

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
EL18-178-000
(Consolidated)

v.

PJM Interconnection, L.L.C.

PJM Interconnection, L.L.C.

REQUEST FOR REHEARING AND CLARIFICATION
OF THE ORGANIZATION OF PJM STATES

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”)¹ and Section 313 of the Federal Power Act (“FPA”),² the Organization of PJM States, Inc. (“OPSI”)³ hereby submits this request for rehearing and clarification of the Commission’s *Order Establishing Just and Reasonable Rate* issued on December 19, 2019 in the above-captioned dockets.⁴

¹ 18 C.F.R. § 385.713.

² 16 U.S.C. § 8251.

³ Approved on January 21, 2020, and adopted by OPSI’s Board of Directors: Vote: Yes: Delaware PSC, PSC of District of Columbia, Illinois CC, Indiana URC supports this request for rehearing, while acknowledging the vertically integrated utility regulated by the Indiana Commission participates in PJM as a Fixed Resource Requirement entity, because of the state’s interest in maintaining jurisdiction over generation resources, as argued in Part. III.A., Kentucky PSC, Maryland PSC, Michigan PSC, New Jersey BPU, North Carolina UC, Pennsylvania PUC supports the filing but abstains from parts I.A and C. and III.A and C, PUC of Ohio, Tennessee PUC, and PSC West Virginia; Abstain Virginia SCC

⁴ *Calpine Corporation, et al.* 169 FERC ¶ 61,239 (2019) (“December 19 Order”).

I. STATEMENT OF ERRORS AND ISSUES

Pursuant to Rule 713(c)(1)-(2), OPSI identifies these errors and issues for rehearing:

A. THE DECEMBER 19 ORDER INTRUDES ON STATE JURISDICTION OVER GENERATION RESOURCES AND EXCEEDS FEDERAL AUTHORITY.

Issue: Whether the Commission's Order nullifies and disregards lawful state policies. 16 USC 824(b); 16 U.S.C. 824(b)(1); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016).

B. THE REPLACEMENT RATE IS PUNITIVE, EXCESSIVE, UNJUST AND UNREASONABLE.

Issue: Whether the Commission's order is arbitrary, capricious, punitive, excessive, unjust and unreasonable. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. at 774 (2016); *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1221-24 (D.C. Cir. 1999); *Env'tl. Def. Fund v. EPA*, 852 F.2d 1316, 1326 (D.C. Cir. 1988); *New England Power Generators Ass'n v. FERC*, 881 F.3d 202, 212 (D.C. Cir. 2012); *Jersey Central Power & Light v. FERC*, 810 F.2d 1168, 1177-78 (D.C. Cir. 1987); *Advanced Energy Mgmt All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017); *Michigan v. EPA*, 135 S. Ct. 2699, 2707, 192 L. Ed. 2d 674 (2015); *TransCanada Power Marketing v. FERC*, 811 F.3d 1, 11-12, 421 U.S. App. D.C. 1 (D.C. Cir. 2015); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1989); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1199 (D.C. Cir. 2005); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002).

C. THE COMMISSION ERRED IN NOT ACCOMMODATING STATE POLICIES.

Issue: Whether the commission failed to provide a necessary accommodation of state policy. 163 ¶ 61,236 (2018).

D. THE COMMISSION SHOULD EXPAND THE CRITERIA FOR WHAT IS CONSIDERED AN EXISTING RPS RESOURCE.

Issue: Whether the Commission erred in narrowly defining the exemption criteria. 169 FERC ¶ 61,239 (2019).

II. REQUEST FOR CLARIFICATION

OPSI further seeks clarification on the following issues:

- A. CLARIFY THAT “NEW RPS RESOURCE EXEMPTION” INCLUDES RESOURCES REQUIRED BY STATE LEGISLATION ENACTED PRIOR TO THE COMMISSION’S DECEMBER 2019 ORDER OR RESOURCES ACCOMMODATED BY STATE REGULATORY COMMISSION ORDERS PRIOR TO THE DATE OF THE COMMISSION’S DECEMBER 19, 2019 ORDER.**

- B. CLARIFY THAT GENERATION RESOURCES FINANCIALLY BENEFITING FROM TRANSMISSION RESOURCES PLANNED BY PJM PURSUANT TO ORDER 1000’S PUBLIC POLICY PROVISIONS ARE NOT SUBJECT TO THE STATE SUBSIDY DEFINITION SET FORTH IN THE DECEMBER 2019 ORDER.**

III. ARGUMENT FOR REHEARING

A. The December 19 Order Intrudes on State Jurisdiction Over Generation Resources and Exceeds Federal Authority.

The December 19 Order is a direct attack on the states’ jurisdictional decision-making and sovereign rights.⁵ The December 19 Order improperly seeks to nullify state policy decisions about facilities used for the generation of electricity. The Commission found that “federal subsidies distort competitive markets in the same manner that State Subsidies do,” but resources receiving federal subsidies will not be subject to the Minimum Offer Price Rule (“MOPR”) because “[t]his Commission may not disregard or nullify the effects of federal legislation.”⁶ Yet that is precisely what the Commission has done to state policies. This crosses the boundary

⁵ 16 USC 824 (b); December 19 Order, at P 37-38; *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016) (“Nothing in this opinion should be read to foreclose [states] from encouraging production of new or clean generation through measures ‘untethered to a generator’s wholesale market participation.’”).

⁶ December 19 Order, at P 10.

between the states and the Commission and violates the law and Congress' expressed intent to maintain that separate jurisdiction.⁷ Notwithstanding exclusive jurisdiction to regulate wholesale rates, the Commission does not have the authority to nullify or disregard state policy choices regarding generation.

B. The Replacement Rate is Punitive, Excessive, Unjust and Unreasonable.

The overly-inclusive, expanded MOPR violates the FPA, because it is punitive, excessive, unjust and unreasonable. OPSI requests rehearing, among other things, on the Commission's broad definition of "State Subsidies,"⁸ which unreasonably expands the scope of the MOPR mitigation mechanism. The December 19 Order's definition of "State Subsidies" is ambiguous and, on a plain reading, far exceeds the scope necessary to address the Commission's alleged concerns of price suppression in the capacity market.⁹ Contrary to guidance that the Commission's jurisdiction does not have "infinite breadth,"¹⁰ the expansive definition includes states using their decades-old vertically integrated model, and even situations where generators receive indirect financial benefits from state programs. An expanded MOPR based on this definition is unworkable and contrary to the FPA. This outcome is not just and reasonable; it is overly broad, arbitrary and capricious.¹¹

⁷ 16 U.S.C. 824(b)(1).

⁸ December 19 Order, at P 67.

⁹ OPSI has challenged the Commission's concerns of price suppression in the capacity market and the conclusion that price suppression has rendered the existing rate unjust and unreasonable. *Request for Rehearing of OPSI*, Docket Nos. EL16-49 et al. (July 30, 2018); *Comments of OPSI*, Docket No. EL18-178 (Oct. 2, 2018) ("OPSI Comments").

¹⁰ *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. at 774.

¹¹ *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1221-24 (D.C. Cir. 1999) (reviewing, under the arbitrary and capricious standard, whether a regulation was overbroad); *Env'tl. Def. Fund v. EPA*, 852 F.2d 1316, 1326 (D.C. Cir. 1988).

The Commission's expanded MOPR provision effectively precludes new generation resources with compensated external attributes from clearing PJM's capacity auctions. The December 19 Order punishes consumer preference and states' lawful decision-making regarding generation resources by artificially inflating capacity prices and keeping certain new and existing resources from clearing in the capacity market. OPSI has previously argued that the potential price inflation resulting from an expanded MOPR outweighs concerns of price suppression.¹² Yet the Order indicates no consideration of those concerns, no balancing of the interests of consumers against the generators, as required by law.¹³ Where, as here, the Commission has neglected to conduct such a balancing and fails to consider costs, the resulting rate is not just and reasonable; the Order is arbitrary and capricious.¹⁴

Although the Commission claims the Order will improve competition in the capacity market, the resulting rate appears designed to do the opposite. To the extent that the Commission's MOPR applies differently to new versus existing resources, it will lead to fewer existing resources exiting the market, and a decrease in new resources' ability to compete, thereby limiting competition in PJM's capacity auctions. Such decrease in competition is likely to lead to higher auction clearing prices than would otherwise have been the case; higher clearing prices ultimately result in consumers paying more. But, again, the Commission's December 19 Order contains no discussion about consumer cost. An Order is arbitrary, and the resulting rate not otherwise shown to be just and reasonable, when the Commission gives no consideration to

¹² OPSI Comments at § B.

¹³ *New England Power Generators Ass'n v. FERC*, 881 F.3d 202, 212 (D.C. Cir. 2012).

¹⁴ *Jersey Central Power & Light v. FERC*, 810 F.2d 1168, 1177-78 (D.C. Cir. 1987) (holding that the rate must "add up" to an "end result" that is just and reasonable).

consumer cost.¹⁵ The Order is arbitrary and capricious where it is internally inconsistent or otherwise fails to link the conclusion (replacement rate) to the facts in the record.¹⁶

Further, OPSI's comments in EL18-178 argued that if the Commission were to order an expanded MOPR, the price floor should not exceed a competitive level. Any use of resource class average Net CONE as the MOPR floor price is excessive and would therefore fail to produce a just and reasonable rate.¹⁷ The December 19 Order fails to address OPSI's concerns by setting the default offer price floor for certain resources that have not previously cleared the capacity market at resource class average Net CONE¹⁸ and at the Net ACR for existing resources.¹⁹ Net CONE for each resource type is not a proper proxy for a competitive market offer price, and exceeds the Reference Resource Net CONE value previously opposed by OPSI in the instant record.²⁰ The December 19 Order fails to address OPSI's prior arguments regarding the proper definition of a competitive offer, and sets a Net CONE mitigation level which is unreasonably higher than the competitive price established by the marginal resource technology.²¹

¹⁵ *Advanced Energy Mgmt All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) (citing *Michigan v. EPA*, 135 S. Ct. 2699, 2707, 192 L. Ed. 2d 674 (2015); *TransCanada Power Marketing v. FERC*, 811 F.3d 1, 11-12, 421 U.S. App. D.C. 1 (D.C. Cir. 2015)).

¹⁶ *Natural Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 879 F.3d 1202, 1215 (D.C. Cir. 2018) (quoting *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 119 F.3d 38, 43 (D.C. Cir. 1997)); see *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1989).

¹⁷ OPSI Comments, at 11-14.

¹⁸ December 19 Order, at P 138.

¹⁹ *Id.*

²⁰ OPSI Comments, at 12-13.

²¹ *Id.* at 11-12 ("even use of PJM's [Reference Resource] Net CONE value as a MOPR price will inflate market prices above the cost of new entry. The Commission should not accept any proposals that would allow the MOPR floor price to exceed the costs of entry for the competitive resource type, absent scarcity conditions.").

Ultimately, under the FPA, it is the Commission’s duty to show that its replacement rate is just and reasonable.²² The December 19 Order does not, and cannot, quantify the degree of its related cost increase, due to the unknown scope and unreasonable level of mitigation. For these reasons, the Commission has failed to carry its burden. The Commission’s replacement rate is punitive, excessive, unjust and unreasonable.

C. Need for Accommodation of State Policies

In its June 2018 Order, the Commission detailed the need for an accommodative alternative to an expanded MOPR, proposing a resource-specific FRR option and even soliciting proposals for other accommodative measures, to “accommodate state policy decisions and allow resources that receive out of market support to remain online.”²³ However, the December 19 Order rejected requests for transition mechanisms or accommodative measures that would allow entities facing an expanded MOPR the option and the time necessary to adopt new resource rules and/or legislation.²⁴ The Commission appears to have dismissed all such requests and proposals for various accommodative measures or transition mechanisms as moot, on the singular basis that the December 19 Order did not include the resource-specific FRR option previously proposed by the Commission.²⁵ Although the Commission gave considerable thought to a resource-specific FRR option in its June 2018 Order,²⁶ and developed a paper hearing record to support it, the Commission offered negligible rationale for its ultimate decision to discard the

²² *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1199 (D.C. Cir. 2005) (quoting *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002)).

²³ *PJM Interconnection, L.L.C.*, 163 ¶ 61,236, at P 172 (2018) (“June 2018 Order”).

²⁴ December 19 Order, at PP 217-219.

²⁵ *Id.*, at P 219.

²⁶ June 2018 Order at PP 160-172.

proposed resource-specific accommodative measure; stating only that it “would have unacceptable market distorting impacts that would inhibit incentives for competitive investment in the PJM market over the long term.”²⁷ This determination was based solely on PJM proposals, with no consideration of any other proposed accommodative measure filed in the paper hearing.

As OPSI has previously explained, the application of an expanded MOPR, without some corresponding measure for state policy accommodation would be unjust and unreasonable.²⁸ Under the Commission’s December 19 Order, the only alternative option to the MOPR is the FRR-Alternative in PJM’s tariff that has existed for many years. The existence of the FRR-Alternative in PJM’s tariff, in and of itself, is not sufficient to accommodate state public policy decisions under the new requirements of an expanded MOPR. Because the expanded MOPR represents a significant new modification to PJM’s capacity auction process and design, the Commission’s decision to reject all new accommodative measures is not just and reasonable. In addition, because the Commission’s expanded MOPR will be imposed on specific individual resources, rather than falling equally on all resources, it is unjust and unreasonable for the Commission not to have authorized any resource specific accommodative measure. Just and reasonable rates here depend on meaningful accommodation for state policy and the resources affected by state policy.²⁹

For an accommodative measure in lieu of the capacity market, including the existing FRR-Alternative, to be a meaningful option for states with policies targeted by the December 19

²⁷ December 19 Order, at P 6.

²⁸ OPSI Comments, at 6–9.

²⁹ *Id.*

Order and for resources which will now be subject to MOPR, states may need to pursue new and complex state legislation. The OPSI states largely rely on a transparent and competitive wholesale capacity market, but the December 19 Order abruptly narrows the scope of capacity market competitors. The replacement rate creates new challenges that could not have been reasonably foreseen based on the Commission's findings in the June 2018 Order. If the Commission does not permit states enough time and opportunity to respond to these complex challenges, certain resources affected by state policy may be forced offline or prevented from entering the market, thus nullifying state policy decisions, as discussed above. For this reason, the Commission's failure to allow for a transition period renders its replacement rate unjust and unreasonable.

In summary, the Commission erred in not adopting accommodative measures; and in not allowing sufficient time, prior to implementation of the new MOPR, for states to employ meaningful measures to transition.

D. The Commission should expand the criteria for what is considered an Existing RPS resource.

The December 19 Order directs PJM to include an RPS Exemption for existing, renewable resources receiving State Subsidies that: (1) have successfully cleared an annual or incremental capacity auction prior to the order; (2) have an executed interconnection construction service agreement on or before the date of the 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 order.³⁰ The Commission claims that this exemption

³⁰ December 19 Order, at P 14.

reflects earlier assessments that the limited quantity of such resources had little impact on clearing prices and investments were made in reliance on earlier Commission prior determinations.³¹

While these criteria may be indicative of plans for specific resources to become operational, they do not reflect the only actions indicative of such intentions. For example, specific resources may be expected to become operational if mandated by state legislation, state regulatory commission orders or commercial contracts. Any such actions completed prior to issuance of the December 19 Order should be included among the exemption criteria. The Commission is requested to include the following among the criteria for Existing RPS resource:

“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 related to the prospective construction and operation of a renewable generation facility or the issuance of RECs issued prior to the December 2019 Order, or (6) is built pursuant to a commercial contract executed prior to issuance of the December 2019 Order.”

OPSI submits that the addition of these criteria is consistent with the rationale underlying the RPS Exemption set forth in the December 19 Order, and therefore should also be adopted.

IV. ISSUES FOR CLARIFICATION

A. Clarify that “new RPS resource exemption” includes resources required by state legislation enacted prior to the Commission’s December 2019 Order or resources accommodated by state regulatory commission orders prior to the date of the Commission’s December 19, 2019 Order.

As described above, the December 19 Order outlines an RPS exemption for certain renewable resources that meet one or more of three conditions. Should the Commission deny

³¹ *Id.*

rehearing on the above, in the alternative OPSI requests clarification that the RPS exemption includes resources meeting the following conditions in addition to those included in the December 19 Order:

[Resources that] (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 related to the prospective construction and operation of a renewable generation facility or the issuance of RECs issued prior to the December 2019 Order, or (6) is built pursuant to a commercial contract executed prior to issuance of the December 2019 Order.

This clarification is consistent with the rationale underlying the RPS Exemption set forth in the December 19 Order, and therefore should also be adopted.

B. Clarify that generation resources financially benefiting from transmission resources planned by PJM pursuant to Order No. 1000’s Public Policy provisions are not subject to the State Subsidy definition set forth in the December 2019 Order.

Commissioner Glick’s dissent explains that the definition of State Subsidy in the Order is overly broad.³² Various state commissions seek rehearing and clarification that the definition should not cover, among other things, resources benefitting from carbon-pricing mechanisms.³³ Additionally, OPSI requests the Commission make clarifications regarding this definition as it pertains to Order No. 1000 Public Policy Requirements. The Commission’s Order No. 1000 “support[s] 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

³² *Id.*, at Glick Dissent, P 18.

³³ *See, e.g.*, Request for Rehearing of the Illinois Commerce Commission, Docket Nos. EL16-49 et al. (Jan. 21, 2020); Request for Rehearing of the Maryland Public Service Commission, Docket Nos. EL16-49 et al. (Jan. 21, 2020); Request for Rehearing of the New Jersey Board of Public Utilities, Docket Nos. EL16-49 et al. (Jan. 21, 2020).

regulations (Public Policy Requirements).”³⁴ OPSI requests the Commission 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 19 Order. Such a result would bring about further conflict among the Commission’s Orders, leading to an arbitrary and capricious result.

V. CONCLUSION

For the reasons discussed above, OPSI requests rehearing and clarification of the December 19 Order as discussed herein. OPSI further seeks any and all other appropriate relief.

Respectfully Submitted,

/s/ Gregory V. Carmean

Executive Director

Organization of PJM States, Inc.

700 Barksdale Road, – Suite 1

Newark, DE 19711

Tel 302-266-0914

Email: greg@opsi.us

Dated: January 21, 2020

³⁴ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051 (2011) at P 2.

CERTIFICATE OF SERVICE

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

s/s Gregory V. Carmean

Executive Director
Organization of PJM States, Inc.
700 Barksdale Road , Suite 1
Newark, DE 19711

Tel 302-266-0914
greg@opsi.com

Dated at Newark, Delaware this 21st day of January, 2020