UNITED STATES OF AMERICA
BEFORE THE
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, C.P. Crane LLC, Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean Energy, LLC and Panda Power Generation Infrastructure Fund, LLC	**Docket Nos. EL16-49-000**
v.	
PJM Interconnection, L.L.C.	
PJM Interconnection, L.L.C.	**EL18-178-000 (Consolidated)**

REQUEST FOR REHEARING AND CLARIFICATION
OF THE MARYLAND PUBLIC SERVICE COMMISSION

Pursuant to Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825l, and Rule 385.713 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure, 18 C.F.R. § 385.713, the Maryland Public Service Commission ("Maryland PSC") requests rehearing and clarification of the Commission's *Order Establishing Just and Reasonable Rate*, issued on December 19, 2019 ("December 2019 Order") in this consolidated proceeding. Maryland PSC also requested rehearing of the Commission's June 29, 2018 *Order Rejecting Proposed Tariff Revisions, Granting in Part and Denying in Part Complaint, and Instituting Proceedings Under Section 206 of the Federal Power Act* ("June

2018 Order"),[1] asserting that the Commission erred in determining PJM's Reliability Pricing Model ("RPM") tariff provisions unjust and unreasonable.[2] Although the Commission's June 2018 Order rejected PJM's proposed Tariff revisions, it granted the *Calpine* complaint—in part—finding that the status quo is unjust and unreasonable.[3] All requests for rehearing of the June 2018 Order remain pending a decision by the Commission.

The Commission's December 2019 Order retreats from earlier indications that the Commission was open to proposals to accommodate state preferred resources in PJM's capacity market. Moreover, the Order's lack of consideration for state policies now has the potential to result in significant rate increases for customers in the PJM region.[4] The practical effect of the December 2019 Order will be to frustrate state polices designed to support a transition to cleaner generating resources, in violation of the states' exclusive authority to make decisions regarding the facilities used in generation, as specified in the Federal Power Act.

---

[1] *Calpine Corp., et al. v. PJM Interconnection, LLC*, 163 FERC ¶ 61,236 (June 29, 2018).

[2] Maryland PSC's Request for Rehearing of the Commission's June 2018 Order was based on its Protest and Comments filed in FERC Docket No. ER18-1314, in opposition to the Federal Power Act ("FPA") section 205 filing by PJM Interconnection, L.L.C.'s ("PJM") that proposed to either re-price capacity offers by certain state-sponsored generators, or alternatively expand the Minimum Offer Price Rule ("MOPR") to include generators that receive certain state subsidies. Maryland PSC also requested rehearing of the June 2018 Order based on the Commission's action on its own motion initiating a FPA section 206 proceeding after granting in-part and denying in-part Calpine's complaint in Docket EL16-49. Maryland PSC also filed Comments in opposition to the FPA section 206 complaint filed by Calpine in FERC Docket No. EL16-49, which requested that the Commission find PJM's existing MOPR insufficient and expand its reach to numerous existing generators receiving support from state public policies. In its Request for Rehearing of the June 2018 Order, Maryland PSC noted that the Order: (1) intruded improperly into an area of traditional state jurisdiction by impeding or foreclosing the lawful right of each state to shape its generation mix pursuant to the FPA; (2) unlawfully extended Commission authority over renewable energy credits, despite the fact that a prior Commission order had found the agency possessed no such jurisdiction; (3) conflated renewable energy credits with megawatts; (4) improperly frustrated state policies to recognize externalities and value generation environmental attributes; and (5) reached numerous conclusions that are not supported by the record and that are arbitrary and capricious.

[3] June 2018 Order at P 6.

[4] December 2019 Order, Glick Dissent, at P 3. (The December 2019 Order "will likely cause a large and systematic increase in the cost of capacity—at least 2.4 billion dollars per year."), citing PJM Interconnection, *2021/2022 RPM Base Residual Auction Results*, https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2021-2022/2021-2022-base-residual-auction-report.ashx (last visited Dec. 19, 2019). (*Id.* at P 50).

I. BACKGROUND

On March 21, 2016, in Docket No. EL16-49, Calpine and certain other generators filed a FPA section 206 complaint against PJM, claiming that PJM's MOPR is unjust and unreasonable because it allows for the artificial suppression of prices in PJM's capacity market as a result of certain resources receiving state-supported out-of-market payments. On April 9, 2018, in Docket No. ER18-1314, PJM made a FPA section 205 filing with the Commission to change its capacity market rules, offering the Commission the option to select one of two proposals. Maryland PSC protested PJM's filing, asserting that neither proposal was just and reasonable.

On June 29, 2018, the Commission issued an order in the Calpine case (Docket No., EL16-49), and on its own motion initiated a section 206 proceeding (Docket No. EL18-178), consolidating Docket Nos. EL16-49 and ER18-1314, stating that neither of PJM's proposals was just and reasonable, and that the existing RPM tariff was unjust and unreasonable. In that Order, the Commission stated further that the MOPR—with few exceptions—should apply to all resources that receive out-of-market subsidies. The Commission set the matter for paper hearing procedures and solicited comments, including comments on a resource-specific FRR Alternative, a mechanism that the Commission suggested would accommodate state policies.

Maryland PSC requested rehearing of the June 2018 Order, asserting that the Order was arbitrary and capricious in its finding that the existing RPM tariff was unjust and unreasonable, and filed comments advocating for exemptions in the event the Commission chose to proceed with a rate structure that expanded the MOPR. Maryland PSC also submitted a proposal referred to as the Competitive Carve-Out Auction ("CCOA"). The CCOA is a solution that can accommodate the inclusion of state-preferred resources in the capacity clearing process in a timely, competitive, and efficient fashion.

On August 29, 2018, the Commission issued a tolling order granting rehearing for further consideration of the June 2018 Order.[5] Since then, the Commission has not issued a substantive order on rehearing in the underlying (consolidated) proceeding. However, in its December 2019 Order, the Commission maintains that the pre-existing PJM market rules are unjust and unreasonable. The December 2019 Order also sets forth a Replacement Rate that expands the current MOPR for resources that receive what the Commission characterizes as "State Subsidies," and requires PJM to make a compliance filing within 90 days and develop additional details associated with the Replacement Rate–details that the Order failed to provide any guidance.

Maryland PSC now requests rehearing and clarification of the Commission's December 2019 Order. Unless rehearing and clarification is granted, the December 2019 Order and compliance filing by PJM pursuant to the Order will result in irreparable harm to Maryland ratepayers, by implementing a replacement rate that is unjust and unreasonable, discriminatory and unduly preferential. Additionally, the requirement of a compliance filing by PJM within 90 days of the December 2019 Order is patently unreasonable, providing PJM and stakeholders little time to analyze and address the sweeping changes required by the Order.

The December 2019 Order observes that subsequent to issuance of the June 2018 Order (which emphasized the Commission's willingness to accommodate[6] state polices) several states had increased the number of resources eligible to receive state subsidies.[7] Since the Order now

[5] Aug. 29, 2018 Commission Order Granting Rehearing for Further Consideration.

[6] The Commission's June 2018 Order made numerous references to accommodating state policies. *See, e.g.*, June 2018 Order at P 160. "In addition to expanding PJM's MOPR, we also preliminarily find that it may be just and reasonable to accommodate resources that receive out-of-market support, and mitigate or avoid the potential for double payment and over procurement, by implementing a resource-specific FRR Alternative option." The Commission's December 2019 Order fails to adequately explain its departure from these earlier findings.

[7] December 2019 Order at 22, stating that "State Subsidies for capacity resources continue to expand to cover

denies any reasonable accommodation of states' policies subsequent to issuance of the June 2018 Order, additional time will be required for Maryland (and other states) to fully assess and respond to the implications of the December 2019 Order. Additional time will also be required for the Commission to address pending requests for rehearing and clarification, as well as any elements of the Order (and subsequent Commission decisions) that may need to be revised for purposes of compliance. Therefore, Maryland PSC requests that the Commission direct PJM to delay conducting any future capacity auction to no earlier than May 2021. This delay would allow the various state legislatures, including the Maryland General Assembly, enough time to consider options to protect state-preferred resources that will be effectively excluded from clearing the PJM capacity market, and to propose alternatives to the Replacement Rate in the interest of their citizens.[8]

Additionally, Maryland PSC requests that the Commission: (1) reverse its decision to reject Maryland PSC's accommodative CCOA alternative approach for clearing state-preferred resources in the PJM capacity market; (2) exempt all existing and future renewable resources that receive or are eligible to receive subsidies pursuant to state policies adopted subsequent to the issuance of the Commission's June 2018 Order and prior to the issuance of the December 2019 Order; (3) reconsider exempting limited amounts of emerging technologies; (4) expand criteria for new RPS resource exemption to include resources that received State regulatory commission authorization for RECs prior to the date of the Commission's December 2019 Order; (5) clarify

---

additional resource types based on an ever-widening scope of justifications." Among the references noted is Maryland Clean Energy Jobs Act, Senate Bill No. 516 (H.B. 1158) (2019), n55.

[8] Under the current schedule, PJM's compliance filing is due by March 18, 2020. At the earliest, a compliance order by the Commission on PJM's filing is not expected until sometime in May 2020. However, the Maryland General Assembly convenes annually for a period of 90 days, from January–April. In order to develop, introduce, and consider appropriate legislation that may be needed to address the impediments on state-preferred generation resources in PJM's capacity market, the Maryland General Assembly would need time to address this matter during the course of the 2021 Legislative Session.

that new resources participating in retail utility demand response ("DR") programs—which retail customers move in and out of—are not subject to the new resource MOPR requirement; (6) clarify that resources benefiting from the Regional Greenhouse Gas Initiative ("RGGI") or any state carbon-pricing mechanism do not receive a State Subsidy, as the term is defined in the December 2019 Order; and (7) clarify that transmission resources planned by PJM pursuant to Order No. 1000 Public Policy provisions and sponsored by states attempting to meet public policy goals by delivering power from state-preferred generation resources, do not cause the underlying generation resources to receive a State Subsidy, as that term is defined in the December 2019 Order.

II. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

Pursuant to Rule 713(c)(2), 18 C.F.R. § 385.713(c)(2), the Maryland PSC respectfully submits that the December 2019 Order is arbitrary, capricious, insufficiently supported, contrary to law, and beyond the Commission's authority in the following respects:

1. The December 2019 Order interferes unlawfully with the states' exclusive jurisdiction over generation and resource portfolio decisions, impeding generation resources that receive state support from fairly participating in PJM's wholesale capacity market. *See* 16 U.S.C. § 824(a); 16 U.S.C. § 824(b)(1); *New England States Comm. on Electricity v. ISO New England Inc.*, 142 FERC ¶ 61,108 (2013); *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015); *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016); *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760 (2016).
2. The December 2019 Order unlawfully asserts Commission authority over renewable energy credits ("RECs"), despite the fact that the Commission had previously found that it did not possess jurisdiction over credits unbundled from wholesale energy. The Order fails to provide a reasoned explanation for its change in policy or an analysis of why jurisdiction exists. *See Grand Council of Crees (of Quebec) v. FERC*, 198 F.3d 950, 956-957 (D.C. Cir. 2000); *WSPP Inc.*, 139 FERC ¶ 61,061, P 18 (2012); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Green Island Power Authority v FERC*, 577 F.3d 148, 166-69 (2d Cir. 2009); 16 U.S.C. § 824; 16 U.S.C. § 824d; 16 U.S.C. § 824e.
3. The December 2019 Order improperly established a replacement rate for PJM's RPM by expanding PJM's MOPR-Ex proposal that the Commission found to be unjust and unreasonable, without ruling on rehearing requests in Docket No. ER18-1314. FERC's

procedural error inappropriately prevents aggrieved parties such as the Maryland PSC from seeking judicial review of FERC's underlying decisions, including FERC's decision to curtail state rights over generation resources. *See, e.g., Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55 (2014).

4. The December 2019 Order improperly denies *any* safe harbor for accommodating state public policy programs by arbitrarily eliminating, with virtually no explanation, the accommodative June 2018 Order's proposed resource-specific FRR Alternative option or any variation of that option, including the RTO-wide competitive carve out approach that Maryland PSC proposed. Specifically, FERC's June 2018 Order attempted to balance the new restrictions on state-sponsored generation projects imposed by an expanded MOPR with the creation of a mechanism intended to "allow, on a resource-specific basis, resources receiving out-of-market support to choose to be removed from the PJM capacity market, along with a commensurate amount of load, for some period of time." FERC found in its June 2018 Order that a resource-specific FRR Alternative would "accommodate state policy decisions" and allow resources that receive out-of-market support to "remain online." 163 FERC ¶ 61,236 at PP 8, 160. *See* also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The December 2019 Order arbitrarily removes the resource-specific FRR Alternative, or any form of accommodation, without sufficient explanation.
5. The December 2019 Order unjustly precludes Maryland PSC's proposed CCOA, which is a competitive process that, unlike the regime required by the December 2019 Order, does not threaten the competitiveness of the capacity market, but accommodates the inclusion of state preferred resources. *See Sierra Club v. FERC*, 867 F.3d 1357 (2017). The December 2019 Order fails to provide any explanation for rejecting the CCOA.

As detailed below, the December 2019 Order: (1) contains factual findings that are not supported by substantial evidence; (2) makes legal conclusions that are not the product of reasoned decision-making; (3) interferes unlawfully with the states' exclusive jurisdiction over generation and resource portfolio decisions; and (4) if not corrected on rehearing, or clarified, will produce outcomes that are unjust, unreasonable, and unduly discriminatory, in violation of the Federal Power Act.

III. REQUEST FOR REHEARING

For the reasons set forth below, Maryland PSC submits that the December 2019 Order erred in several key respects. A Commission order will be reversed on review if it is arbitrary or capricious, reflects an abuse of discretion, is not otherwise in accordance with law, or is not

supported by substantial evidence.[9] In order to satisfy its obligation to engage in reasoned decision-making, the Commission must examine the relevant data and articulate a rational connection between the facts found and the choices made.[10] The Commission must reach its conclusion through decision-making that is "reasoned, principled, and based upon the record."[11]

The Commission's December 2019 Order intrudes improperly into an area of traditional, and exclusive,[12] state jurisdiction—namely, the valuation of the environmental attributes of generation for state health and public welfare purposes. The Order also undermines the resource preference (and valuation) states have made, by enlarging the MOPR to extend to new generation resources that receive any out-of-market payments attributed to state policies, including renewable resources.[13] The expanded MOPR is intended to impede or prevent these resources from clearing in PJM's wholesale capacity market, thereby precluding them from receiving capacity payments, and undoing the benefit of State support. The December 2019 Order thereby thwarts state public policy decisions addressing environmental attributes. As Commissioner Glick stated in his dissent: "The FPA is clear. The states, not the Commission,

[9] *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014); *Sacramento Mun. Util. Dist.v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010) ("*Sacramento*").

[10] *Sacramento*, 616 F.3d at 528*; Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (quoting *Motor Vehicle Mfs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

[11] *ExxonMobil Oil v. FERC*, 487 F.3d 945, 953 (D.C. Cir. 2007*); see New York v. FERC*, 535 U.S. 1, 36 (2002); *see also Transmission Access Policy Group v. FERC*, 225 F.3d 667, 705, 716 (D.C. Cir. 2000) (citing *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1021 (D.C. Cir. 1987).

[12] Chairman Chatterjee conceded this during his public remarks during the Open Meeting; "*I recognize, respect, and support states' exclusive authority to make choices about types of generation resources that serve their communities.*" (Dec. 19, 2019 FERC Open Meeting Transcript at 18:5-7) Commissioner McNamee similarly stated "*I ... fundamentally agree states have authority to make decision over the facilities used in generation. In fact, it's clearly spelled out in section 201(b)(1) of the Federal Power Act.*" (Dec. 19, 2019 Transcript at 51:22-24 - 51:1).

[13] *See* June 2018 Order at P 5, finding that the current MOPR is unjust and unreasonable because "it fails to mitigate price distortions caused by out-of-market support granted to other types of new entrants or to existing capacity resources of any type."

are the entities responsible for shaping the generation mix."[14] By raising barriers to state-sponsored renewable resources and effectively excluding them from participating in wholesale markets, the Commission has acted *ultra vires* to shape generation mix and thwart states from exercising that function. The December 2019 Order, Commissioner Glick notes, "is carefully calibrated to give existing resources a leg up over new entrants and to force states to bear enormous costs for exercising the authority Congress reserved to the states when it enacted the Federal Power Act."[15]

The December 2019 Order is particularly dangerous in that it severely curtails cooperative federalism in the regulation of generation by acting to stymie state efforts to value resource attributes. As Commissioner Glick aptly stated in his dissent of the June 2018 Order: "The state programs of which the Commission disapproves are precisely the sort of actions that Congress reserved to the states when it enacted the FPA. The Commission's role is not—and should not be—to exercise its authority over wholesale rates in a manner that aims to mitigate, frustrate, or otherwise limit the states' exercise of their exclusive authority over electric generation facilities."[16]

Likewise, the December 2019 Order exceeds the Commission's authority under the FPA and intrudes inappropriately upon states' authority over generation resources by unreasonably attempting to limit, frustrate, or otherwise foreclose the lawful right of each state to encourage certain types of generation through measures untethered to the wholesale market. Accordingly, the Commission should grant rehearing.

[14] December 2019 Order, Glick Dissent, at P 7.

[15] *Id*. at P 4.

[16] June 2018 Order, Glick Dissent at 2.

A. The December 2019 Order Interferes Unlawfully With the States' Exclusive Jurisdiction Over Generation And Resource Portfolio Decisions.

The FPA vests the Commission with exclusive jurisdiction over "the sale of electric energy at wholesale in interstate commerce,"[17] but reserves to the states alone, "the regulation of 'any other sale.'"[18] The December 2019 Order, however, undermines states' legitimate interests in policies that promote the environment and the health and welfare of their citizens. The Order "attempt[s] to establish a set of price signals for determining resource entry and exit that will supersede state resource decision-making and [instead establishes decision-making that reflects] the Commission's priorities."[19] In doing so, the Order unlawfully targets and nullifies states' legitimate interest in policies that promote the environment, health and welfare of their citizens.

The December 2019 Order fails to meet the requirement under section 206 of the Federal Power Act, that the Commission establish rates that are just and reasonable and not unduly discriminatory or preferential. Moreover, the Commission's conclusion that long-standing renewable portfolio standards ("RPSs") are significantly suppressing market prices and are threatening the viability of PJM's capacity market is contrary to the record evidence and therefore arbitrary and capricious. While the December 2019 Order asserts that state-subsidized resources suppress prices and threaten the competitiveness of PJM's capacity market, the Order fails to cite any facts or evidence in support of the Commission's conclusion.

---

[17] *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016) (quoting *FERC v. EPSA* at Slip Op.1) (*Hughes v. Talen*).

[18] *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 205 (1983) (*Pacific Gas & Elec*.).

[19] December 2019 Order, Glick Dissent, at P 12. He notes further that "repeating the phrase 'price suppression' does not change the fact that the Commission's stated concern in both the June 2018 Order and [in the December 2019] order is the states' exercise of their authority to shape the generation mix or that the Commission's stated goal for the Replacement Rate is to displace the effects of state resource decision-making." *Id.* at P 13.

Instead, the December 2019 Order forcefully treads on states' rights as they pertain to state jurisdiction over both generation resources and environmental programs. The FPA has always placed generation decisions firmly on the state side of the jurisdictional bright line.[20] Of course, section 201 of the FPA firmly vests the Commission with authority over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce."[21] However, FPA section 201(a) makes clear that federal regulation "extend[s] only to those matters which are not subject to regulation by the States" – with decisions regarding the size, location, and fuel type of generation historically belonging to states and not federal agencies.[22] Indeed, section 201(b) of the FPA curtails federal jurisdiction over generation and local distribution, subjects historically regulated by the states, providing that the Commission "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 …."[23] The courts have consistently recognized state authority over generation matters.[24] The Commission has recognized this division as well.[25]

[20] *Hughes v. Talen* 136 S. Ct. at 1299.

[21] FPA section 201.

[22] 16 U.S.C. § 824(a).

[23] 16 U.S.C. § 824(b)(1). *See also* FPA section 202(b), which provides that although the Commission can order the physical connection of transmission facilities between utilities, the Commission "shall have no authority to compel the enlargement of generating facilities for such purposes," a power that is within state jurisdiction. 16 U.S.C. § 824a(b).

[24] *See New York v. FERC*, 535 U.S. 1, 22 (2002) ("the legislative history [of the FPA] is replete with statements describing Congress' intent to preserve state jurisdiction over local [generation] facilities.").

[25] *New England States Comm. on Electricity v. ISO New England Inc*., 142 FERC ¶ 61,108 (2013) (LaFleur, concurring) ("States have the unquestioned right to make policy choices through the subsidization of capacity.").

The vast majority of PJM states have adopted some form of RPS. Specific to Maryland, in 2004, several years *before* the implementation of RPM, the Maryland General Assembly established the State's RPS, which values the environmental attributes of specific forms of generation—such as solar, wind, and hydroelectric—to protect its citizens from hazards associated with poor air quality and to generally improve the environment.[26] As Commissioner Glick notes, the December 2019 Order "permits the Commission to zero out any state effort to address the externalities associated with sales of electricity."[27] This cannot be.

The December 2019 Order discriminates against state RPS programs by limiting the MOPR exemption set forth in that Order to only intermittent renewable resources.[28] Why the RPS exemption is limited to intermittent resources is not explained.

Prior to the December 2019 Order, the Commission respected state decisions regarding renewable portfolio standards. Even as recently as the June 2018 Order, the Commission—in recognition of federal-state cooperation—suggested an approach (the resource-specific FRR) as a way of "accommodating" state policy objectives. Previously, the Commission had not attempted to exert federal jurisdiction over generation attributes,[29] but neither had it impeded states from

[26] In addition to encouraging the use of clean resources through its RPS, Maryland has promoted energy efficiency and demand side management measures over a reliance on carbon emitting resources.

[27] December 2019 Order, Glick Dissent, at P 17.

[28] Renewable resource as used in the RPS Exemption means Intermittent Resource as defined in the PJM Tariff as "a Generation Capacity Resource with output that can vary as a function of its energy source, such as wind, solar, run of river hydroelectric power and other renewable resources." December 2019 Order at P 173, n.340, citing PJM Tariff, Art. 1.

[29] In fact, FERC recently confirmed that it has no jurisdiction under the FPA with respect to sales of state-issued renewable energy credits that are not bundled with sales of wholesale energy. *WSPP Inc*., 139 FERC ¶ 61,061, P 18 (2012). Specifically, FERC held that "RECs and contracts for the sale of RECs are not themselves jurisdictional facilities subject to the Commission's jurisdiction" under FPA sections 201, 205 and 206. *Id*. at PP 18, 21. FERC concluded that "a REC does not constitute the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce." *Id*. at P 21. Because the Commission has failed to provide a reasoned explanation for its deviation from prior precedent regarding a matter of vital importance – the Commission's jurisdiction over RECs vis-à-vis the states – the Commission should grant rehearing of its December 2019 Order.

doing so.[30] That history has allowed states—consistent with the principle of cooperative federalism—to pursue policies to promote particular resources based on their generation attributes and in furtherance of state health, welfare, and environmental goals.[31]

Finally, the Federal Power Act does not permit the Commission to nullify state generation resource preferences any more than the Commission can nullify federal legislative policies. However, if applying the MOPR to federal subsidies would nullify federal policies, the same is true with respect to state policies, and is thus equally forbidden by the FPA.[32]

B. The Existing FRR Alternative Does Not Accommodate State Policies.

While applying MOPR to resources that receive revenues outside of PJM markets is clearly unjust and unreasonable, the December 2019 Order suggests that PJM's existing FRR Alternative is a path that can be pursued should certain entities choose to opt out of the capacity market. As the only alternative presented in the December 2019 Order, the Commission is effectively inviting states to exit PJM's capacity market. As such, the Replacement Rate encourages a rejection of the forward capacity market concept, which would further concerns that non-subsidized resources would have regarding investor confidence and any supposed impact that resources receiving state subsidies would have on their revenues.

---

[30] The Commission has questioned whether it has authority under the FPA to enact a carbon tax to indirectly benefit those resources (such as nuclear units) that provide emissions-free generation. *See e.g.*, Docket No. AD17-11-000 - Technical Conference re State Policies and Wholesale Markets, May 1, 2017 Transcript (Accession No. 20170530-4007). However, the Commission has not attempted to exert this authority, if it exists, and has instead left the states free to pursue individual policies that address environmental externalities and value resource attributes—a longstanding power exercised by the states.

[31] *See Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288, 1300 (2016) (Sotomayor, J., concurring) ("In short, the Federal Power Act, like all collaborative federalism statutes, envisions a federal-state relationship marked by interdependence."). See also *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 510 - 511 (1989) (The power "to allocate and conserve scarce natural resources" remained with the states after the enactment of the FPA, "as a result of the system of dual state and federal regulation established in § 1(b) of that Act.")

[32] *See* December 2019 Order, Glick Dissent, at P 30. "The Commission is embarking on a quixotic effort to mitigate the effects of any attempt to exercise the authority that Congress reserved to the states." *Id.* at P 59.

As a restructured state, Maryland ratepayers have relied on a competitive approach to meet reliability needs in a cost effective manner. Employing the existing FRR Alternative, assuming that it is a workable option for the State, would significantly jeopardize the value Maryland PSC would hope to receive from a competitive market that relies on resources throughout the PJM region to meet the State's needs.

The December 2019 Order is also in conflict with the June 2018 Order, which supported accommodating state policies using a resource-specific FRR Alternative that the Commission characterized as being "similar in concept to the FRR Alternative" in the existing PJM market rules.[33] Specifically, the Commission found in its June 2018 Order that: "The resource-specific FRR Alternative would accommodate such resources by allowing them to remain on the system, despite their inability to compete in the capacity market based on their costs, by permitting them to exit the capacity market with a commensurate amount of load and operating reserves."[34] However, the December 2019 Order arbitrarily dismisses this approach solely on the evaluation of PJM's proposals—and no others—filed in the paper hearing without explanation.[35] Then, the Commission points to the "similar" existing FRR Alternative as a way to avoid subjecting state-subsidized resources to MOPR in the capacity market with no explanation as to why it would dismiss one approach in favor of a "similar" one.

By inexplicably withdrawing the resource-specific FRR alternative and rejecting consideration of any other "accommodative" state preferred resource approach, it appears that the Commission no longer believes any approach other than the MOPR could be just and

[33] June 2018 Order at P 8.

[34] *Id.* at P 160.

[35] *See,* December 2019 Order at P 6.

reasonable. Indeed, the December 2019 Order all but states that entities that are not satisfied with the Replacement Rate should exit the capacity market completely and use only the existing FRR Alternative – a limited and flawed option.

Moreover, in setting forth the Replacement Rate, the Commission does not examine how the existing FRR Alternative can be used along side the Replacement Rate, especially as it relates to market power concerns. For example, if the Replacement Rate set forth in the December 2019 Order were to be implemented in constrained zones, certain resources could exercise market power by preventing investor-owned utilities ("IOUs") from pursuing an FRR Alternative simply by refusing to participate. This would force the procurement of capacity from a capacity market that would subject state preferred resources to the MOPR, effectively reducing the amount of available supply and placing upward pressure on capacity prices. If resources have the option of maximizing revenues in an administratively inflated capacity market, as will be the outcome of applying the Commission's Replacement Rate, those resources would be reluctant to participate as an FRR Alternative resource.

Assuming a zone has sufficient capacity and an FRR Alternative can be pursued, the resources opting not to participate in the FRR Alternative may be in the position to exercise market power in the capacity auction where they may not have been able to do so before the other resources became part of the FRR Alternative plan. And even resources agreeing to be part of an FRR Alternative plan may, effectively, be in the position to demand an excessively high price for their participation in the FRR Alternative. Therefore, the existing FRR Alternative that the Commission claims can be used along side the Replacement Rate—in effect—cannot.

The existing FRR Alternative can also present challenges to implementing successful state-jurisdictional retail competition. If resources selected to meet the FRR Alternative do not

include resources that are owned or contracted by competitive retail suppliers, those competitive suppliers may no longer find it viable to operate in a retail choice state that has elected the FRR Alternative. This result could significantly impair retail competition in restructured (retail choice) states.

C. The December 2019 Order Improperly Established A Replacement Rate For PJM's RPM By Expanding PJM's MOPR-Ex Proposal—A Proposal That The Commission Found To Be Unjust And Unreasonable—Without Ruling On Rehearing Requests In Docket No. ER18-1314.

The December 2019 Order directs PJM to replace its current rate with a replacement rate. Under section 206 of the FPA, this can only be done if the existing rate is demonstrated to be unjust and unreasonable. Maryland PSC and numerous other parties filed requests for rehearing of the June 2018 Order challenging the Commission's determination. Other than the tolling order issued by the Commission on August 29, 2018, no order on rehearing has been issued. Nevertheless, the Commission's December 2019 Order expands on the premises set forth in its June 2018 Order, while denying parties access to judicial review of those underlying premises in the Commission's Order.

The December 2019 Order requires PJM to run auctions under a cloud of continued market uncertainty, except for signaling that any auctions conducted under the Replacement Rate adopted by the Commission will not be rerun. [36] This decision will result in irreparable harm to resources that will be precluded from clearing PJM's capacity market due to unjust and unreasonable, discriminatory and unduly preferential RPM tariff provisions required by the Commission. And it will cause irreparable harm to end-use customers.

[36] December 2019 Order at P 3, n10. ("In cases involving changes to market design, the Commission generally exercises its discretion and does not order refunds when doing so would require re-running a market.")

1. Withholding Orders on Rehearing Denies Parties' Their Right to Due Process.

Open ended tolling of the Commission's action on pending rehearing requests will adversely impact markets and cause similar concerns to those raised in *Allegheny Def. Project v. FERC*[37] ("*Allegheny*") in that due process is being denied if a RPM auction is allowed to proceed before orders on rehearing are issued. Judge Millet's concurrence in *Allegheny* notes that tolling orders may often be acceptable in disputes over monetary payments, where remedies can be fixed later and the consequences of Commission delay were temporary and remediable. However, in this case—since refunds would not be ordered—the delay is neither temporary nor subject to remediation. Rather, this would be akin to casting aside the time limit on rehearing requests imposed by Congress.[38]

2. The Commission Should Instruct PJM to Delay the BRA.

The December 2019 Order requires a compliance filing from PJM within 90 days, including a schedule for conducting the 2022/2023 and 2023/2024 auctions. Even if a rehearing order is issued concurrent with an order on PJM's compliance filing, the Commission should instruct PJM to delay the BRA until no earlier than May 2021. While the June 2018 Order solicited input on transitioning to a resource-specific FRR Alternative, in the December 2019 Order, the Commission eliminated any alternative proposal that could accommodate states. However, the Commission should recognize that time is still needed for states to understand the rules that PJM will be developing and to determine how or whether participation in the capacity

[37] 932 F.3d 940 (2019).

[38] 932 F.3d 940, Millet J. Concurrence. Noting that in other cases "the Commission has twisted [the court's] precedent into a Kafkaesque regime … [t]he Commission does so by casting aside the time limit on rehearing that Congress ordered—treating its decision as final-enough for the [utility] to go forward with their … plans, but not final for the injured [party] to obtain judicial review." Under its tolling procedure, she notes, "the Commission can keep [dissatisfied parties] in seemingly endless administrative limbo while energy companies plow ahead seizing land and constructing the very pipeline that the procedurally handcuffed homeowners seek to stop."

market is warranted going forward. This will take time to study and to develop legislative and regulatory alternatives that would accommodate the limitations inherent in the Replacement Rate. As such, auctions should be delayed until a transition and workable alternatives can be developed and employed.

Because of the uncertainty associated with this Order, both in application and in seeking alternatives to reliance on the capacity market, Maryland PSC requests that subsequent RPM auctions be permitted to occur no earlier than May 2021 (after the Commission issues orders on rehearing and on PJM's compliance filing), and after state legislatures have completed a full legislative session to consider options for state preferred resources excluded from clearing the PJM capacity market. Additionally, while state regulatory commissions had been earnestly working towards alternative approaches with the prospect of accommodation of state preferred resources in the PJM capacity market,[39] states are now scrambling to consider other options. As such, this delay in running the next auction is reasonable.

D. The December 2019 Order Improperly Ignores Alternative Competitive Proposals for State Supported Resources to Participate in The Capacity Market Thereby Eliminating Any Safe Harbor for State Public Policy Programs.

1. Harm is Caused by Applying the MOPR with No Accommodation.

As prescribed, the Replacement Rate adopted by the Commission in the December 2019 Order will have the effect of requiring that ratepayers procure more capacity than necessary to meet reliability requirements. The December 2019 Order characterizes this result as "paying twice," and attempts to justify the outcome by quoting a federal court holding that states "are free to make their own decisions regarding how to satisfy their capacity needs, but they 'will

[39] OPSI Letter to the PJM Board of Managers, September 26, 2018, supporting a Competitive Carve-out Approach, https://opsi.us/wp-content/uploads/2018/11/PJM-Board-Letter-Capacity.pdf

appropriately bear the costs of [those] decision[s],' … including possibly having to pay twice for capacity." Nevertheless, it would be more appropriate for the Commission to balance the needs of the market, with the understanding that a market should not be structured to force customers to purchase more capacity than they need and from resources that potentially contribute to the environmental harm that customers are paying to avoid in other markets (*e.g.* RPS and RGGI). The Commission's decision to force ratepayers participating in the capacity market to support undesirable resources under the proposed Replacement Rate, and to ignore the capacity from renewable resources procured pursuant to state policy is, therefore, unjust, unreasonable and unduly discriminatory.

2. The December 2019 Order Unjustly Precludes Maryland PSC's Proposed Competitive Carve Out Auction (CCOA), Which Is A Competitive Process That Does Not Threaten the Competitiveness of the Capacity Market.

The failure of the Commission to address "an important aspect of the problem"[40]—the need to accommodate state preferred resources, and "to engage the arguments raised before it"[41] —renders the December 2019 Order arbitrary and capricious and constitutes a failure of reasoned decision-making.[42] While the Maryland PSC offered a constructive solution to the perceived problem, the Commission acted arbitrarily and capriciously in failing to address the proposal, which was intended to address concerns expressed by the Commission in earlier orders. Instead, the December 2019 Order directs PJM to submit a replacement rate that extends

[40] *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

[41] *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998).

[42] *See, e.g., ExxonMobil Oil v. FERC*, 487 F.3d 945, 953 ((D.C. Cir. 2007) (quoting *So. Cal. Edison Co. v. FERC*, 443 F.3d 94, 98 (D.C. Cir. 2006)) (quoting *Williston Basin v. FERC*, 165 F.3d 54, 60 (D.C. Cir. 1999)).

the MOPR to resources that receive certain out-of-market payments[43] and declines to adopt alternative proposals.[44] In the event the Commission does not find Maryland PSC's CCOA approach just and reasonable based on the present record, the Commission should explain as much.

The Maryland PSC recognizes that FPA section 206 requires the Commission to determine a just and reasonable rate, and having selected an extended MOPR, the Commission believes it has met its statutory obligations. However, Maryland PSC now requests a finding that the Maryland PSC's CCOA approach is a just and reasonable and accommodative approach, which would not have "unacceptable market distorting impacts that would inhibit incentives for competitive investment in the PJM market over the long term", as it found with other proposals.[45]

The CCOA approach provides a truly competitive capacity auction for resources that are eligible to meet any PJM state's clean energy requirements. As described in Maryland PSC's October 2, 2018 filing in the paper hearing proceeding underlying the December 2019 Order, the CCOA would establish a capacity auction where resources that the Commission has described as being state-subsidized would compete among themselves, separate from the other resources that the Commission considers non-subsidized. If insufficient capacity is procured in this CCOA auction, non-subsidized resources would have the opportunity to meet the reliability needs of the region through the traditional Base Residual Auction ("BRA"). And any amount of clean capacity above and beyond the minimum needs of load would also be met through the traditional BRA. Any subsidized resource opting to participate in the BRA rather than the CCOA would be

[43] December 2019 Order at P 2.

[44] *Id.* at P 6.

[45] *Id.* at P 6.

subject to the MOPR. In this way, both subsidized and non-subsidized resources would have the opportunity to compete without being subject to any price suppression. Additionally, as states' clean energy targets increase over an extended period, non-subsidized resources can be assured accurate price signals with a long-term solution to pursuing investment revenue.

3. All RPS Resources Should Be Exempt from the MOPR.

The December 2019 Order states that, based on past assessment, RPS resources had little impact on clearing prices and the limited quantity of RPS resources would not undermine the market.[46] Yet, the Commission inexplicably concludes that this is irrelevant. The amount of renewables expected to clear a capacity auction is minimal. The amount of renewables that cleared in the 2020/2021 BRA was *de minimus* (1,013 MW, or approximately 0.6% of the 165,109 MW that cleared the entire auction).[47] Yet, the Commission relies on a PJM estimate that 5,000 MW of renewable energy is "needed to meet the 2018 program requirements for RPS in PJM" in its decision to limit the renewable exemption to existing resources.[48] While renewable generation targets for state RPS programs continue to increase,[49] even if targets for state-subsidized renewables were to reflect a doubling of RPS goals,[50] the amount of renewable capacity expected to clear the auction would be significantly less than "8,866 MWs by the end of 2033[,]" let alone 5,000 MW by 2018.[51]

[46] *Id.* at P 14.

[47] PJM's RPM *Base Residual Auction Results* for this auction and the two prior auctions were referenced in the Maryland PSC May 7, 2018 Filing (p.4-5) as they relate to the 11,860 MW of new resources that cleared the auctions over that timeframe even with the presence of state-subsidized resources in the capacity market.

[48] December 2019 Order at P 175.

[49] *Id.* at P 22.

[50] In its 2019 legislative session, Maryland increased its RPS target from 25% by 2020 to 50% by 2030.

[51] December 2019 Order at P 175.

4. A Limited Amount of Emerging Technologies Should be Exempted.

The Commission should reconsider exempting from any PJM MOPR requirement emerging technologies that pave the way for other future developments that could spur competition and benefit ratepayers across the RTO without the need for further subsidization. Such projects could be first-of-a-kind developments in the RTO that are sponsored by ratepayers from a specific state.[52] As Maryland PSC noted in its comments, "[w]hen built on a commercial scale, such technologies may have the opportunity to advance at a rapid pace furthering such benefits."[53] Subsidies for emerging "first-of-a-kind" technologies are not specifically targeted for the interest of the sponsoring state, but rather provide benefits that could inure to the industry and the RTO.

Maryland PSC proposed—and urges the Commission to reconsider—an exemption for first-of-a-kind technologies up to 375 MW level RTO-wide per technology. While the Commission recognizes Maryland's reasoning that subsidized emerging technologies have the potential to pave the way for other future developments that could spur competition and benefit ratepayers across the PJM region without the need for further subsidization,[54] the Commission provides no justification for requiring that all such resources should be subject to the MOPR.[55]

E. Expand Criteria for New RPS Resource Exemption to Include Resources that Received State Regulatory Commission Authorization for RECs Prior to the Date of the Commission's December 29, 2019 Order.

[52] See Maryland PSC's Initial Comments dated Oct. 2, 2018 in response to the Commission's Order initiating Paper Hearing Procedures in Docket No. EL18-178.

[53] Maryland PSC's Initial Comments dated Oct. 2, 2018 in response to the Commission's Order initiating Paper Hearing Procedures in Docket No. EL18-178.

[54] December 2019 Order at P 49.

[55] *Id.* at P 54.

The Order directs PJM to include an RPS Exemption for existing intermittent renewable resources receiving support from state-mandated or state-sponsored RPS programs that fulfill at least one of the following criteria: (1) have successfully cleared an annual or incremental capacity auction prior to this order; (2) have an executed interconnection construction service agreement on or before the date of this order; or (3) have an unexecuted interconnection construction service agreement filed by PJM for the resource with the Commission on or before the date of the December 2019 Order. The Commission indicates that it found this exemption just and reasonable because it expressly exempted those resources in the past based on the assessment that such resources had little impact on clearing prices and the initial investments in those resources were made in reliance on earlier Commission determinations that the limited quantity of RPS resources would not undermine the market.[56]

The Commission's criteria appear to reflect key actions that confirm the plans and intent of a renewable resource to become operational. That is, the Order provides exemptions for existing intermittent renewable resources, limiting the definition of what it would consider to be existing to three criteria without explanation or justification as to why exception should be limited to these criteria. While it is understood that these criteria are indicative of a commitment to build and operate, the MOPR exemption should not be limited only to those cases.

Other actions that also meet the Commission's rationale would include commitments required by state legislation enacted prior to the Commission's December 2019 Order, and resources accommodated by a state regulatory commission order related to the prospective

[56] *Id.* at 14.

construction and operation of a renewable generation facility. As such, it is requested that the Commission confirm that an RPS Exemption for renewable resources receiving support from state-mandated or state-sponsored RPS programs include the following additional criteria: "or (4) are built pursuant to renewable energy legislation that has been enacted by state legislatures before issuance of the Commission's December 2019 Order, or (5) is accommodated by a state regulatory commission order issued on or before December 19, 2019 related to the prospective construction and operation of a renewable generation facility or the issuance of RECs."

IV. REQUEST FOR CLARIFICATION

The Maryland PSC requests the following additional clarifications.

A. Clarify the New Retail Utility Demand Response Programs Are Not Subject to MOPR requirements.

The December 2019 Order provides an exemption to applying the MOPR to existing demand response resources. Maryland's ratepayers have the opportunity to participate in retail utility demand response ("DR") programs in order to conserve energy and reduce environmental impacts. These programs are comprised of thousands of retail customers, many of whom may be new to the program only because customers move in and out of homes on an ongoing basis. While it may not have been the Commission's intent to consider each individual customer as a demand response resource and every new or replacement customer as a new resource, clarification is needed that any resource that is part of a retail utility demand response program, and indeed the programs themselves, would be exempt from the application of the MOPR.

B. Provide Clarifications to What is Considered a State Subsidy

1. Clarify That Resources Benefiting From the Regional Greenhouse Gas Initiative ("RGGI") Do Not Receive a State Subsidy, as That Term is Defined in the December 2019 Order.

In his dissent to the December 2019 Order, Commissioner Glick observed that the definition of a State Subsidy is so broad that it could even encompass programs like RGGI that assign a cost on carbon emissions, presumably providing financial benefit to clean resources. Maryland PSC seeks clarification that this was not the intent of the December 2019 Order, and that RGGI, and any associated financial impact or implication, does not constitute a State Subsidy.

2. Clarify That Transmission Resources Planned by PJM Pursuant to FERC Order No. 1000's Public Policy Provisions to Deliver Power from State Preferred Generation Resources Do Not Subject Such Generation Resources to the State Subsidy Definition Set Forth in the December 2019 Order.

In 2011, the Commission issued Order No. 1000, putting forward a set of reforms it characterized as "support[ing] the development of transmission facilities…[that would] allow for consideration of transmission needs driven by public policy requirements established by state or federal laws or regulations (Public Policy Requirements)."[57] The Maryland PSC seeks clarification that any financial benefit realized by a state-preferred generation resource that may be associated with transmission resources planned by PJM pursuant to Order No. 1000 Public Policy provisions to deliver power from those generation resources, does not subject such generation resources to the State Subsidy definition set forth in the December 2019 Order, and that such generation resources would not be subject to the MOPR under FERC's Replacement Rate.

[57] 136 FERC 61,051 at P 2.

V. CONCLUSION

For the foregoing reasons, the Maryland Public Service Commission respectfully requests that the Commission grant rehearing and clarification of the December 2019 Order to address the errors specified herein. Maryland PSC further requests that the Commission direct PJM to defer conducting any future capacity auction to no earlier than May 2021 in order to allow states sufficient time to consider adopting alternatives to the Replacement Rate to protect the interests of their citizens.

Respectfully submitted,

Morris Schreim
Senior Commission Advisor
Maryland Public Service Commission
Tel 410-767-3556
morris.schreim@maryland.gov

H. Robert Erwin, Jr.
General Counsel

s/ *Miles H. Mitchell*

Miles H. Mitchell
Deputy General Counsel
Tel. 410-767-2972
miles.mitchell@maryland.gov

Ransom E. Ted Davis
Associate General Counsel
Tel. 410-767-8076
ransom.davis@maryland.gov

Maryland Public Service Commission
6 St. Paul Street
Baltimore, MD 21202

Dated: January 21, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am on this date serving a copy of the foregoing document upon each person designated on the official service list compiled by the Federal Energy Regulatory Commission in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Baltimore, Maryland this **21st** day of January, 2020.

s/ *Miles H. Mitchell*

Miles H. Mitchell