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 No. EL16-49
v.	)	
PJM Interconnection, L.L.C.	)	
PJM Interconnection, L.L.C.	)	Docket Nos. ER18-1314-003
	)	ER18-1314-004
PJM Interconnection, L.L.C.	)	Docket No. EL18-178
	)	(Consolidated)

COMMENTS OF THE ORGANIZATION OF PJM STATES, INC.

Pursuant to Rule 212 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, and the Notice of Extension issued March 31, 2020, establishing May 15, 2020, as the deadline for interventions, comments, and protests in the above-captioned dockets, the Organization of PJM States, Inc. ("OPSI"),[1] respectfully submits

[1] Approved on May 14, 2020, and adopted by OPSI's Board of Directors: Vote: Yes: Delaware PSC, PSC of District of Columbia, Illinois CC, Kentucky PSC supports Section I.A regarding auction implementation scheduling and abstains from the remainder of the filing, Maryland PSC, Michigan PSC, New Jersey BPU, North Carolina UC, Pennsylvania PUC supports the filing but abstains from Section I.A regarding auction implementation scheduling, Tennessee PUC, and PSC of West Virginia; Abstain: Indiana URC, PUC of Ohio, and Virginia SCC.

the following comments[2] regarding the Compliance Filing concerning the minimum offer price rule ("MOPR") submitted on March 18, 2020,[3] by the PJM Interconnection L.L.C. ("PJM") in the above-captioned docket ("Compliance Filing").[4]

I. INTRODUCTION

OPSI addresses several aspects of the Compliance Filing below.

A. The Auction Implementation Schedule Proposed in the Compliance Filing is Unworkable in Light of the Commission's April 16 Order.

B. The Compliance Filing Does Not Provide Flexibility in the Resource-Specific Cost Review Consistent with the Commission's Guidance.

C. PJM's Proposed Revisions to Seller-Side Mitigation Must Be Rejected.

D. All Existing Bilateral Contracts Should be Exempt from the MOPR.

E. The Proposed RPS Exemption Fails to Capture Investment Commitments Relying on Prior Commission Decisions.

F. PJM's Proposal Regarding State Default Service Auctions Should Be Accepted.

G. Benefits Created By Transmission Investments that are a Result of the Regional Transmission Expansion Plan Are Not State Subsidies.

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[2] OPSI comments on this Compliance Filing are separate from and do not undermine or otherwise prejudice the continuing challenges of state commissions to the legality of the June 2018 and December 2019 Orders.

[3] Compliance Filing Concerning the Minimum Offer Price Rule, Request for Waiver of RPM Auction Deadlines, and Request for an Extended Comment Period of at Least 35 Days, filed by PJM in Docket Nos. EL16-49, et al. on March 18, 2020 ("Compliance Filing").

[4] On March 25, 2020, PJM submitted an Errata to its Compliance Filing noting a correction to the description of the Hope Creek nuclear plant in the report titled "Gross Avoidable Cost Rates for Existing Generation and Net Cost of New Entry for New Energy Efficiency" developed by The Brattle Group and Sargent & Lundy. OPSI takes no position on the Errata herein.

II. COMMENTS

A. The Auction Implementation Schedule Proposed in the Compliance Filing is Unworkable in Light of the Commission's April 16 Order.

PJM requests that it "not be required to conduct the next Base Residual Auction ("BRA") until the Commission has acted on this compliance filing and approved the operative Tariff language that will govern that auction."[5] OPSI supports that request. However, OPSI asserts that it would not be just and reasonable for the the next BRA to be held until the Commission has addressed the forthcoming PJM Compliance Filing ("Second Compliance Filing") required by the Commission's April 16 Order.[6]

PJM proposes to open the BRA for the 2022/2023 Delivery Year ("BRA-22/23") within six-and-one-half months after receiving the order from the Commission in response to the Compliance Filing.[7] PJM states that, "if the Commission were to issue its order on the compliance filing by mid-May, PJM would conduct the delayed 2019 BRA no later than December of this year."[8] Pursuant to the April 16 Order, PJM is now required to submit its Second Compliance Filing on June 1, which means the Commission will not likely be issuing an order on PJM's initial Compliance Filing by mid-May. Consequently, it is unrealistic to expect the next BRA will be held in 2020.

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[5] Compliance Filing, at 83.

[6] *Calpine Corp. v. PJM Interconnection, L.L.C.,* 171 FERC ¶ 61,035 (2020) ("April 16 Order").

[7] Compliance Filing, at 84.

[8] *Id*., at 85.

As mentioned in the Compliance Filing,[9] OPSI submitted a letter to PJM on February 13, 2020, expressing concern that the auction schedule would fail to provide enough time for states to pursue any regulatory or legislative changes needed to respond to revised capacity market rules.[10] In that letter, OPSI recommended a schedule that provides at least twelve months between the date that the Commission issues its final compliance order and the execution of the next BRA, or no later than May 31, 2021. OPSI understands the need for market certainty as market participants make financial decisions reflecting revised wholesale capacity resource rules. On the other hand, the December 2019 Order[11] and April 16 Order directly impact state resource policies, the portfolio of resources to serve customers, and the price electricity consumers will have to pay for that service. State policy makers need time to give thoughtful consideration to appropriate reforms if reliance on PJM's revised capacity auction no longer benefits electricity consumers.

Despite the Compliance Filing's attempt to accommodate state policy processes, PJM's Legislation Contingency Provision[12] fails to strike the appropriate balance. The Compliance Filing includes a provision for potentially extending the date for the next BRA beyond the six-and-one-half month period that would otherwise apply. This Legislation Contingency Provision would require a state to enact legislation directly applicable to new elections of the Fixed Resource Requirement ("FRR") alternative by June 1, 2020, and would require that state's public

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[9] *Id*.

[10] OPSI Letter to PJM Board of Managers, ("OPSI Letter"), (February 13, 2020).

[11] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) ("December 2019 Order").

[12] Compliance Filing, at 86. The Compliance Filing's Legislation Contingency Provision relates to a state's potential enactment of legislation directly applicable to new elections of the Fixed Resource Requirement ("FRR").

utility commission, acting in its official capacity, to formally request that PJM extend the auction schedule.[13] In no event however, would PJM agree to extend the BRA-22/23 beyond March 31, 2021, under this provision.[14] Following PJM's proposed six-month interval schedule for this contingency, BRA-23/24 could occur in October of 2021. PJM asserts that its proposal balances OPSI's suggestions with the importance of market certainty for capacity sellers.[15] OPSI fundamentally disagrees.

OPSI finds the Compliance Filing's Legislation Contingency Provision to be impracticable, especially insofar as it proposes to dictate the timeline to state legislative bodies through a regulated utility tariff provision. In the OPSI Letter to PJM, OPSI described the need for an auction schedule that would provide enough time for states to "develop, adopt, and implement new legislation and/or administrative rules to reform their approach to resource planning, capacity procurement, state resource compensation or other related processes."[16] PJM states have different governance models and different statutory contexts. Moreover, the FRR is not the only alternative approach the states may explore. While some state commissions may be able to react to the Commission's major restructuring of PJM's capacity rules through administrative or regulatory responses, other states may need to adopt legislative changes. Even in the best of circumstances, states would be unable to take reasoned action by June 1, 2020, and

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] OPSI Letter to PJM Board of Managers, ("OPSI Letter"), (February 13, 2020), at 1.

any actions – particularly legislative – will be substantially delayed by the worst public health crisis the country has seen for at least 100 years.

These current circumstances, and recent Commission action have rendered PJM's auction implementation proposal even less reasonable. In the weeks since PJM submitted its first Compliance Filing, the Commission extended the comment deadline to May 15, required a Second Compliance Filing, and continued to acknowledge difficulties associated with the current health crisis.[17] In addition, some state legislatures may not be returning until the beginning of their next legislative sessions in 2021.[18] State legislative bodies able to convene will likely be rightly prioritizing budgets and/or public health and safety of their constituents. Thus, in these circumstances, the chances of states meeting PJM's proposed June 1, 2020 deadline are vanishingly remote.

Moreover, the proposed timeline in the Compliance Filing does not comport with the existing provisions in PJM's Reliability Assurance Agreement ("RAA") [19] for "State Regulatory

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[17] *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, Issued on: March 13, 2020 (https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/); *Disturbance Monitoring and Reporting Requirements Reliability Standard*, 171 FERC ¶ 61,052 (2020).

[18] *See Delaware General Assembly*, "Home," (https://legis.delaware.gov/) (last accessed May 14, 2020); *Indiana General Assembly*, "Notices & Updates," (http://iga.in.gov/information/notices/) (last accessed May 14, 2020); *Maryland General Assembly*, " House Floor Actions," (http://mgaleg.maryland.gov/mgawebsite/FloorActions/Media/house-53-) and "Senate Floor Actions" (http://mgaleg.maryland.gov/mgawebsite/FloorActions/Media/senate-53-C) (last accessed May 14, 2020); and Md. Const., art. III, § 14 (indicating the Assembly reconvenes January 13, 2021).

[19] PJM Reliability Assurance Agreement, at Schedule 8.1.C.3 ("RAA").

Structural Changes".[20] Parties electing the FRR alternative to the BRA must provide PJM with prior notice before the following BRA takes place.[21] RAA Schedule 8.1 explains that parties which undergo such State Regulatory Structural changes must only provide PJM two months notice prior to the first BRA, rather than the four month prior notice that would otherwise apply to parties electing the FRR alternative without State Regulatory Structural Change. Whether requiring notification four months or two months prior to BRA-22/23, given the extremely short timeframe that PJM is proposing between the issuance of the Commission's final compliance Order and the execution of the auction, and the emergency circumstances that the states now find themselves in with respect to the coronavirus outbreak, this existing provision of the RAA provides no salve for states that may find it necessary to pursue FRR in order to protect electricity consumers and advance their legitimate public policies.

The Compliance Filing's Legislation Contingency Provision also fails to acknowledge situations where state commissions may be able to take regulatory action to guide customers' participation in centralized capacity markets. The Compliance Filing does not address this scenario at all. By contrast, PJM's existing RAA is not so limiting. The RAA defines "State Regulatory Structural Change" as "a state law, rule, or order" which changes participation in

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[20] *Id*., at Article 1, Definitions ("'State Regulatory Structural Change' shall mean as to any Party, a state law, rule, or order that, after September 30, 2006, initiates a program that allows retail electric consumers served by such Party to choose from among alternative suppliers on a competitive basis, terminates such a program, expands such a program to include classes of customers or localities served by such Party that were not previously permitted to participate in such a program, or that modifies retail electric market structure or market design rules in a manner that materially increases the likelihood that a substantial proportion of the customers of such Party that are eligible for retail choice under such a program (a) that have not exercised such choice will exercise such choice; or (b) that have exercised such choice will no longer exercise such choice, including for example, without limitation, mandating divestiture of utility-owned generation or structural changes to such Party's default service rules that materially affect whether retail choice is economically viable.") (emphasis added).

[21] *Id*., at Schedule 8.1.C.

retail choice.[22] The Commission has already accepted timing considerations based on State Regulatory Structural Changes as just and reasonable.[23] PJM's Compliance Filing does not offer any support for why excluding state regulatory action is just and reasonable. In states that require legislation, the passage of legislation contemplated by the Compliance Filing is only the first step. These states, too, must then undertake the substantial regulatory processes that accompany a regulatory change of this magnitude. States' ability and right to respond to the expanded MOPR – whether legislative, regulatory, or otherwise – would further require the Commission to ensure that BRA-23/24 does not take place too soon after BRA-22/23. PJM's claimed attempt to balance the competing expectations of various parties therefore fails to strike the appropriate balance.

In an effort to permit meaningful state response, OPSI requests the Commission to approve the following auction implementation approach and schedule:

1) If the Commission issues its final compliance order prior to November 15, 2020, and no PJM state informs PJM prior to four and a half months after the order is issued that it has enacted relevant enabling energy legislation (or issued an administrative/regulatory directive for states not needing legislation), PJM may hold BRA-22/23 six and a half months after the order is issued, but no earlier than March 31, 2021.
2) If the Commission issues its final compliance order prior to November 15, 2020, and any PJM state informs PJM prior to four and a half months after the order is issued that it has enacted relevant enabling energy legislation (or issued an administrative/regulatory directive for states not needing legislation) and requests an auction extension from PJM within those four and a half months, then PJM shall extend BRA 22/23 as requested by the state, but by no more than sixty days (not to extend beyond May 31, 2021).
3) If the Commission issues its final compliance order after November 15, 2020, PJM may hold the BRA-22/23 no earlier than six and a half months after the order date.

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[22] *Id.*, at Article 1, Definitions (emphasis added).

[23] *Id.*, at Schedule 8.1.C.3.

4) Regardless of whether or not the Commission adopts the foregoing, if BRA-22/23 is conducted any time prior to May 31, 2021, BRA-23/24 shall be conducted no earlier than December 1, 2021.[24]

These auction implementation/scheduling rules properly balance state policy and consumer interest needs with the desire for market certainty by capacity sellers. These rules are based on the Commission issuing an Order or Orders substantively addressing both PJM's March 18, 2020 Compliance Filing and PJM's Second Compliance Filing. These rules do not confine states only to "legislation directly applicable to new elections of the FRR alternative" [25] as proposed by PJM. OPSI's proposal also incorporates foreseeable consequences of the current health crisis. Finally, OPSI's proposal here acknowledges that BRA-22/23 should not be unnecessarily delayed and establishes circumstances that would provide additional time between BRA-22/23 and BRA-23/24 for states to pursue policy responses prior to BRA-23/24.

B. The Compliance Filing Does not Provide Flexibility in the Resource-Specific Cost Review Consistent with the Commission's Guidance.

The Compliance Filing does not provide flexibility consistent with Commission guidance regarding resource-specific[26] evaluations of New Entry Capacity Resources.[27] As proposed, the Compliance Filing is inconsistent with PJM's own assertions, the Commission's directives, and competitive outcomes. OPSI agrees with PJM's assertion that different resource types have different inherent characteristics and supports PJM's proposal, as far as it goes, to provide

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[24] This provision establishes an opportunity for state legislative/regulatory action to take place and potentially be implemented prior to PJM's conduct of BRA-23/24.

[25] Compliance Filing, at 86.

[26] Id., at 72 (PJM chose to use the term "resource-specific" rather than "unit-specific").

[27] *Id*., at 74 (citing Proposed Tariff, Attachment DD, section 5.14(h)(3)(B)).

flexibility with respect to the twenty-year unit life parameter, provided that the resource owner can document a different unit life with supporting evidence. However, PJM's proposal must go further to ensure that a resource able to document resource-specific values with respect to other financial parameters in the resource-specific calculation are able to rely on these values in calculation of the relevant price floor. Thus, the Compliance Filing does not provide adequate flexibility.

In the Compliance Filing, PJM proposes to standardize five of the six financial modeling assumptions[28] that underlie calculation of resource-specific offers, contradicting PJM's own notion of resource economics. While each of the assumptions may have a material impact on the calculation of the offer floor, PJM only proposes flexibility with respect to the twenty-year unit life element. To support the flexibility regarding resource life, PJM explains that "20 years may not, in all instances, be appropriate as different resource types have different inherent characteristics that may allow them to remain economic for a longer period of time."[29]

Unfortunately PJM stops there when PJM's rationale for providing this flexibility could apply equally to the other five listed financial parameters. Different resource types feature different characteristics that may allow them to remain economic for a longer period of time.[30] To best represent these different economic features of distinct resources, calculation of a resource-specific offer must account for different actual values for each parameter. For this reason, and to comport with PJM's reasoning in the Compliance Filing, OPSI urges that

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[28] *Id.*, at 74 (listing the financial parameters as: "(i) nominal levelization of gross costs, (ii) asset life of 20 years, (iii) no residual value, (iv) all project costs included with no sunk costs excluded, (v) use first year revenues, and (vi) weighted average cost of capital based on the actual cost of capital for the entity proposing to build the Capacity Resource.") (citing Proposed Tariff, Attachment DD, section 5.14(h)(3)(B)).

[29] *Id.* (emphasis added).

[30] *Id.*

flexibility extend to each of the six financial parameters, not just the twenty-year unit life parameter. For example, if a resource owner maintains its financial records using real levelized costs rather than nominal,[31] or can document residual value for its unit, or uses a different protocol for sunk costs, the resource-specific cost review process for the purpose of calculating MOPR floor prices should permit that flexibility to be reflected.

OPSI supports this flexibility to the extent it can be documented with appropriate evidence. PJM explained that "the Capacity Market Seller must submit to PJM and the Market Monitor 'documentation to support the fixed development, construction, operation, and maintenance costs of the Capacity Resource, as well as estimates of offsetting net revenues.'"[32] With respect to the twenty-year unit life parameter, PJM states that "[f]urther documenting this existing flexibility, when justified by supporting evidence, [would provide] for a reasonable level of flexibility given the diverse demographic of technologies the MOPR now applies to."[33] OPSI fully supports PJM's proposed requirement for documentation, and the Commission should extend this flexibility to the other five stated financial parameters. To be clear, OPSI is not recommending eliminating these six financial elements from the resource-specific cost review process, rather OPSI is recommending that these six financial elements not be standardized and mandated as fixed values as currently proposed in PJM's Compliance Filing.

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[31] *PJM Interconnection, L.L.C., reh'g denied*, 137 FERC ¶ 61,145 at P 3 (2011) (the Commission stated, "in our partial acceptance of PJM's compliance filing, project sponsors seeking an offer price floor lower than the MOPR screen will have recourse to a unit-specific, cost-justification review process that may include alternative levelization methods, among other proposed cost assumptions. Accordingly, while we continue to find the nominal levelized method to be just and reasonable for the initial screening of offers, we will grant rehearing (as discussed below) with respect to unit-specific offers and permit project sponsors the opportunity to justify the use of a real levelized method with respect to their specific processes.") (emphasis added).

[32] Compliance Filing, at 74 (citing Proposed Tariff, Attachment DD, section 5.14(h)(3)(B)).

[33] *Id.*

Such additional flexibility in the resource-specific cost review process would comport with the Commission's directives in this case. For example, the Commission stated that the resource-specific cost review process should be expanded to cover all resource types so as to "permit any resource that can justify an offer lower than the default offer price floor to submit such bids to PJM for review."[34] The Commission directed that the process "be based on the resource's expected costs and revenues"[35] and stated that suppliers should use "the best available data to support their Unit-Specific Exemptions, including non-public cost data."[36] These directives would not be fulfilled by accepting the limiting calculations proposed in the Compliance Filing. Further, on rehearing, the Commission explained further that the resource-specific exemption must be available for "resources facing truly low costs"[37] and that the Commission "expect[s] there to be some flexibility involved in that option."[38] Since the purpose of the resource-specific cost review process is to determine the actual true cost of the unit, flexibility should be permitted to enable the unit owner to reflect its actual true costs in its submission, rather than mandated fixed financial parameters that may not reflect the cost characteristics of the unit.

Given that PJM is requiring documentation of all resource-specific submissions, it is not necessary for any standardized parameters to be specified in the tariff. Consequently, OPSI

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[34] December 2019 Order, at P 214.

[35] *Id.*

[36] *Id*., at P 215.

[37] April 16 Order, at P 192.

[38] *Id*.

recommends the following modification to PJM's Proposed Tariff, Attachment DD, section 5.14(h)(3)(B):

> ~~The financial modeling assumptions for calculating Cost of New Entry for Generation Capacity Resources and generation-backed Demand Resources shall be: (i) nominal levelization of grosscosts, (ii) asset life of twenty years, (iii) no residual value, (iv) all project costs included with no sunk costs excluded, (v) use first year revenues (which may include revenues from the sale of renewable energy credits for purposes other than state-mandated or state-sponsored programs), and (vi) weighted average cost of capital based on the actual cost of capital for the entity proposing to build the Capacity Resource. Notwithstanding the foregoing, a~~A Capacity Market Seller that seeks to utilize an asset life other than twenty years (but no greater than 35 years) shall provide evidence to support the use of a different asset life, including but not limited to, the asset life term for such resource as utilized in the Capacity Market Seller's financial accounting (*e.g.*, independently audited financial statements), or project financing documents for the resource or evidence of actual costs or financing assumptions of recent comparable projects to the extent the seller has not executed project financing for the resource (*e.g.*, independent project engineer opinion or manufacturer's performance guarantee), or opinions of third-party experts regarding the reasonableness of the financing assumptions used for the project itself or in comparable projects. Capacity Market Sellers may also rely on evidence presented in federal filings, such as its FERC Form No. 1 or an SEC Form 10-K, to demonstrate an asset life other than 20 years of similar asset projects.
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> Supporting documentation for project costs may include, as applicable and available, a complete project description; environmental permits; vendor quotes for plant or equipment; evidence of actual costs of recent comparable projects; bases for electric and gas interconnection costs and any cost contingencies; bases and support for property taxes, insurance, operations and maintenance ("O&M") contractor costs, and other fixed O&M and administrative or general costs; financing documents for construction-period and permanent financing or evidence of recent debt costs of the seller for comparable investments; and the bases and support for the claimed capitalization ratio, rate of return, cost-recovery period, inflation rate, or other parameters used in financial modeling.

C. PJM's Proposed Revisions to Seller-Side Mitigation Must Be Rejected.

In the Compliance Filing, PJM proposes revisions to the application of supplier-side mitigation measures in its Reliability Pricing Model ("RPM"), which should be rejected.

Specifically, in circumstances where the MOPR floor price exceeds the Market Seller Offer Cap ("MSOC"), PJM's proposed revisions to Proposed Tariff, Attachment DD, sections 6.4(a) and 6.5(a)(i) would result in PJM mitigating a resource's offer to a price exceeding the market seller offer cap ("MSOC").[39] This proposed revision should be rejected for the following reasons. First, the Commission's own statements acknowledge that the MSOC serves a "different function" than the MOPR price floor,[40] and the focus of this Section 206 proceeding was on alleged price suppression. Second, PJM cannot, on compliance, propose changes to its tariff that were not directed by the Commission. Accordingly, the Commission must reject PJM's proposed revisions to supplier-side mitigation measures.

In June 2018, the Commission instituted the instant proceeding under Section 206 for the stated purpose of addressing alleged RPM clearing price suppression purportedly associated with state policy-influenced resource price offers in the capacity market.[41] In its own words, the Commission recently explained that this proceeding is about "protecting PJM's capacity market from the price-suppressive effects of resources receiving out-of-market support by ensuring that such resources are not able to offer below a competitive price."[42] The Commission's concern

[39] Compliance Filing, at Proposed Tariff, Attachment DD, sections 6.4(a) and 6.5(a)(i).

[40] April 16 Order, at P 194.

[41] *See*, PJM Interconnection, L.L.C., 163 FERC ¶ 61,236 (2018) ("June 2018 Order").

[42] April 16 Order, at P 35 (citing December 2019 Order, at P 5 & n.11 (affirming and quoting Commission's initial finding in the June 2018 Order, at P 158)).

about alleged price suppression of RPM clearing price has been the singular focus of this docket, since the June 2018 Order.[43]

Although OPSI continues to contend that the Commission has not supported its premise of price suppression, even accepting *arguendo* the Commission's theory, no revisions to the existing supplier-side mitigation measures are needed to address the matter found by the Commission to be unjust and unreasonable. The Commission has not identified a need to revise the existing supplier-side mitigation measures. Indeed, throughout this proceeding, the Commission has expressly stated that the MSOC serves a distinct purpose, separate from the default offer price floor at issue. The Commission has only found the price floor unjust and unreasonable, due to the alleged suppression of the RPM clearing price.

The Commission expressly upheld the currently-effective MSOC, and the distinctly separate purpose it serves in the supplier-side mitigation regime:

> Some parties argue that the Commission should set the default offer price floor for resources subject to the MOPR at Net CONE * B. The Commission previously found Net CONE * B provided a reasonable estimate of a competitive offer for a resource with a low ACR. However, we did not find the Net CONE * B price accurately reflects any particular resource's cost. In addition, we note that the Commission did not find that Net CONE * B was the only just and reasonable competitive offer. We therefore find that it is just and reasonable for PJM's Tariff to use **one definition** of a competitive offer to set the default capacity market seller offer cap for supplier-side market power mitigation and **a different one** for the purpose of setting the default offer price floor. [44]

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[43] June 2018 Order, at P 155 (stating "[a]s PJM explains in its filing, states in the PJM region have been increasingly supporting specific resources or resource types. Price suppression stemming from state choices to support certain resources or resource types is indistinguishable from that triggered through the exercise of buyer-side market power. Under these circumstances, we no longer can assume that there is any substantive difference among the types of resources participating in PJM's capacity market with the benefit of out-of-market support.").

[44] December 2019 Order, at P 152 (emphasis added).

Even on rehearing, the Commission did not rule that the MSOC mitigation method was unjust and unreasonable, but indeed affirmed that the MSOC and the MOPR serve distinct purposes stating,

> We acknowledge that it is theoretically possible that some default offer price floors may be higher than the default offer cap. . . . Further, the default offer price floors and the default offer cap serve **different functions** and are designed to protect the market against **different types of uncompetitive behavior** . . . .[45]

Indeed, despite this Commission's acknowledgement of the potential of a scenario where the MOPR floor price could exceed the MSOC, the Commission still did not require any PJM revision to supplier-side RPM mitigation measures.[46] The Commission's own orders thus emphasize the assertion that the Commission has determined that supplier-side mitigation is distinctly separate and apart from the MOPR mitigation at issue in the current proceeding.

Notwithstanding its opportunity to address the existing supplier-side mitigation measures in this 206 proceeding, the Commission did not require any revisions to the MSOC or the procedures for implementing supplier-side mitigation. For the Commission to have directed the kind of revisions to supplier-side mitigation proposed in PJM's Compliance Filing, the Commission would be required to have made substantial factual findings as to the unjustness and

[45] April 16 Order, at P 194.

[46] *Id.; see also* December 2019 Order.

unreasonableness of the *maximum* price in RPM.[47] The Commission would have needed to carry the substantial burden of first finding the RPM supplier-side mitigation measures unjust and unreasonable under Section 206 to then mandate changes through a replacement rate.[48] The Commission has not done so. The Commission's express statements that supplier-side mitigation serves a different purpose than MOPR mitigation reveal that the Commission has not even attempted such an analysis. Without such a threshold finding, any proposed revisions to supplier-side mitigation are unlawful.

Nevertheless, PJM proposes, on compliance, unsupported changes to its supplier-side mitigation rules. Because the Commission's analysis did not reach this issue, PJM does not, and cannot, cite any Commission directive in the relevant section of its Compliance Filing describing these revisions.[49] PJM instead explains that "where certain elements of the Commission's December 19 Order required additional details to support the design and application of the modified MOPR, PJM has used its best efforts to add these additional detailed elements to comply with the overarching goal of the December 19 Order."[50] This explanation is not sufficient. Supplier-side mitigation in RPM plays a critical role in protecting ratepayers from

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[47] *See Maine v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017) ("However, in this case we review FERC's determination under section 206, not 205. Section 206 permits, indeed requires, FERC to determine whether an existing rate is 'unjust, unreasonable, unduly discriminatory or preferential....' 16 U.S.C. § 824e(a). Only after having made the determination that the utility's existing rate fails that test may FERC exercise its section 206 authority to impose a new rate.") (emphasis added).

[48] *Id.*

[49] Compliance Filing, at § J.1.

[50] *Id.*, at 1.

excessive prices, and is a foundational element of RPM.[51] The Commission did not address any arguments related to the justness and reasonableness of supplier-side mitigation, because participants in this docket heeded the Commission's statements that it serves a different purpose than MOPR floor mitigation. Having acknowledged that the supplier-side mitigation rules serve a different purpose, the Commission's own language indicates that changes to those rules are not part of the "overarching goal"[52] of the Commission's Order. Ultimately, because the Commission did not reach the issue of the maximum RPM price, PJM's proposed revisions are out of scope for this compliance proceeding, and must not be accepted.

PJM states that, "[w]hile the resource-specific MOPR Floor Offer Price for Cleared Capacity Resources with State Subsidy and the Market Seller Offer Cap both rely on the similar sets of data to compute the ACR, the MOPR Floor Offer Price can exceed the resource specific offer cap."[53] PJM states that, "The same is true with respect to the default MOPR Floor Offer Prices and the default Market Seller Offer Cap . . . ."[54] PJM states that this counter-intuitive outcome (MOPR floor exceeding MSOC ceiling) could occur "because, for example, the

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[51] *See generally* PJM Open Access Transmission Tariff ("OATT" or "Tariff"), Attachment DD, Section 1 (stating "measures to identify and mitigate capacity market structure deficiencies is a fundamental requirement of PJM's RPM") (internal citations omitted); OATT, Attachment M, Section E-1 (stating "[i]f the potential exercise of market power is related to a Sell Offer submitted in an RPM Auction, the Market Monitoring Unit may file a complaint with the Commission addressing the issue"); *Analysis of the 2021/2022 RPM Base Residual Auction: Revised*, at 2-3 (August 24, 2018) (stating "[i]nsufficient market power mitigation has resulted in excessive prices in recent auctions, as identified by the Independent Market Monitor") (https://www.monitoringanalytics.com/reports/Reports/2018/IMM_Analysis_of_the_20212022_RPM_BRA_Revised_20180824.pdf); and *ISO New England Inc*., 162 FERC ¶ 61,206, at P 37 (2018) (stating that "[w]e find that the IMM's use of implied bids sufficiently addresses the risk associated with setting the Dynamic De-List Bid Threshold too high; that is, the marginal resource's bid may not be subject to IMM review and could therefore reflect the exercise of market power").

[52] Compliance Filing, at 1 (indicating PJM efforts to comply with the "overarching goal of the December 19 Order").

[53] *Id*., at 78.

[54] *Id.*, at n.245 (citing Tariff, Attachment DD, section 6.4).

Capacity Market Seller used a forward-looking projection of revenues in the determination of the resource specific MOPR Floor Offer Price, while the resource-specific offer cap determination only uses historical revenues."[55] OPSI notes that, while PJM gives one example that could cause this counter-intuitive outcome, there are other examples such as the default MOPR floor offer price being based on a resource class calculation while the default Market Seller Offer Cap is based on the reference unit.

PJM's current tariff specifies that "the submission of a Sell Offer with an Offer Price at or below the revised Market Seller Offer Cap . . . shall not, in and of itself, be deemed an exercise of market power in the RPM market."[56] PJM is proposing in its Compliance Filing to append to that sentence the following addition: "nor shall a Sell Offer with an Offer Price equal to the applicable MOPR Floor Offer Price, in and of itself, be deemed an exercise of market power in the RPM market."[57] OPSI opposes that addition. PJM points to no directive or authorization from the Commission's December 2019 Order to support its proposed addition to Section 6.4(a). OPSI recommends that the unauthorized addition be rejected.

Specifically, PJM proposes unauthorized additions to Section 6.4(a) and Section 6.5(a)(i) which would permit PJM to approve an offer price in excess of the applicable MSOC for the first time.[58] The Compliance Filing proposes that, in instances where an offer is submitted at a price above the applicable MSOC (either resource-specific or default) and the applicable MOPR Floor

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[55] *Id*., at 78.

[56] Tariff, Attachment DD, section 6.4(a).

[57] Compliance Filing, at Proposed Tariff, Attachment DD, section 6.4(a).

[58] *Id.*, at Proposed Tariff, Attachment DD, section 6.5(a)(i) (proposing to mitigate offers that are submitted in excess of the MSOC to "the higher of" the MSOC or the MOPR price floor) (emphasis added).

(either resource-specific or default) exceeds the applicable MSOC, PJM's proposed modifications to Section 6.5(a)(i), would require PJM to mitigate such offer either down to the applicable MOPR floor price (if the offer has been submitted at a price higher than both the applicable MSOC and the applicable MOPR floor price) or up to the applicable MOPR floor price (if the offer has been submitted at a price higher than the applicable MSOC but lower than the applicable MOPR floor price). In either of these cases, PJM would be approving an offer price in excess of the applicable MSOC.

OPSI is not aware of any precedent permitting PJM to approve an offer at a price higher than the applicable MSOC, and PJM cites no precedent in its Compliance Filing. PJM's only support for this unprecedented authorization of offers exceeding the applicable MSOC is the statement that "[b]ecause an offer at the applicable MOPR Floor Offer Price (whether resource-specific or default) is a valid, competitive offer representative of the resource's costs, such an offer should not 'in and of itself, be deemed an exercise of market power in the RPM market.'"[59] But this notion, as applied to supplier-side mitigation, is inconsistent with the Commission's discussion in this record. The Commission has consistently separated these two concepts: the MOPR and supplier-side mitigation. Accepting PJM's proposed language in the Compliance Filing would be an unreasonable expansion of the scope of this proceeding, and would require findings on issues that the Commission has not reached in this case.

On the other hand, PJM's current tariff, which establishes that "the submission of a Sell Offer with an Offer Price at or below the revised Market Seller Offer Cap permitted under this

[59] *Id*., at 78 (citing Proposed Tariff, Attachment DD, section 6.4(a)). In other words, PJM cites its own unlawful tariff addition as the support for including its own unlawful tariff addition.

proviso shall not, in and of itself, be deemed an exercise of market power in the RPM market,"[60] is supported by Commission precedent and economic fundamentals. Conversely, the submission of a Sell Offer with an Offer Price above the applicable MSOC currently is deemed an exercise of market power in the RPM market. This is for good reason. The level of the MSOC is based on Net CONE * B for the Commission-approved reference resource or the resource's alternative MSOC as documented by the Seller,[61] which is determined to "encourage appropriate capacity investment and achieve an adequate level of reliability."[62] Even to support the Commission's notion of competition and concerns about alleged price suppression, offers cannot be said to be too low when mitigated to either the default or resource-specific MSOC, as applicable. Offers above the applicable MSOC are invalid (and mitigated) because such offers represent opportunities to exercise market power.

When the applicable MOPR floor exceeds the applicable MSOC, and a capacity seller submits an offer above the applicable MSOC, a decision must be made as to which objective is more critical—preventing exercise of market power or preventing offers that are perceived to be too low. PJM's proposal chooses in favor of allowing, and even mandating, the exercise of

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[60] Tariff, Attachment DD, section 6.4(a).

[61] *Id*. (stating "the default Market Seller Offer Cap for any Capacity Performance Resource shall be the product of (the Net Cost of New Entry applicable for the Delivery Year and Locational Deliverability Area for which such Capacity Performance Resource is offered times the average of the Balancing Ratios in the three consecutive calendar years . . . that precede the [BRA] for such Delivery Year) . . . a Capacity Market Seller may seek and obtain a Market Seller Offer Cap for a Capacity Performance Resource that exceeds the revised Market Seller Offer Cap permitted under the prior sentence, if it supports and obtains approval of such alternative offer cap pursuant to the procedures and standards of subsection (b) of this section 6.4.").

[62] *PJM Interconnection, L.L.C.*,167 FERC ¶ 61,029 at P 16 (2019) (citing *PJM Interconnection, L.L.C.*, 149 FERC ¶ 61,183, at P 52 (2014) (2014 VRR Order)). The Commission has long set the level of Net CONE as the appropriate level to incentivize new entry of capacity resources. *See* 2014 VRR Order, at P 8 ("CONE (or Gross CONE) represents the first-year total net revenue (net of variable operating costs) that a representative new generation resource would need in order to recover its capital investment and fixed costs, given reasonable expectations about future cost recovery over its economic life."); *see also PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,062, at P 18 (2012).

market power. In addition to recognizing that PJM's proposed revisions extend beyond compliance, OPSI recommends that the Commission retain the current tariff objective of preventing exercise of market power.

This concern is not merely academic. The Commission is aware of the IMM's pending complaint alleging that certain units exercised market power in the last BRA because the MSOC set at Net CONE * B was too high and enabled the exercise of market power.[63] PJM's proposal in this MOPR case to mandate offers even higher than the MSOC will increase the opportunity for capacity sellers to exercise market power, creating unjust and unreasonable rates. This foreseeable consequence illustrates how far PJM has strayed beyond the bounds of a Compliance Filing intended to address the very "different" issue of alleged price suppression.[64]

OPSI is not suggesting that PJM solve the issue in tension here by modifying the tariff to permit the default MSOC to be higher – as it is already too high. Rather, OPSI is suggesting that when the applicable MOPR floor exceeds the applicable MSOC, that PJM not accept an offer higher than the applicable MSOC. This is consistent with PJM's current tariff which prohibits offers higher than the applicable offer cap.[65] As explained above, the Commission has plainly identified supplier-side mitigation as a different matter; there is no record in this proceeding to support addressing supplier-side mitigation in this Compliance Filing. For these reasons, OPSI

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[63] *Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.*, Complaint of the Independent Market Monitor for PJM, Docket No. EL19-47-000 (Feb. 21, 2019).

[64] April 16 Order, at P 194.

[65] Tariff, Attachment DD, section 6.4(a).

recommends that the Commission reject PJM's proposed modifications to Tariff, Attachment DD, section 6.4(a) and section 6.5(a)(i).

D. All Existing Bilateral Contracts Should be Exempt from the MOPR

The Compliance Filing unreasonably restricts the universe of bilateral contracts that would be exempt from the MOPR. PJM proposes to exempt bilateral contracts from the MOPR, only where the buyer is a self-supply entity, on the basis of preserving existing investments and limiting industry disruption. In support of the bilateral self-supply exemption, PJM explains that "while the December 19 Order explicitly included only resources that are owned by Self-Supply Entities as one of the requirements to qualify for this exemption, it is appropriate to also include resources that are bilaterally contracted by such Self-Supply Entities."[66] OPSI supports this proposal to exempt bilateral contracts from the MOPR when the buyer is a self-supply entity, but believes that the exemption should not be limited to only self-supply entities. The PJM justification for the exemption applies equally to other, bilateral contracts of non-self-supply entities. OPSI therefore asserts that this exemption should be extended further to include enforceable supply purchase contracts entered into by non-self-supply entities entered into prior to December 19, 2019 in reliance upon then-existing Commission guidance. Load-serving entities ("LSE") in restructured states should not be precluded from using the business arrangement provided for self-supply entities in PJM's Compliance Filing. Accepting such a proposal would unduly discriminate against LSEs in restructured states. Exempting enforceable contracts relying on previous Commission guidance would further the preservation of existing investments, and would prevent preferential treatment.

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[66] Compliance Filing, at 31.

E. The Proposed RPS Exemption Fails to Capture Investment Commitments Relying on Prior Commission Decisions.

PJM proposes to categorically exempt intermittent resources that qualify for a state mandated or state-sponsored RPS program from the MOPR if one of the following three criteria are met:

> an Intermittent Resource that (a) has successfully cleared an RPM Auction prior to December 19, 2019; (b) is the subject of an interconnection service agreement or equivalent agreement executed on or before December 19, 2019; or (c) is the subject of an unexecuted interconnection service agreement or equivalent agreement filed by PJM with the Commission on or before December 19, 2019, will be exempt from the MOPR.[67]

OPSI notes that the Commission addressed eligibility for the RPS exemption in Paragraph 279 of the April 16 Order, wherein the Commission stated, "[w]e grant clarification that the resources eligible for the RPS Exemption include all existing resources that were included by an RPS standard as of the December 2019 Order."[68] The Commission was particularly responding to the Delaware Division of the Public Advocate's request that the RPS exemption not be limited only to intermittent renewable resources but should be extended to all renewable resources meeting that criteria.[69] Accordingly, the language in PJM's Proposed Tariff, Attachment DD, section 5.14(h)(6) must be revised to extend not only to intermittent renewable resources but to all renewable resources meeting that criteria.

While OPSI supports PJM's proposed exemption for RPS resources, as clarified by the Commission to cover non-intermittent renewable resources as well as intermittent renewable resources, OPSI does not believe these provisions alone properly capture planned resources that

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[67] *Id*., at 33.

[68] April 16 Order, at P 279.

[69] *Id*., at P 274.

may have made "prior investment decisions [that] were based on the Commission's previous affirmative determinations that renewable resources had too little impact on the market to require review and mitigation."[70] Renewable resources may have, in fact, made investment decisions prior to the December 2019 Order, based on other factors. Specifically, a resource developer may have made an investment decision upon the issuance of a state regulatory commission order approving a long-term price schedule of payments for the environmental attributes of a renewable energy project, specific to that project, pursuant to state legislation and guided by the Commission's previous affirmative determinations that renewable resources had too little impact on the market to require review and mitigation. And the developer for that specific resource may have filed with that state regulatory commission agreeing to these conditions and made financial commitments, accordingly.

The Commission recognizes the effect of its prior decisions, but PJM's Compliance Filing fails to appropriately identify all resources that are impacted. This example is consistent with the Commission's rationale in the December 2019 Order and does not conflict with the Commission's determination in the April 16 Order to exclude resources broadly "built pursuant to existing legislation or otherwise anticipated by the state before the date of the December 2019 Order."[71] Therefore, OPSI requests the Commission to direct PJM to amend the exemption criteria for renewable resources in Proposed Tariff, Attachment DD, section 5.14(h)(6) and to include a new Paragraph (D) as follows:

> (6) ~~Intermittent Resource~~ RPS Exemption. A Capacity Resource with State Subsidy ~~that is an Intermittent Resource~~ shall be exempt from the Minimum Offer

[70] Compliance Filing, at 34.

[71] April 16 Order, at P 282.

Price Rule if such Capacity Resource (1) receives or is entitled to receive State Subsidies through renewable energy credits or equivalent credits associated with a state-mandated or state-sponsored renewable portfolio standard ("RPS") program or equivalent program and (2) satisfies at least one of the following criteria:
(A) has successfully cleared an RPM Auction prior to December 19, 2019;
(B) is the subject of an interconnection construction service agreement, interim interconnection service agreement, interconnection service agreement or equivalent executed on or before December 19, 2019; ~~or~~
(C) is the subject of an unexecuted interconnection construction service agreement, interim interconnection service agreement, interconnection service agreement or equivalent filed by PJM with the Commission on or before December 19, 2019; or
(D) has filed for and obtained authorization from a state public utility commission prior to December 19, 2019, to receive a prescribed, long-term schedule of payments for the environmental attributes of a renewable energy project, pursuant to state legislation.

F. PJM's Proposal Regarding State Default Service Auctions Should Be Accepted.

OPSI supports PJM's definition in the Compliance Filing, which plainly states that "any state-directed default service procurement program that is competitively procured without regard to resource fuel type (e.g., New Jersey Basic Generation Service, Maryland Standard Offer Service)" is not a State Subsidy.[72] Similarly, default service procurements in the District of Columbia, Pennsylvania, Delaware and other states are not State Subsidies. State default service is a retail ratemaking mechanism, not a State Subsidy.

Contrary to the conclusion in the April 16 Order, the nature of state default service is exactly as PJM described it in the Compliance Filing—"energy and related services" procured in "competitive and non-discriminatory auctions."[73] As PJM stated, there is no "basis for finding these auctions to represent state subsidies within the definition of subsidy in the Order."[74] OPSI encourages the Commission to approve PJM's proposal to "explicitly exempt such state directed

[72] Compliance Filing, at 13.

[73] *Id.*, at 16.

[74] *Id.*, at 16-17.

default service procurement programs from the definition of State Subsidy for MOPR purposes."[75]

G. Benefits Created By Transmission Investments that are a Result of the Regional Transmission Expansion Plan Are Not State Subsidies.

PJM's Compliance Filing clarifies that State Subsidy does not include "any indirect benefits to a Capacity Resource as a result of any transmission project approved as part of the Regional Transmission Expansion Plan."[76] PJM explains that, for a state that utilizes the State Agreement Approach outlined in the PJM Tariff, "any Capacity Resources that subsequently use such transmission assets should not be deemed to have received a state subsidy."[77] "This [conclusion] is appropriate given that such transmission projects are recoverable under PJM's Tariff and approved by the Commission."[78] Thus, the Commission should accept this clarification to the definition of State Subsidy in the Compliance Filing.

III. CONCLUSION

Wherefore, OPSI recommends that the Commission: (1) direct PJM to adopt the auction implementation schedule described in Section A above; (2) direct PJM to delete the standardized financial parameters proposed to be applied to the resource-specific cost review process as described in Section B above; (3) direct PJM to delete its proposed revisions to supplier-side mitigation as described in Section C above; (4) extend the provision as described in Section D above regarding bilateral contracts so that it applies non-discriminatorily with respect to actual business operations, rather than only to a narrowly and specifically defined class; (5) direct PJM

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[75] *Id*., at 17.

[76] *Id*., at 13.

[77] *Id*., at 15.

[78] *Id*., at 15-16.

to expand the class of resources eligible for the RPS exemption; (6) approve without change PJM's proposal with respect to state default service auctions; and (7) approve without change PJM's proposal with respect to resources benefitting from Order 1000-based transmission planning.

Respectfully Submitted,

/s/ Gregory V. Carmean

Executive Director

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Dated: May 15, 2020

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served in accordance with 18 C.F.R. Section 385.2010 upon each person designated on the official service list compiled by the Secretary in this proceeding.

s/s Gregory V. Carmean
Executive Director

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Dated at Newark, Delaware this May 15, 2020.