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FEDERAL ENERGY REGULATORY COMMISSION

Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, Homer City Generation, L.P., NRG Power Marketing LLC, GenOn Energy Management, LLC, Carroll County Energy LLC, Docket No. EL16-49-000 C.P. Crane LLC, Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean Energy, LLC and Panda Power Generation Infrastructure Fund, LLC	)	**Docket No. EL16-49-000**
V.	)	
PJM Interconnection, L.L.C.	)	**Docket No. EL18-178-000**
Section 206 Investigation	)	

REPLY COMMENTS OF THE MICROGRID RESOURCES COALITION

The Microgrid Resources Coalition ("MRC") welcomes the opportunity to reply to the proposal for revisions to its Reliability Pricing Model (RPM) submitted by PJM in these dockets (the "PJM Proposal")[1] in response to the Commission's Order dated June 29, 2018 (the "Capacity Order"). [2] The MRC is a consortium of leading microgrid owners, operators, developers, suppliers, and investors formed to advance microgrids through advocacy for laws,

[1] *Initial Submission of PJM Interconnection, LLC,* Docket Nos. EL16-49-000; ER18-1314-000, 001; EL18-178-000, filed October 2, 2018.
[2] *Order Rejecting Proposed Tariff Revisions, Granting in Part and Denying in Part Complaint, And Instituting Proceeding Under Section 206 of the Federal Power Act,* 163 FERC ¶ 61,236 (June 29, 2018).

regulations and tariffs that support their access to markets, compensate them for their services, and provide a level playing field for their deployment and operations. In pursuing this objective, the MRC intends to remain neutral as to the technology deployed in microgrids and the ownership of the assets that form a microgrid. The MRC's members are actively engaged in developing and operating advanced microgrids in many regions of the United States, including in PJM territory.[3]

The Capacity Order Infringes on Matters Expressly Reserved to the States under the Federal Power Act and Seeks to Regulate Matters outside of the Commission's Jurisdiction.

The Capacity Order and the PJM Proposal begin from a fundamentally flawed premise. They both assume that some generating resources operating in PJM are wrongly "subsidized" by states and perhaps in the future by the federal government. These resources are prejudicially called "out-of-market resources," presumably because they would be unable to clear in the PJM RPM auction without the benefit of the "subsidy." We refer to them below as "State Market Resources" because they have successfully provided environmental benefits procured under state policies. Resources that fail to clear in the RPM auction because their all-in costs are too high (and are truly out of market) are somehow entitled in the PJM Proposal to be made whole for failing to provide a competitive price. Nothing in the Capacity Order or the PJM Proposal suggests that there is any characteristic of either set of resources that makes them better or worse at providing capacity to the bulk power system. In practice, this misconception leads the Commission and PJM to impermissibly infringe on matters concerning the qualification of facilities used for the generation of electric energy that are expressly and exclusively reserved to

[3] The MRC is actively engaged in advancing the understanding and implementation of microgrids across the country. MRC members own significant energy assets connected to the electric grids, provide energy generation and supply services, and are undertaking microgrid construction in different locations throughout the country. MRC members include: Anbaric Transmission, Commonwealth Edison, Concord Engineering Group, Clearway Energy Group., Eaton, ENGIE, ICETEC Energy Services, Inc., Massachusetts Institute of Technology, NRG Energy, Inc., Princeton University, and Thermo Systems. The MRC is affiliated with the International District Energy Association ("IDEA"), which connects members from all over the country operating combined heat and power plants and microgrids. This filing reflects the position of the MRC as an organization and should not be construed to reflect on the positions of any individual member.

the states under the Federal Power Act ("FPA").[4] Such infringement is highlighted by the PJM Proposal's design of the new MOPR, which "functionally sets"[5] or marks to the value of exclusively state jurisdictional environmental compliance instruments and thereby drives the formation of capacity prices in a manner so as to countermand and nullify that value.

In addition to their exclusive jurisdiction over generation resource mix under the FPA, states also have broad environmental protection authority to go above and beyond federal requirements (e.g. regulating carbon emissions).[6] State action to affect the environmental performance of generators include proscriptive limitations on emissions, requirements to purchase allowances to emit certain pollutants (and conversely the ability to sell such allowances if they reduce their emissions), as well as requirements for the growth of sustainable generation resources implemented by establishing markets for renewable energy certificates.[7] These actions, to the extent aimed at environmental outcomes, are wholly outside of the Commission's subject matter jurisdiction. Some states also seek to improve local resilience through measures that encourage microgrids. To the extent that PJM and the Commission seek to reverse the effects of state environmental policy regarding generation, they step outside of their sphere of regulation entirely.

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[4] *See* 16 U.S.C. § 824(b)(1) "The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. **The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy** or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter". *Emphasis added*. The States' reserved authority includes control over in-state "facilities used for the generation of electric energy." §824(b)(1); see Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U. S. 190, 205, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983) ("Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States.").

[5] *See PPL EnergyPlus, LLC v. Nazarian*, 753 F. 3d 467, 476 (2014).

[6] Note that state generation and environmental protection jurisdiction is the foundation for the enactment of the clean energy standards and renewable portfolio standards that are in the crosshairs of the PJM Proposal's "Material Subsidy" definition.

[7] *See infra* note 17 for a more detailed overview of positive and negative environmental markets.

Both the Capacity Order and the PJM Proposal fail to accommodate the impact of state actions in these areas that are the exclusive province of the states. Rather, the frameworks seek to expressly countermand and nullify the intended impact of state action, and with it, states' exclusive authority. The PJM Proposal suggests that states will be incented to arrange for capacity payments to resources that are "carved out" of the RPM. On one hand, this amounts to an acknowledgement that the state policies respecting generation resources will be infringed. It also recognizes that such nullification will further a cycle of inefficient regulatory actions to balance and counterbalance as a result.[8] If states (as many have) adopt policies that impose a price on carbon emissions,[9] it would clearly fall outside the Commission's competence to provide subsidies to resources that pay that price or give them preferential treatment in the RPM. The Court in recent cases has looked favorability on FERC's "notable solicitude toward the states" and the Commission's action to nullify the exercise of state exclusive jurisdiction represents an extraordinary departure from a collaborative and accommodating approach.[10]

The Commission defends its Capacity Order by saying that it is protecting the RPM, which is clearly within its jurisdiction, from state actions affecting the RPM. The breadth of the Commission's "affecting" jurisdiction, the "natural" interaction between retail and wholesale rates, [11] and the fact that the Commission can accept elements of a jurisdictional rate that derive

[8] Note that neither PJM nor the Commission has the authority to compel states to address capacity payments for resources that are not paid through the RPM.

[9] *See, e.g., The Regional Greenhouse Gas Initiative*, https://www.rggi.org/.

[10] *See FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 779 (2016). As with the Resiliency docket, the Commission risks addressing the bulk system in isolation and without necessary collaboration with the states. Resiliency is different from reliability and capacity, but should be valued, because without it there is not much value to reliability and capacity. It is where the rubber of the entire system (from bulk generation to the end user) hits the road. FERC Docket No. AD18-7-000, *Comments of the Microgrid Resource Coalition*, filed May 9, 2018 (proposing to define Resiliency as "The ability to withstand and reduce the magnitude and/or duration of disruptive events, which includes the capability to anticipate, absorb, adapt to, and/or rapidly recover the functioning of critical infrastructure to sustain essential services for communities during and following such an event.").

[11] See, *Federal Energy Regulatory Commission v. Electric Power Supply Association (EPSA*) 136 S. Ct. 760, 764 (2016)(stating that transactions occurring at the wholesale level have "natural consequences" on the retail level and not seeing interference or problematic cross-price impacts between services at different market layers). Wholesale market access for behind-the-meter resources is natural, but inconsistent commitments for the same increment of a resource's (or an aggregation's) capacity is not. Unified resource aggregations such as microgrids are able to fulfill commitments using combinations of generation, load and storage resources.) *See also*, Federal Energy Regulatory

from state electricity ratemaking and use them to establish different wholesale capacity rates for different mechanisms[12] does not permit the Commission to allow the formation of wholesale rates in a manner that countermands and nullifies the exercise of actions reserved to the states.

This does not present a question of federal preemption of state action; Congress was express in the Federal Power Act's reservation of state exclusive jurisdiction. Even though the Commission may disavow any attempt to tamper with state regulations, PJM has deployed a regulatory sledgehammer to deny access to markets to resources that are benefitted by actions that recognize generator environmental performance and are squarely reserved to the states. Moreover, by subjecting state environmental compliance market resources to a MOPR that specifically factors in associated state compliance instrument payments, it will establish a rate that is "functionally set" or marked to the value received from state compliance instruments for the purpose of countermanding and nullifying such value.[13] PJM is asking the Commission to "strike at the heart" of Congress's reservation of state exclusive jurisdiction.[14] Federal agencies have no such authority.[15]

It is one thing to address, accommodate and partially impact, it is another to address and effectively nullify. The PJM Proposal acts as the latter against state environmental performance-

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Commission, *Order 719: Wholesale Competition in Regions with Organized Electric Markets*, 125 FERC ¶ 61,071, issued October 17, 2008.

[12] *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540, 552 (5th Cir. 2014)("FERC reviewed the reasonableness of incorporating the state agencies' rates when it accepted the bandwidth formula and continues to review them in Section 206 complaint filings. . . Accordingly, FERC has not unlawfully subdelegated to state regulators and continues to exercise its authority consistent with the FPA.").

[13] *See PPL EnergyPlus, LLC v. Nazarian*, *supra* note 5.

[14] *See Hughes v. Talen Energy Marketing Mktg, LLC, 136 S. Ct. 1288, 1298 (2016)*, 136 S. Ct. 1288, 1296 (2016)("Relying on this Court's decision in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U. S. 354, 370, 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988), the Fourth Circuit observed that state laws are preempted when they 'den[y] full effect to the rates set by FERC, even though [they do] not seek to tamper with the actual terms of an interstate transaction." *PPL EnergyPlus, LLC v. Nazarian*, 753 F. 3d 467, 476 (2014). Maryland's program, the Fourth Circuit reasoned, 'functionally sets the rate that CPV receives for its sales in the PJM auction,' 'a FERC approved market mechanism." Id., at 476-477. "[B]y adopting terms and prices set by Maryland, not those sanctioned by FERC,' the Fourth Circuit concluded, Maryland's program "strikes at the heart of the agency's statutory power." Id., at 478.")

[15] That PJM proposes FERC approve the rate / price (should one ever come to exist) that a subsidized resource may receive for capacity outside the auction process does not inoculate the act of effectively countermanding and nullifying state exclusive regulatory authority.

based generation regulations aimed directly at a state's overall environmental performance and sustainability. Such state regulation of generation for environmental and sustainability purposes is not directly aimed at transactions involving interstate purchasers and wholesales for resale and does not address any transaction in connection with markets under the Commission's jurisdiction.[16] The scope of such regulations covers many different types of entities and technologies. Further, the environmental subject-matter and use of intangible tradable compliance instruments by such regulation are completely separate from the provision of any physical energy commodity, product or service at any time. They are not conditioned by, marked to, nor have anything to do with the actions required to maintain reserve margins.[17] If such

[16] "States, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain. *See Oneok, Inc. v.Learjet, Inc.*, 575 U. S.135 S. Ct. 1591, 191 L. Ed. 2d 511, 528 (2015) (whether the Natural Gas Act (NGA) preempts a particular state law turns on 'the target at which the state law aims'). But States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates, as Maryland has done here. See ibid. (distinguishing between 'measures aimed directly at interstate purchasers and wholesalers for resale, and those aimed at subjects left to the States to regulate' (internal quotation marks omitted))." *Hughes v. Talen Energy Marketing Mktg* at 1298.

[17] State regulatory compliance instruments are formally regulated as "intangible nonfinancial commodities" *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed. Reg. 156, 48208 (Aug. 13, 2012) at 48233. While they can be "physically settled" in registry systems and consumed for state compliance purposes, they are fundamentally intangible and lacking of any corpus in physical reality. While they are originated and unitized in MWhs, expressly, by law and in physical reality, they are completely separate from the underlying production of energy and represent a completely different product. Therefore, the state compliance instruments / environmental commodities constituting the heart of the "Material Subsidies" animating PJM and the Commission clearly have an inability to physically provide anything, let along energy, to the grid. They do not share the underlying rationale behind capacity, they don't represent the ability to physically provide energy in the future – rather, they address and regulate a wholly different environmental subject-matter. Such subject-matter is not jurisdictional to the Commission and unreasonable to integrate in the pursuit of physically maintaining reserve margins. Notwithstanding the breath of PJM's proposed "Material Subsidy" definition discussed below, it is clear that the primary motivation of the Capacity Order and the PJM Proposal is to directly integrate such subject-matter. State clean energy standards and renewable portfolio standards are examples of "positive" environmental market regulation – regulatory markets designed to increase the number of sustainable generation resources overtime and reward environmental performance previously unrecognized and uncompensated. The compensation comes in the form of tradable and monetizable, compliance instruments / commodities, such as zero energy and renewable energy certificates, that the state regulations allow to be originated by an eligible generator and require to be procured by load serving entities to ensure ratepayers are being met by a resource mix of improving environmental performance. These state compliance instruments contain rights to environmental attributes that represent environmental improvements and positive outcomes associated with one MWh of energy provided. They exist to recognize and compensate the positive environmental attributes of certain activities. Contrast this to "negative" environmental markets, such as emissions markets, that are designed (notwithstanding offset projects) to shrink overtime and utilize compliance instruments (allowances) that grant rights to undertake environmentally damaging activity. The Commission has traditionally adapted to negative emissions markets by allowing cost adjustments based on the required procurement of emissions allowances. However, until recently, the Commission has not tried to address positive environment markets and we suggest that adjusting for them in a manner that expressly countermands and nullifies the exercise of state exclusive jurisdiction is impermissible.

actions are deemed to be "indirectly" impacting or "affecting" wholesale rates, it becomes hard to see where the Commission's scope of jurisdiction might end, which the Supreme Court has determined was not the intent of Congress.[18]

Overall, the Capacity Order, and to a greater extent the PJM Proposal, are designed to impermissibly countermand and nullify the exercise of state exclusive authority. Further, the PJM Proposal arguably presents the inverse to Hughes by expressly and directly marking to state environmental regulatory values and nullifying their intended impact in a manner that "invades" state regulatory turf by effectively adjusting a state environmental compliance rate.[19] It is clear

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[18] "The FPA delegates responsibility to FERC to regulate the interstate wholesale market for electricity — both wholesale rates and the panoply of rules and practices affecting them. As noted earlier, the Act establishes a scheme for federal regulation of "the sale of electric energy at wholesale in interstate commerce." 16 U. S. C. §824(b)(1); see supra, at ___, 193 L. Ed. 2d, at 668. Under the statute, "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with" interstate wholesale sales "shall be just and reasonable"; so too shall "all rules and regulations affecting or pertaining to such rates or charges." §824d(a). And if FERC sees [*774] a violation of that standard, it must take remedial action. More specifically, whenever the Commission "shall find that any rate [or] charge" — or "any rule, regulation, practice, or contract affecting such rate [or] charge" — is "unjust [or] unreasonable," then the Commission "shall determine the just and reasonable rate, charge[,] rule, regulation, practice or contract" and impose "the same by order." §824e(a). That means FERC has the authority — and, indeed, the duty — to ensure that rules or practices "affecting" wholesale rates are just and reasonable.

Taken for all it is worth, that statutory grant could extend FERC's power to some surprising places. As the court below noted, markets in all electricity's inputs — steel, fuel, and labor most prominent among them — might affect generators' supply of power. See 753 F. 3d, at 221; id., at 235 (Edwards, J., dissenting). And for that matter, markets in just about everything — the whole economy, as it were — might influence LSEs' demand. *So if indirect or tangential impacts on wholesale electricity rates sufficed, FERC could regulate now in one industry, now in another, changing a vast array of rules and practices to implement its vision of reasonableness and justice. We cannot imagine that was what Congress had in mind. (Emphasis added).*

For that reason, an earlier D. C. Circuit decision adopted, and we now approve, a common-sense construction of the FPA's language, limiting FERC's "affecting" jurisdiction to rules or practices that "directly affect the [wholesale] rate." *California Independent System Operator Corp. v. FERC*, 372 F. 3d 395, 403, 362 U.S. App. D.C. 28 (2004) (emphasis added); see 753 F. 3d, at 235 (Edwards, J., dissenting). As we have explained in addressing similar terms like "relating to" or "in connection with," a non-hyperliteral reading is needed to prevent the statute from assuming near-infinite breadth. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U. S. 645, 655, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) ("If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes [the statute] would never run its course"); *Maracich v. Spears*, 570 U. S. ___, ___, 133 S. Ct. 2191, 186 L. Ed. 2d 275, 288 (2013) ("The phrase 'in connection with' is essentially indeterminat[e] because connections, like relations, stop nowhere" (internal quotation marks omitted)). The Commission itself incorporated the D. C. Circuit's standard in addressing its authority to issue the Rule. See 76 Fed. Reg. 16676, ¶112 (stating that FERC has jurisdiction because wholesale demand response "directly affects wholesale rates"). We think it right to do the same."
Federal Energy Regulatory Commission v. Electric Power Supply Association (EPSA) 136 S. Ct. 760, 773-774 (2016).

[19] "As earlier recounted, see supra, at, 194 L. Ed. 2d, at 419, the FPA allocates to FERC exclusive jurisdiction over "rates and charges . . . received . . . for or in connection with" interstate wholesale sales. §824d(a). Exercising this authority, FERC has approved the PJM capacity auction as the sole ratesetting mechanism for sales of capacity to PJM, and has deemed the clearing price per se just and reasonable. Doubting FERC's judgment, Maryland—through the contract for differences—requires CPV to participate in the PJM capacity auction, but guarantees CPV a rate distinct from the clearing price for its interstate sales of capacity to PJM. By adjusting an interstate wholesale rate,

such an approach lacks accommodation for the respective regulatory authorities under the FPA and environmental statutes, demonstrates no "solicitude toward the states" and does not represent a collaborative approach.[20] If the PJM Proposal is allowed to proceed, it is vulnerable to being overturned.

The PJM Proposal Goes Beyond the Capacity Order in Ways that Discriminate against Resources that Meet State Environmental Policy Requirements.

In the Capacity Order, the Commission acknowledged that it was essentially excluding state supported resources from the RPM. The PJM Proposal's implementation would go further and establish unduly discriminatory rates that are not just and reasonable. The Capacity Order itself risks undue discrimination between capacity resources that offer comparable capacity products and performance levels based on state regulatory actions of a subject-matter that is entirely separate from ensuring the physical maintenance of reserve margins. As discussed below, the PJM Proposal doubles down on this discriminatory treatment of state market resources based on categories that have no bearing on the ability to deliver a capacity product and are not subject to Commission jurisdiction.

The Capacity Order purports to offer a "non-discriminatory" alternative to participation in the RPM – an expanded FRR mechanism (the Resource Carve-Out or "RCO") in which a state supported resource subject to the MOPR could exit the RPM with "a commensurate amount of load and operating reserves."[21] Describing this as a "bifurcated approach," the Commission appeared to open the way for a parallel bilateral market in which state market resources could be compensated by load serving entities for capacity ultimately provided to PJM. A coalition of joint

Maryland's program invades FERC's regulatory turf. See EPSA, 577 U. S., at ___, 136 S. Ct. 760, 193 L. Ed. 2d 661, 682 ('The FPA leaves no room either for direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result.' (internal quotation marks omitted))." *Hughes v. Talen* at 1297.

[20] *See supra* note 10.

[21] Capacity Order at ¶ 157.

stakeholders submitted a brief as part of initial submissions in this docket that outlined principles for such a market.[22] The MRC is skeptical of a "separate but equal" approach but agrees that the principles proposed in the joint brief would likely result in a reasonably competitive market and would support this approach if offered.

Overall the RCO offers two choices to resources complying with state environmental and generation resource planning policy: (i) forego being treated as capacity resource at all, or (ii) choose to subject its capacity to a PJM commitment with no assurance of any compensation. Both options are unduly discriminatory. For any resource that fails to clear the RPM because of the expanded MOPR and nevertheless elects to continue to offer energy or ancillary services in PJM markets, PJM will have the benefit of its capacity in any event. The resource electing option one will simply be ineligible for revenues for providing this service, and PJM will have no forward assurance of its participation – a loss for all concerned. The second option is even less appealing. The resource may receive no, or a partial, value capacity payment, but must to commit to perform on a forward basis nonetheless. This is clearly unjust and unreasonable and also unduly discriminatory as compared to resources permitted in the RPM. The capacity from the resource is allocated to load serving entities who may not pay for it, rather than belonging to the resource to sell. This is clearly beyond the power of either PJM or the Commission to command. There can be no meaningful expectation that a resource will accept option two compared to option one.

PJM's suggestion that States may elect to compensate resources that elect option two does nothing to preserve the PJM Proposal. On the one hand, an offer of compensation that PJM has no power to deliver is no compensation at all. On the other hand, PJM is suggesting to states that they offer to resources complying with state environmental and generator portfolio regulations a contract for differences or other mechanism to make up for the excess of lost

[22] Docket EL18-178-000 et al., *Joint Brief of Consumer Advocates, NGOs and Industry Stakeholders*, filed October 1, 2018.

capacity market revenues over state market payments. As highlighted above, this is exactly what the Supreme Court forbade in Hughes.[23] Additionally, this would be inconsistent with Commission's entire market thrust for the last 20+ years.[24]

The Federal Power Act is Consumer Protection Legislation, and the PJM Proposal Turns the Act on its Head in an Effort to Raise Prices

The Federal Power Act amendments of 1935 were enacted as consumer protection legislation. State regulated utilities were entering into interstate supply contracts with affiliates at inflated prices and passing those prices through to consumers. The out of state affiliates and interstate transactions were beyond the reach of state utility commissions, and the commissions' efforts to ensure just and reasonable prices for their ratepayers were frustrated. Against this background, the FPA sought to provide federal assistance to consumers by regulating the areas that state commissions were powerless to regulate. The balance of jurisdiction in the FPA was intended to fill a regulatory void while leaving state regulation intact through express reservation. PJM and the Commission's efforts to nullify state generation and environmental compliance regulations must be viewed in this light.[25]

Before PJM became an RTO it was a "tight power pool" in which members had capacity obligations and capacity was traded in a bilateral market. As independent power producers bloomed in the wake of the Public Utility Regulatory Policies Act (PURPA), power purchase agreements between independent generating resources and incumbent utilities typically allocated title to the capacity to the power purchaser along with the electric power. The market was not especially transparent.

Following the formation of the RTO, PJM developed its capacity product in something

[23] *See Hughes supra* note 14.
[24] *See, e.g., Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures*, 162 FERC ¶ 61,012 (issued January 2018).
[25] Dozier A. DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, George Washington Law Review, Vol. 14, Issue 1 (December 1945).

like its present form. The Commission's Capacity Order and the PJM Proposal both make frequent reference to the PJM "capacity market," but it is important to recognize that that the Reliability Pricing Model ("RPM") was (as its name suggests) never a market. The RPM at its best was a competitive procurement run by a monopsonist purchaser. It has always been based on a constructed "demand curve" with an artificially contrived, downward sloping tail that has historically procured more capacity than is required to meet NERC standards. Nevertheless, it had the at least the potential of driving a good bargain on behalf of ratepayers and had the benefit of being fairly transparent. Everyone knew what the price was, and residual auctions allowed market participants to true up their obligations in a competitive format.

At the inception of the RPM, there was concern that integrated utilities would have, in their role as load serving entities, perverse incentives to try to lower the price they paid as purchasers by bidding in their generation into the RPM below its marginal cost of operation. To counteract this possibility, PJM adopted the Minimum Offer Price Rule ("MOPR") to require these load serving entities to enter a minimum bid based on the actual costs of a typical generating unit, or their own actual demonstrated costs, if lower. Alternatively, these integrated utilities were permitted to use their own generation to serve their own load under the Fixed Resource Requirement ("FRR") provisions of the tariff. As the Commission notes in the Order, the MOPR requirement was subsequently expanded to encompass natural gas-fired resources that received explicit state subsidies directly marked to the capacity auction. While the design of those subsidies were ultimately struck down by the Supreme Court in Hughes, this MOPR expansion led to the slippery slope where state governmental environmental compliance payments adopted to meet state policy objectives unrelated to the RTO markets are now under attack.[26]

[26] *See supra*, note 19.

PJM now proposes to apply the MOPR to all resources that receive "actionable subsidies." While it is hard to know, as discussed above, exactly what will be swept into this catchall category, we have the specter of most new resources being subject to a form of heavy handed, one-size-fits-most rate regulation. Instead of ratepayers receiving the benefit of low bids from resources that are able to provide environmental or other benefits to meet state generation and environmental policies, PJM's proposal will deliberately raise prices and indeed penalize the "subsidized resources" to pay for "displaced intra-marginal resources" that are unable to clear in the market. We are in danger of PJM becoming a forum for the regulated entities that are sellers in the market to raise prices in an interstate wholesale market that is beyond the reach of state regulators. This is exactly the outcome that the Federal Power Act amendments of 1935 were enacted to prevent. It is also the precise mirror of the problem that the MOPR was originally designed to prevent. The Commission's role is to prevent PJM from interfering with market forces through implementation of an RPM that is a non-market price support scheme.

Proposed Exemptions to the Material Resource Definition Require Refinement.

The proposed exemptions to the Material Resource definition in the PJM Proposal require refinement to address the capabilities of microgrids and other advanced grid-edge resources. To start, it is worth noting that microgrids often present to PJM as asset-backed economic demand resources. Should such a resource, existing or new, become subject to the MOPR, the MRC supports PJM's proposed MOPR Floor Offer Price of zero.

It is unclear how the PJM Proposal will deal with curtailment service providers and any other third party aggregators offering diverse resources and hybrid resources such as microgrids. Unlike ISO New England, PJM requires an aggregator to have a single participant account for all resources it bids into the market, so it cannot separate classes or make custom combinations of resources in their portfolio. It is not clear how a microgrid that includes 20 MW of cogeneration,

10 MW of storage, and 5 MW of solar PV that is net metered *and* is able to originate state environmental compliance instruments / solar renewable energy certificates would be treated.

The MRC generally supports the 20 MW exemption to the Material Resource definition as a mechanism to not unduly burden grid-edge resources. However, care must be given to microgrids that are unified aggregations of generation, storage, and load assets. Microgrids that want to participate in the RPM should not be restricted in selecting any combination of aggregated assets up to the 20 MW of Unforced Capacity limit to be offered. Further, such combination should not be required to be static if the aggregation is capable of fulfilling the same commitment by means of another asset combination. In addition, the fact that a microgrid's unified aggregation of assets may be capable of a higher collective output profile that is dedicated in part to serving included load should not restrict its ability to offer up to the 20 MWs of Unforced Capacity and be availed of the exemption.

The MRC generally supports the waste-to-energy and combined heat and power exemptions and note that a consistent application of the "primary purpose" criteria should also include asset-backed demand resources such as microgrids. Microgrids are deployed for many purposes. For instance, cost effective self-supply, thermal and electric applications, the ability to island included load and the related resiliency benefits, and environmental performance often combine as the "primary purpose" behind microgrid operations. Many of these purposes are ancillary to, or co-benefits of, electricity production. Indeed, wholesale power production is often value added to other primary purposes. Therefore, the MRC suggests a categorical primary purpose exemption to the Material Resource definition covering any resource with a primary purpose other than the production of wholesale electricity (i.e. sale for resale). At minimum, asset-backed demand resources should be included with waste-to-energy and combined heat and power in the exemption.

Respectfully submitted,

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