the Commission will remain split on the issues raised in the June 29 Order and not be able to issue an order establishing the just and reasonable replacement rate in time for the May 2019 BRA.

[2] June 29 Order at P 173.

[3] *Id.* at PP 164-173.

reply testimony, evidence, and/or argument.[4] Notably, this directive does not require PJM to file an actual proposed tariff to implement the Commission's proposed replacement rate; but even if it did, and even if PJM chooses to file one, 60 days provides time for at best a truncated stakeholder process to develop a full proposal.

Section 206(a) of the FPA states, "Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate … then in force, and the reasons for any proposed change or changes therein."[5] Similarly, the APA and due process require adequate notice and a meaningful opportunity to be heard.[6] Without a more specific proposal for the design of the proposed expanded MOPR and resource-specific FRR alternative on the table, interested parties are left to speculate on the details of the "change or changes" to the existing rate and provide comments based on that speculation prior to the 60-day deadline.[7] But as noted above, the June 29 Order outlines the broad contours of these

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[4] *Id.* at Ordering Para. (F).

[5] 16 U.S.C. § 824e(a).

[6] *See* 5 U.S.C. § 554 (requiring parties to be notified of "the matters of fact and law asserted"); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) ("[t]he essential requirements of due process . . . are notice and an opportunity to respond"); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (the opportunity to be heard must be "'at a meaningful time and in a meaningful manner'"). Indeed, an application of the *Mathews v. Eldridge* balancing test demonstrates why more process is required. This proceeding impacts a multi-billion dollar market, existing and planned investments in clean energy, and important state policies designed to protect the environment. The opaqueness and haste of the current process results in a substantial risk of error and poor policy; in contrast, the value of additional or substitute procedural safeguards is significant. Finally, the administrative burden in providing additional process is *de minimis* because the hearing is a paper hearing. More process should also be required because the Commission is creating policy in an adjudication, instead of relying on notice and comment rulemaking. *See Union Flights, Inc. v. Administrator*, 957 F.2d 685, 688 (9th Cir. 1992) ("policymaking by adjudication could be an abuse of discretion if an agency's sudden change in direction leads to undue hardship for those who had relied on past policy").

[7] The Commission also improperly relied upon the record that was developed in response to PJM's capacity market proposal in Docket No. EL16-49-000. The Calpine Complaint and Amended Complaint focused on state support for existing nuclear plants. The parties in that proceeding responded to that specific complaint, and, in fact, PJM never conceded that its Tariff was unjust and unreasonable. Indeed,

mechanisms while leaving numerous details regarding their precise design and scope unresolved. Interested parties then have just 30 days to respond to the numerous disparate comments and evidentiary demonstrations that will be filed regarding how the potential replacement rate outlined by the Commission will impact market participants, and how it could be implemented. This is an inadequate timeframe to consider such complex questions with the potential for major impacts to the design of the RPM, market participants in the RPM, and to State policy objectives impacted by the results of RPM auctions. And given the need for parties to speculate on potential outcomes in order to provide comments, the Commission is likely to be left with a muddled record on which to make a decision. In fact, given the breadth of the questions posed by the Commission about the design of the expanded MOPR and resource-specific FRR alternative and short to time frame to consider them, there is no guarantee the Commission will receive *any* concrete proposals for how to design and implement them in PJM's tariff.

The lack of a specific proposal to implement the Commission's broad vision of a potential replacement rate also deprives the public of notice and an opportunity to comment on the actual replacement rate that the Commission proposes to implement as the just and reasonable rate "to be thereafter observed and in force."[8] The Commission must provide

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PJM disputed Calpine's assertion that there was a "dire need for corrective action" and noted that "material harm to the market is not likely to occur immediately but rather over the longer term." *Answer to Amended Complaint of PJM Interconnection, L.L.C.*, Docket No. EL16-49-000 (filed Jan. 30, 2017), at 3. PJM's subsequent filing in Docket No. ER18-1314 was under section 205 of the FPA, not section 206, and while parties responded to PJM's proposals to re-design the capacity market, they lacked notice that the Commission would use the record compiled in that proceeding to answer a very different question than the one being asked. This procedural problem has resulted in the Commission relying on an incomplete record -- especially with respect to state policies that support renewable resources, which were not at issue in the Calpine Complaint -- and unable to meet its burden of establishing that the PJM Tariff is unjust and unreasonable.

[8] 16 U.S.C. § 824e(a).

adequate notice of the ultimate market design (*i.e.*, the rate) that it proposes to establish, and provide interested persons with the opportunity to provide arguments and evidence regarding that particular market design. The broad outlines of the proposed replacement rate offered by the Commission, along with an extensive list of questions regarding how that replacement rate would actually be designed and implemented, does not provide adequate notice of the actual rate that the Commission proposes to implement. Assembling the specific aspects of the replacement rate *after the fact* and directing PJM to implement them – which appears to be the procedural course set out in the June 29 Order – does not give interested parties any opportunity to comment on the justness and reasonableness of the actual replacement rate before it is put in place.

This is especially so given the Commission's other rules of practice that apply to petitions for rehearing and compliance filings. If the replacement rate is revealed for the first time in a Commission order, Clean Energy Associations will be able to seek rehearing. But, as *NRG Power Marketing, LLC v. FERC*[9] recognizes, "'Parties seeking rehearing of Commission orders are not permitted to include additional evidence in support of their position, particularly when such evidence is available at the time of the initial filing.'" Nor, as a general matter, does the Commission allow parties to raise issues for the first time on rehearing.[10] Thus, as a practical matter, Clean Energy Associations will be foreclosed from seeking rehearing on the issues that

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[9] 862 F.3d 108, 116-17 (D.C. Cir. 2017) (quoting *PJM Interconnection, LLC*, 108 FERC ¶ 61,187, at ¶ 49 (2004)),

[10] *See Columbia Gas Transmission*, 101 FERC ¶ 61,378, at ¶ 15 (2002) ("[A]bsent compelling reasons by the petitioner, the Commission will look with disfavor on parties raising on rehearing issues that should have been raised earlier because this is disruptive to the administrative process."); *Sierra Pacific Power Company*, 96 FERC ¶ 61,050, 61,124 (2001) ("The Commission has made clear that '[w]e look with disfavor on parties raising on rehearing issues that should have been raised earlier' because this is 'disruptive to the administrative process.' We have applied this rule to exclude arguments on rehearing by a party that had not raised them previously.").

may become apparent only when the specifics of the replacement rate are known. Similarly, once PJM makes a compliance filing, a Clean Energy Associations challenge to the filing may be barred by the prohibition on collateral attacks on a prior order.[11]

The process set forth in the June 29 Order stands in sharp contrast to the Commission's usual approach under FPA section 206, under which it issues preliminary findings regarding the lawfulness of current rates, and then gives the public utility subject to those findings the opportunity to either "show cause" why its existing rate continues to be just and reasonable, or to file a proposed just and reasonable replacement rate.[12] Interested parties then have notice and a full opportunity to comment on the specific proposed replacement rate before the Commission takes action under "step two" of FPA section 206 to establish the just and reasonable rate that will be in effect going forward. The process adopted here, by contrast, deprives interested parties of the protections of FPA section 206's two-step process.[13] As the Supreme Court has long recognized, "the purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities," and the section must be read in "light of this purpose."[14]

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[11] *See California Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,240, at ¶ 13 (2007) (finding a protest of a compliance filing a collateral attack on a prior Commission order).

[12] The Commission's recent efforts to improve gas-electric coordination provide an example of that type of process. There, the Commission issued a Notice of Proposed Rulemaking and initiated show cause proceedings under section 206 of the FPA and section 5 of the NGA. *See FERC Proposes Reforms to Improve Gas-Electric Coordination* (March 20, 2014).

[13] *See Maine v. FERC*, 854 F.3d 8, 24 (D.C. Cir. 2017) ("unlike section 205, section 206 mandates a two-step procedure that requires FERC to make an explicit finding that the existing rate is unlawful before setting a new rate").

[14] *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956); *see also Electrical Dis. No. 1 v. FERC*, 774 F.2d 490, 492-93 (D.C. Cir. 1985) (Scalia, J.) ("the provision must be read in light of the Federal Power Act's primary purpose of protecting the utility's customers").

Given the infirmities in the Commission's reasoning, the lack of evidentiary support for its unjust and unreasonable finding (both discussed below), and the procedural problems described above, the Commission should act now to withdraw its unjust and unreasonable determination and embark upon a more typical "show cause" proceeding. Doing so would ensure that the Commission develops a more robust record for any action it (or PJM) ultimately takes to accommodate state policies in the RPM. In addition, this approach would ensure that all interested parties (including the States that would be uniquely impacted by the proposed changes to the RPM) have a sufficient opportunity to comment on any proposed replacement rate before it is established. Taking this path would also allow more time to utilize additional procedural tools (including technical conferences or workshops) to address the concerns of States and other important stakeholders regarding the limits that the ex parte communication rules place on their ability to engage in discussions with the Commission regarding the proposal for an expanded MOPR and resource-specific FRR alternative.

For the reasons discussed above, however, at a minimum the Commission must adjust the procedures it has established to provide interested parties with a meaningful opportunity to comment on the specific replacement mechanisms that it proposes to establish as the just and reasonable rate going forward. In particular, this includes (but is not limited to) giving interested parties an opportunity to provide comments and evidence regarding the specific design of an expanded MOPR and resource-specific FRR alternative *before* determining that it is just and reasonable and ordering PJM to implement it going forward.[15]

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[15] The Commission also improperly relied upon the record that was developed in response to PJM's capacity market proposal in Docket No. EL16-49-000. The Calpine Complaint and Amended Complaint focused on state support for existing nuclear plants. The parties in that proceeding responded to that

B. The Commission lacked substantial evidence in the record to support its conclusion that PJM's capacity market is unjust and unreasonable, and did not meaningfully respond to arguments and record evidence to the contrary.

1. The Commission's unjust and unreasonable finding relies on claims of actual market impact and a theory regarding future market impact, that are not supported by the record.

The Commission summarily concluded, without pointing to any relevant evidence, that increasing participation of generation resources in state programs (such as RPS or ZEC programs) has *already* impacted the PJM market and will do so to a greater extent in the future.[16] The Commission reaches these conclusions without presenting even a "back of the envelope" demonstration of how capacity market prices have been impacted already and will be impacted in the future. The Commission cites no data or analysis showing what it expects that prices should have been in the absence of these state programs, or the magnitude to which it expects future prices will be depressed by participation of resources developed or retained under these programs. While the Commission can rely on either a theory or specific evidence of market problems to support action under FPA section 206, where it relies on both, there must be record evidence to support both.[17] Here, there is neither.

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specific complaint, and, in fact, PJM never conceded that its Tariff was unjust and unreasonable. Indeed, PJM disputed Calpine's assertion that there was a "dire need for corrective action" and noted that "material harm to the market is not likely to occur immediately but rather over the longer term." *Answer to Amended Complaint of PJM Interconnection, L.L.C.*, Docket No. EL16-49-000 (filed Jan. 30, 2017), at 3. PJM's subsequent filing in Docket No. ER18-1314 was under section 205 of the FPA, not section 206, and while parties responded to PJM's proposals to re-design the capacity market, they lacked notice that the Commission would use the record compiled in that proceeding to answer a very different question than the one being asked. This procedural problem has resulted in the Commission relying on an incomplete record -- especially with respect to state policies that support renewable resources -- and unable to meet its burden of establishing that the PJM Tariff is unjust and unreasonable

[16] June 29 Order at P 151-52.

[17] See Nat'l Fuel Gas Supply Corp. v. FERC, 468 F.3d 831 (D.C. Cir. 2006).

Moreover, in reaching this conclusion, the Commission relied on data presented by PJM that it claims demonstrates that "increasing out-of-market support" from these programs "will significantly affect the PJM capacity market."[18] However, the evidence the Commission points to in support of its conclusions regarding the impact of RPS programs concerns the impact of ZECs on the capacity market. Specifically, the June 29 Order merely points to an affidavit submitted by PJM with a purported analysis of the price-suppressive impact of existing nuclear power; putting aside whether or not this analysis is correct with respect to the impacts from ZECs, the Commission certainly cannot rely on this evidence to draw its conclusion that a broader set of state policies (including renewable energy policies) have a similar impact. PJM's analysis simply does not offer any examples of RPS or other programs resulting in price suppression, even though they have been in place for the entire existence of PJM's capacity market.[19]

Further, the portion of the PJM affidavit cited by the Commission merely provides a calculation of the "subsidy" ZEC and REC payments provide and compares them to clearing prices. The Commission never explains, with evidence, how this calculation and comparison demonstrates that state policies are impacting actual capacity market clearing prices.

The Commission also pointed to the megawatt targets of the RPS programs to argue that an increasing presence of renewables procured under those programs will have a greater impact on the capacity market in the future.[20] Even if those targets result in greater deployment of renewable energy, this does not provide any evidence that these resources will increase their participation in PJM's capacity market and have a greater impact on the market than is currently

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[18] June 29 Order at P 152.
[19] *See, e.g.,* Motion to Dismiss and Protest of the Illinois Commerce Commission, Docket No. ER18-1314, at 14 (May 7th, 2018) [Hereinafter "ICC Protest"].
[20] June 29 Order at P 152.

the case. There is no evidence in the record, and the Commission does not cite any evidence or offer a theory that these resources choose to participate in the capacity market. Accordingly, the Commission does not have a reasonable basis to assert that these resources will have a significant impact on the market.

The Commission further found that state programs regulating electric generating facilities confer a competitive advantage that is not "the result of competitive market forces" and, therefore, are "uneconomic" and must be mitigated.[21] The Commission failed to consider, however, the evidence in the record that demonstrates that RECs are generally competitively procured.[22] RECs are secured through competitive markets, resulting in efficient market outcomes and incentivizing innovation. Furthermore, "not all" RPS resources depend on state support to make their participation in PJM's markets economic, and some existing renewable sources "may have avoidable costs that are low enough to be met with other PJM market revenues."[23] The Commission does not acknowledge or reconcile this explanation from PJM's witness, who Commission relies on heavily in the June 29 Order. Instead, the Commission's order merely assumes that all RPS resources rely on the revenue provided by those programs to support their participation in the capacity market.

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[21] *Id.* at P 156.
[22] *See, e.g.,* Answer and Motion for Leave to Answer of the Independent Market Monitor for PJM, Docket ER18-1314 at 6 (May 25, 2018) ("RPS programs are generally competitive").
[23] PJM Filing, Affidavit of Dr. Anthony Giacomoni at P 30.

2. **The Commission failed to grapple with substantial evidence in the record contradicting its conclusion that "state sponsored" capacity resources threaten the integrity of the capacity market.**

In the June 29 Order, the Commission failed to address substantial evidence in the record contradicting its conclusion that the participation of resources (including renewable resources) that are developed or retained under state programs threaten PJM's capacity market. Under section 206 of the FPA, the Commission has failed to carry its burden of showing that the existing rate is not just and reasonable. "[U]nlike section 205, section 206 mandates a two-step procedure that requires FERC to make an explicit finding that the existing rate is unlawful before setting a new rate."[24] Moreover, in making this finding, section 206 "requires FERC to demonstrate that the existing rates are 'entirely outside the zone of reasonableness' before FERC imposes a new rate."[25] The purpose of section 206 is "the protection of the public interest, as distinguished from the private interests of the utilities," and it must be "read in the light of this purpose."[26]

The record includes substantial evidence showing that the participation of capacity resources built pursuant to state renewable energy policies, for example, result in little to no change in the market clearing price.[27] Indeed, the record demonstrates that renewables participate

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[24] *Emera Maine v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017).
[25] *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108, 114 n.2 (D.C. Cir. 2017) (Kavanaugh, J.) (quoting *City of Winnfield v. FERC*, 744 F.2d 871, 875 (D.C. Cir. 1984) (Scalia, J.)).
[26] *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956); *See also Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 492-93 (D.C. Cir. 1985) (Scalia, J.) (section 206 "must be read in light of the Federal Power Act's primary purpose of protecting the utility's customers").
[27] *See, e.g.,* Comments of the Institute for Policy Integrity at New York University School of Law, Docket No. ER18-1314, 29 (May 7, 2018); Protest of Clean Energy Advocates, Docket No. ER18-1314, 80 (May 7, 2018).

in the capacity market to a limited degree,[28] and the renewable resources that do participate therein rarely, if ever, impact prices (as they are seldom the marginal resource). Even when they participate, there is no evidence that this participation is materially aided by the fact that they receive revenues under a state program, or that their participation is required by the state program or aimed at influencing wholesale prices.[29] The Commission does not address any of this evidence in the June 29 Order.

The core of the Commission's reasoning in targeting for mitigation capacity resources that participate in state programs including states policies encouraging the construction and retention of renewable and other advanced energy resources, is that these state actions enable resources to bid below their "true" costs,[30] produce different outcomes than the "result of competition in the market,"[31] and threaten the "integrity of competition in the markets."[32] In reaching this conclusion, however, the Commission fails to even mention, let alone address, arguments and evidence in the record regarding the economic soundness of state policies addressing the environmental externalities of electricity generation (a function that, as discussed below, is well within state authority).[33] Many of the state policies targeted by the Commission for mitigation address these environmental externalities, but the Commission fails to address arguments in the record regarding the economic impacts of pricing those externalities in the PJM market.

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[28] *See, e.g.,* Comments of the Institute for Policy Integrity at New York University School of Law, Docket No. ER18-1314, 29 (May 7, 2018).
[29] *See, e.g.,* Comments of the Institute for Policy Integrity at New York University School of Law, Docket No. ER18-1314, 30 (May 7, 2018).
[30] Order at P 65.
[31] *Id*. at P 153.
[32] *Id*. at P 150.
[33] *See, e.g.,* Willig at ¶¶ 25-46.

Evidence in the record also demonstrates that the market analysis offered by PJM, which was cited by the Commission in the June 29 Order to support its finding that the addition of state-supported resources (including renewables) results in lower prices, is not an accurate prediction of how the capacity market is actually impacted by such policies.[34] For example, the analysis failed to account for market dynamics, such as entry and exit, and market participants' responses to these decisions. The participation of resources supported by state policies is typically known well in advance of the capacity auctions in which they first participate;[35] and, even when such a resource is not fully anticipated by the market, the market typically adjusts readily to its participation and absorbs the additional capacity without any real price impacts.[36] The June 29 Order does not acknowledge or reconcile this contrary evidence.

Further, the record demonstrates that the presence of state-sponsored capacity does not generally prevent the future entry of non-subsidized resources to the extent such resources are needed. PJM's capacity market is designed to respond to supply decreases by producing higher prices, sending a signal to market actors to provide adequate supply.[37] This should continue to be the case even if larger percentages of the capacity resources than are currently in the market are developed or retained under state programs.

In fact, PJM's markets have continued to attract robust new entry of capacity in recent years even in the face of the increasing presence of capacity resources participating in these state programs. The Commission failed to take into account the substantial evidence in the record that

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[34] *See, e.g.,* Clean Energy Advocates Protest at 109; Comments of the Institute for Policy Integrity at New York University School of Law, Docket No. ER18-1314, 30 (May 7, 2018); NJ BPU at 19-20; ICC Protest at 15-16.
[35] Affidavit of James Wilson at ¶ 23.
[36] *Id.* at ¶ 25.
[37] *Id.*

demonstrates that the market performance of PJM's capacity market is not under threat.[38] To the contrary, investment is thriving and PJM has capacity that is more than adequate to meet reserve margins. For instance, PJM's latest planning reserve margin for the summer of 2018 is 28.7 percent; this is well above the recommended installed reserve margin and demonstrates that it is nearly impossible that PJM will face a near-term shortfall given these reserve margins.[39] Over 20 GW of new natural gas capacity is also under construction or in advanced development and expected to enter operation by the end of 2021, and an additional 18 GW of natural gas capacity has been announced or is in early development.[40]

The Commission also failed to reconcile past market performance data demonstrating that government policies have long provided substantial support targeted toward specific types of capacity resources (*e.g.*, decades of federal and state tax incentives for conventional resources),[41] including a significant share of the resources in PJM's capacity market. There is no reason why those actions have any less impact on market prices today than the state policies singled out by the Commission for mitigation.[42] For instance, evidence in the record supports the conclusion that such policies have reduced the price of fuels used by conventional generating technologies

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[38] *See, e.g.,* Clean Energy Advocates Protest at 35-40; Consumer Advocates Protest at 11-13; Clean Energy Industry Protest at 11 (noting that "PJM has said that its system is "safe and reliable today—it has been designed and is operated to meet all applicable reliability standards.") (citing Comments and Responses of PJM Interconnection, L.L.C., Docket No. AD18-7-000, at 4 (March 9, 2018).

[39]PJM, 2017 PJM Reserve Requirement Study 8 (Oct. 12, 2017), http://www.pjm.com/-/media/committees-groups/committees/pc/20171012/20171012-item-03a-2017-pjmreserve- requirement-study.ashx.

[40] S&P Global Market intelligence, Power Plant Units Database and Screener Tool, *Subscription required*, available at https://www.spglobal.com/marketintelligence/en/ (accessed May 3, 2018).

[41] Federal and state tax breaks for conventional energy go back even much earlier in the history of the energy sector than any of the identified state-supported policies in the Order.

[42]*See, e.g.,* Comment of Harvard Electricity Law Initiative at 3 (noting that "state generation procurement policies have long co-existed with restructuring and pre-date PJM's capacity construct by nearly a decade.").

(so-called "competitive" resources), which, in turn, would allow those resources to submit "suppressed" bids into PJM's capacity market. This support, of course, affects the composition of capacity resources in the market (by lowering their marginal costs, these units are more likely to be selected in the capacity market and their development is encouraged), providing advantages to these resources and impacting prices in the market.[43] Since these government policies affect capacity prices, it was unreasonable and discriminatory and preferential for the Commission to ignore this evidence and focus only on the state programs identified in the June 29 Order as problematic and requiring that the Commission establish mitigation measures now.

In sum, the Commission failed to meaningfully examine the evidence in the record that contradicts its unsupported allegation that the unmitigated participation of resources participating in state programs pose a threat to PJM's capacity market; in fact, the substantial evidence in the record indicates that the participation of state-supported renewables in PJM's capacity market has little effect on capacity prices or the capacity market's ability to guarantee adequate resources.

C. The Commission failed to articulate a reasoned basis for its finding that PJM capacity market rules are not just and reasonable and unduly discriminatory.

1. The Commission failed to sufficiently explain how capacity resources that participate in state programs, such as renewable energy resources, cause PJM's existing capacity market rates to be unjust and unreasonable.

While the Commission concluded that "states have provided or required meaningful out-of-market support to resources in the current PJM capacity market" and such "subsidies . . .

[43] In addition, the Commission's list of actionable governmental policies fails to recognize one of the largest sources of out-of-market support: utilities are guaranteed to recover the cost their resources, irrespective of the price they receive in PJM's capacity market. Roughly 20 percent of the installed capacity within PJM is owned by vertically integrated utilities. *See* Glick Dissent at 8.

allow resources to suppress capacity market clearing prices, rendering the rate unjust and unreasonable,"[44] the Commission did not explain what constitutes "out-of-market support" or "subsidy," nor what renders such support "meaningful." The Commission also did not enumerate the specific state programs that it believes currently cause and will continue to cause price suppression, even though there are many different types of state-supported programs. Instead, the Commission's decision arbitrarily singles out RPS programs, as well as ZEC programs, as an example of an out-of-market payment mechanism that causes market harm.[45] Moreover, as noted above, the Commission provided no explanation of the magnitude of price suppression it believes has already occurred in the market or will occur in the future, and has not provided even a cursory analysis comparing current prices to the prices that would result in a market free of such subsidies. In short, the Commission has made a finding that the existing rate is unlawful but failed in its duty to provide a reasoned basis to explain that conclusion.

In this regard, the Commission's decision also fails to apply the statutorily mandated procedures of FPA section 206. "[S]ection 206 mandates a two-step procedure that requires FERC to make an explicit finding that the existing rate is unlawful before setting a new rate."[46] A finding by the Commission that an existing rate is unjust and unreasonable is "the 'condition precedent' to its exercise of its section 206 authority to change that rate."[47] Contrary to this requirement, the Commission did not adequately explain in the Order how certain out-of-market payments render rates unjust and unreasonable and unduly discriminatory.

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[44] Order at P 149.
[45] *Id.* at P 1 n. 1.
[46] *Emera Maine v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017).
[47] Id.

The Commission instead improperly leaves this task to the paper hearing process it has initiated to make a final determination regarding the replacement rate for PJM's Tariff.[48] Specifically, the Commission states that its proposed replacement rate should include an expanded MOPR,[49] but requests comment on the appropriate scope of out-of-market support to be mitigated by that expansion.[50] This begs the question of how the Commission concluded that the existing MOPR is unjust and unreasonable without clearly identifying the problem, let alone its scope, and what needs to be done to remedy it.

2. The Commission failed to articulate a reasoned basis for its conclusion that some state policies cause PJM's existing capacity market to be unjust and unreasonable, while other similar programs and market behavior apparently do not.

The Commission failed to explain why the state policies it singles out in the June 29 Order (primarily state renewable energy policies and ZEC programs) pose a threat to the market, while it has long accepted other programs and market behavior in the PJM capacity market that, under the Commission's rationale, should be expected to have similar impacts on the market. In particular, the Commission did not provide a rationale to support its conclusion that renewable energy policies, which are no different in impact than any other governmental policy or market behavior that affords a competitive advantage to the targeted resource, are uniquely harmful to capacity markets or represent some "tipping point" requiring action now.

To the extent the Commission hinges its conclusion that resources participating in state renewable energy or other programs on the view that such support allows renewables and other supported resources to engage in price suppression, the Commission fails to reconcile that other

[48] Order at P 157.
[49] *Id.* at P 158.
[50] *Id.* at PP 164-65.

resources bid into the PJM capacity market at a level lower than they would otherwise due to governmental policies.[51] Many governmental policies, as discussed above, have the tendency to change resource offers and, therefore, have similar alleged effects on market prices and relative market competitiveness as those alleged of the renewable energy and other policies targeted in the June 29 Order. However, the Commission failed to explain its sole preoccupation with out-of-market payments to only a handful of resources that receive them, such as renewable energy. Under the Commission's new theory of market competition and the impact of out-of-market revenues obtained through governmental policies, protecting the "integrity" of the capacity market would require that it mitigate each and every federal, state, and local subsidy that allows a resource to lower or raise its capacity market offer. In addition, based on the Commission's theory, other resources that offer capacity below their costs because they have other sources of revenue support outside of the PJM markets (for example, the ability of some units to lean on revenues from other entities within their corporate structure to shield them from near-term market losses) would similarly require mitigation. It is an arbitrary and capricious approach to inhibit state actions within their reserved authority to regulate electricity generation within their authority, but permit other federal, state, and local policies and sources of revenue to remain in the markets without mitigation.

The Commission further provided no explanation of why resources participating in state programs (such as state renewable energy policies) pose a greater threat to price formation than other common market practices that do not reflect a resource's actual costs. If offers need to be mitigated because they do not reflect a resource's "actual costs" and, in turn, alter capacity

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[51] *See, e.g.,* ICC protest at 18-20.

market clearing prices (lowering them), the same is also true for offers that are higher than a resource's "competitive" costs (raising them). It is arbitrary for the Commission to mitigate behavior that it deems to result in offers that are too low because of state renewable energy policies while excluding consideration of offers that are too high. This is especially true when, as discussed above, the evidence in the record does not support the conclusion that low prices are producing adverse market outcomes.

In sum, the Commission failed to provide a reasoned basis to explain why other policies and market behavior, which may alter capacity prices, may be permitted to affect capacity offers but renewable energy policies may not.

3. The Commission does not provide a reasoned basis to support its departure from precedent finding that capacity resources participating in state renewable energy and demand-side management programs should not be mitigated to guard against buyer-side market power.

In the June 29 Order, the Commission claims that it has previously recognized that out-of-market support is capable of suppressing market prices and, in turn, suggests that it has supported mitigation of resources participating in such programs in the past.[52] To the contrary, the Order departs from long-standing Commission precedent concluding that the MOPR should not be applied to renewable energy resources given their limited ability to suppress capacity market prices.

Until this year, the Commission's MOPR decisions have appropriately charted a course between what the Commission deemed to be under-mitigation and over-mitigation. In particular, prior to the recent CASPR Order, [53] the Commission applied the MOPR to address the potential

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[52] Order at P 155 (citing *ISO New England, Inc.*, *order on paper hearing*, 135 FERC ¶ 61,029 (2011)).
[53] *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 21 (March 9, 2018) ("CASPR Order"), *reh'g pending*.

for the exercise of buyer-side market power, but did not apply to every state action claimed to result in lower capacity market prices.[54] Like the CASPR Order, the June 29 Order represents a major departure from the Commission's precedent with respect to MOPR, and the Commission fails to provide, in the Order, a reasoned basis for why it is now departing from its former policy.[55]

Most notably, the Commission has frequently determined that renewable resources should not be subject to mitigation under a MOPR.[56] These determinations have been based on the Commission's conclusion that "wind and solar resources are a poor choice if a developer's primary purpose is to suppress capacity market prices."[57] The "capacity value of these resources is only a fraction of the nameplate capacity" due to their "intermittent energy output;" for example, they "would need to offer as much as eight times the nameplate capacity" of a gas resource in order to achieve the same price-suppressive effect.[58] The Commission has also concluded that existing or proposed expansions of MOPR provisions result in unjust and unreasonable rates where they apply too broadly or do not include a unit-specific review

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[54] See, e.g., PJM Interconnection, L.L.C., 135 FERC ¶ 61,022 at P 6 (2011).
[55] Agencies are required to explain a reasoned basis for departing from their past precedent. *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009).
[56] *See, e.g., PJM Interconnection, L.L.C*., 143 FERC ¶ 61,090 at P 166 (May 2, 2013) (exempting, *inter alia*, renewable resources because "MOPR may be focused on those resources that are most likely to raise price suppression concerns."); *New York Pub. Serv. Comm'n, New York Power Auth., & New York State Energy Research & Dev. Auth. v. New York Indep. Sys. Operator*, 153 FERC ¶ 61,022 at PP 2, 47 (Oct. 9, 2015) (granting an exemption to buyer-side mitigation rules for certain renewable resources that have "limited or no incentive and ability to exercise buyer-side market power" up to a megawatt cap to be established by NYISO).
[57] 2011 PJM MOPR Order at P 153.
[58] *Id*.

procedure sufficient to ease the risk of over-mitigation.[59] In fact, the Commission has always recognized that "over-mitigation" in the market is costly and should be avoided, and concluded where the "potential benefits of, and thus incentive to engage in, price suppression are greatly diminished . . . a MOPR is unnecessary."[60]

The Commission may not depart from its precedent without "'provid[ing] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'"[61] In concluding that a MOPR should now potentially be expanded to include renewable resources and other capacity resources supported by state policies that to present have not been subject to MOPR, the Commission claims that increases in state-supported resources in the PJM region mean that it can "no longer assume that there is any substantive difference among the types of resources participating in PJM's capacity market with the benefit of out-of-market support."[62] This conclusory statement, however, fails to explain why the Commission's previous rationale holding that the MOPR should not be applied to renewable resources – in particular, that such resources have low capacity values and would be a "poor choice" for engaging in a price suppression scheme – is no longer valid. In sum, the Commission does not explain why its prior findings that renewable energy has only a de minimis impact on the

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[59] *See, e.g.,* Brief of Respondent FERC at 20, 22, *NRG v. FERC*, Case Nos. 15-1452, 15-1454 (D.C. Cir., filed Sept 27, 2016) (discussing "the need to mitigate buyer-side market power against the risk of over-mitigating competitive entry").
[60] *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,229 at P 106; *see also Con Edison*, 150 FERC ¶ 61,139 at P 45 (finding NYISO's buyer-side mitigation rules to be "unjust and unreasonable because they are unnecessarily applied to unsubsidized, competitive entrants who have no incentive to inappropriately suppress capacity market prices").
[61] *See, e.g., West Deptford v. FERC,* 766 F.3d 10, 17 (D.C. Cir. 2014), *citing Alcoa Inc. v. FERC*, 564 F.3d 1542, 1547 (D.C. Cir. 2009).
[62] June 29 Order at P 155.

capacity market is no longer true and, therefore, why renewable energy resources should now be mitigated under a MOPR. [63]

D. The June 29 Order is contrary to law and usurps the States' exclusive authority to regulate generating facilities and shape the resource mix.

The FPA vests FERC exclusive jurisdiction over "the sale of electric energy at wholesale in interstate commerce,"[64] but places beyond FERC's power, and leaves to the States alone, the regulation of 'any other sale.'[65] The "[n]eed for new power facilities," and "their economic feasibility" are matters that "have been characteristically governed by the States."[66] While section 205 tasks the Commission with ensuring that "[a]ll rates and charges made, demanded or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission" are just and reasonable, the Commission's Order oversteps the bounds of the FPA and effectively coerces the states to abandon their legitimate policy making role regarding the "need for new power facilities" and the facilities' "economic viability,"[67] as well as their legitimate authority to regulate "facilities used for the generation of electric energy"[68] and the environmental impacts of those facilities. There is no lawful basis to mitigate the supply offers of non-pivotal suppliers that hold lawful authorization to transact at market-based rates. By subjecting all "state sponsored" resources to mitigation, the Commission

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[63] 2011 PJM MOPR Order at P 153.
[64] 16 U.S.C. § 824(b)(1).
[65] *Hughes v. Talen Energy Mktg., LLC,* 136 S. Ct. 1288 (2016) (quoting *FERC v. EPSA* at Slip Op 1).
[66] Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U. S. 190, 205 (1983).
[67] Id.
[68] 16 U.S.C. § 824(b)(1).

has improperly intruded on the States' reserved authority to regulate facilities used for the generation of electric energy.[69]

The Commission's intrusion into these legitimate state authorities stems from the impact of its decision to broadly subject resources participating in state programs to mitigation on the ability of those state programs to achieve their goals. The reality is that if resources participating in these programs do not have a reasonable opportunity to clear in the capacity market and have the capacity they provide recognized in satisfying the PJM region's capacity needs, load-serving entities will be forced to purchase additional unneeded capacity in the market to replace them. The Commission recognizes that this will impose substantial costs on consumers and require them to "pay twice" for capacity, but claims that this result "in no way divests the states . . . of their jurisdiction over generating facilities."[70] This claim ignores the reality that those increased costs to purchase additional unneeded duplicative capacity will erect a significant barrier to pursuing those programs. The Commission's determination that all capacity participating in these programs must be mitigated essentially unwinds the impact of the lawful resource planning and environmental policies of the states by denying wholesale market access to resources supported by those policies. This is contrary to the design and intent of the FPA.

As noted above, the FPA gives FERC regulatory authority over "all facilities for such transmission or sale of electric energy," but withholds jurisdiction over "facilities used for the generation of electric energy."[71] By mitigating state policies in an attempt to prop-up the wholesale rates received by so called "competitive" resources, the Commission is exercising its

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[69] *Id.*
[70] June 29 Order at P 158.
[71] 16 U.S.C. § 824(b)(1).

authority over wholesale rates in a manner that aims directly at the states' exclusive jurisdiction. Unlike the narrowly tailored decision in *Connecticut Department of Public Utility Control*, the June 29 Order imposes an arbitrary minimum offer requirement that effectively forces resources participating in state programs, which do not otherwise have market power and hold authorization to transact at market-based rates, out of the capacity market.

While the Commission has jurisdiction to regulate certain parameters of the capacity market that directly impact how the price of capacity is set, even if those determinations touch on State authorities, the Commission does not have the authority to frustrate and discourage legitimate State policies. The court in *Connecticut DPUC* made clear, in fact, that federal regulation of capacity market prices, and even the amount of capacity that must be procured in the capacity market, *does not* obliterate the authority of States to decide what types of generation facilities or other technologies are built and used to serve their customers.[72] The June 29 Order's blanket application of the MOPR to all resources participating in the select state programs the Commission identified effectively does just that by directing the establishment of mitigation rules that will block those resources from the capacity market and erect a significant barrier to their development under those programs. Moreover, in the June 29 Order the Commission fails to examine the "the target at which the state law aims" and presumes that all state programs that result in the development or retention of in-state electric facilities inappropriately impinge on FERC's authority to set wholesale rates.

[72] *Connecticut DPUC*, 569 F.3d at 482-83.

III. Conclusion

For the foregoing reasons, Clean Energy Associations request rehearing of the June 29 Order.

Respectfully submitted,

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