UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

PETITION FOR REHEARING OF NEW JERSEY DIVISION OF RATE COUNSEL, OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA, AND THE MARYLAND OFFICE OF PEOPLE'S COUNSEL

Pursuant to 16 U.S.C. § 825*l*(a) and 18 C.F.R. § 385.713, the New Jersey Division of Rate Counsel, the Office of the People's Counsel for the District of Columbia, and the Maryland Office of People's Counsel, intervenors in this proceeding,[1] petition for rehearing of the Federal Energy Regulatory Commission's (the Commission or FERC) December 19, 2019 order.[2] As explained below, the Commission should grant rehearing because the December 19 Order is arbitrary, capricious, and unjustly discriminatory, unsupported by substantial evidence or reasoned decision-making, departs without reasoned explanation from Commission precedent, and will produce unjust and unreasonable wholesale rates.

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[1] *See* (doc-less) Motion to Intervene of New Jersey Division of Rate Counsel (Apr. 11, 2016), eLibrary No. 20160411-5115; (doc-less) Motion to Intervene of The Office of the People's Counsel for the District of Columbia (July 10, 2018), eLibrary No. 20180710-5060; (doc-less) Motion to Intervene of Maryland Office of People's Counsel (Jan. 27, 2017), eLibrary No. 20170127-5168.

[2] *Calpine Corp. v. PJM Interconnection*, *L.L.C.*, 169 FERC ¶ 61,239 (2019) (December 19 Order or Order).

I. INTRODUCTION

This case concerns the mechanics of the Base Residual Auction (BRA), which is at the heart of the PJM Interconnection, L.L.C. (PJM) capacity market construct, the Reliability Pricing Model (RPM). Without reasoned explanation or support, the December 19 Order adopts sweeping changes to the RPM market rules, directing PJM to implement a substantially expanded mitigation mechanism—the Minimum Offer Price Rule (MOPR)—to mute the market impacts associated with the participation of state-sponsored resources. But the "replacement rate" announced in the December 19 Order is arbitrary, capricious, and unjustly discriminatory, and will produce unjust and unreasonable wholesale rates.

As the Supreme Court long ago made clear, the Federal Power Act (FPA) was enacted "to encourage the orderly development of plentiful supplies of electricity . . . at reasonable prices." *NAACP v. FPC,* 425 U.S. 662, 670 (1976). The core purpose of the statute is "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959). The Order's new MOPR regimen will have exactly the opposite effect. It will instead disconnect the auction, and PJM's RPM as a whole, from the region's actual reliability needs and from the foundational precept that resources should compete to provide capacity on the basis of their net costs—those not covered by revenues received from any source for providing other products or services. And it will obligate

millions of consumers in the PJM service area to buy far more capacity than they need, at enormous and unnecessary cost.[3]

The newly-expanded MOPR will make PJM's markets less, not more, efficient. The December 19 Order is nominally aimed at promoting competition, but instead erects barriers to entry, insulating most existing resources (primarily, fossil-fueled resources) from competition on the basis of their real net costs. The new MOPR will artificially increase some other resources' offers above their real net costs and frustrate the fulfillment of consumer preferences as expressed through state resource planning decisions.

The December 19 Order is out of step with the Commission's legal obligations and state and consumer policy preferences. The FPA preserved state authority to regulate generation, even though such regulation obviously would affect wholesale sales within the Commission's jurisdiction. 16 U.S.C. § 824(b)(1). States increasingly are supporting the development and retention of clean-energy resources to displace resources that pollute and destabilize the climate. And these initiatives are consistent with the states' FPA-preserved authority. As the Commission told the Supreme Court, states may "incentivize the construction of new generation resources," either "directly" or "indirectly," including by requiring local utilities to "purchase a percentage of electricity from a particular generator" or by creating "renewable energy certificates to be independently used by utilities in compliance with state requirements."[4] *See also Cal.*

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[3] December 19 Order, Dissent of Commissioner Glick P 50 (Glick Dissent) ("[T]he mitigation scheme imposed by today's order will likely cause a large and systematic increase in the cost of capacity—at least 2.4 billion dollars per year.").

[4] Brief for the United States as *Amicus Curiae* at 19, 34, *Hughes v. Talen Energy Mktg.*, *L.L.C.*, 136 S. Ct.

Pub. Utils. Comm'n, 133 FERC ¶ 61,059, P 31 n.62 (2010) (acknowledging that states may "grant loans, subsidies or tax credits to particular facilities on environmental or policy grounds").

State programs take myriad forms, but share the goal of making recipient clean energy resources more economic. These programs have the obvious and intended effect of reducing the clean energy resources' net costs of providing capacity to PJM. But the December 19 Order blinks this reality, and instead demands that recipient resources use administratively set prices rather than actual revenues in the calculation of their PJM auction offers, thereby artificially inflating them above their real net cost. While these inflated offers are less likely to clear the auction (and, if they fail to do so, will not receive capacity market revenues), if the states stay the course the resources will be developed (or retained) anyway, and will provide the same reliability benefits as if they had cleared. Far from an "orderly development of plentiful supplies," the December 19 Order creates a bizarre scheme of redundant market and state-sponsored capacity. In this fashion, the December 19 Order burdens (perhaps to the point of defeat) the states' objectives of using cleaner resources to meet reliability obligations at the lowest reasonable cost—and requires PJM to procure other, higher-cost and more polluting resources which are, in fact, not necessary to meet regional reliability targets.

None of this can be squared with the requirements of the FPA, the Administrative Procedures Act, or sound public policy. The Order is riddled with vague and unworkable standards, arbitrary and unjustly discriminatory distinctions, and unexplained departures

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1288 (No. 14-614) (*Hughes* FERC Br.).

from precedent.[5] The Commission should grant rehearing and correct its course. Alternatively, if the Commission intends to confirm the December 19 Order, then we ask that it issue a rehearing order expeditiously, so that efforts to seek judicial review can proceed promptly.[6]

II. SPECIFICATION OF ERRORS

1. The December 19 Order is arbitrary and capricious, unjustly discriminatory, and departs from precedent without reasoned explanation by selectively abandoning core precepts of PJM's BRA, namely: (a) that the BRA should function as a backstop mechanism for procuring additional resources needed for reliability beyond those which the region's load-serving entities have already secured; (b) that prices produced by a competitive residual market—the prices needed to elicit enough competitive supply to satisfy *unmet* needs—are just and reasonable; and (c) that capacity offers based on a supplier's real net costs—gross costs minus revenue earned selling products and services other than capacity—are competitive.

2. The December 19 Order is arbitrary and capricious, unjustly discriminatory, contrary to the FPA, and departs from precedent without reasoned explanation by adopting a mistaken and unprecedented model of wholesale electric competition: one that requires nullifying—selectively and arbitrarily—the advantages and disadvantages conferred on various capacity suppliers by other state and federal laws.

3. The December 19 Order is arbitrary and capricious, unjustly discriminatory, contrary to the FPA, and departs from precedent without reasoned explanation in expanding the MOPR to target and impede selected state policies, including:

    a. The Order is contrary to the FPA's reservation to the states of authority over generation. The Order claims it does not regulate generation because the mitigation protocol affects only capacity costs, and does not prevent the states from pursuing their policies. The Commission, however, says it is unable to mitigate federal subsidies (which the December 19 Order finds

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[5] And while the harsh financial fallout from the December 19 Order will be experienced immediately, jousting over the meaning of the Commission's broadly-worded definition of "State Subsidy" will go on indefinitely. *See* Glick Dissent P 25. The December 19 Order itself admits that "this replacement rate does not purport to solve every practical or theoretical flaw in the PJM capacity market asserted by parties in these consolidated proceedings, or in related proceedings." December 19 Order P 5.

[6] *See Allegheny Defense Project, et al. v. Federal Energy Regulatory Commission, et al.*, Case Nos. 17-1098, *et al.* (D.C. Cir. oral argument scheduled for March 31, 2020),

affect PJM's capacity auction in the same way as State Subsidies[7]) because doing so would "nullify" the federal programs. The Commission cannot have it both ways. If mitigation nullifies the intent or effect of a federal subsidy, then it impermissibly does the same to State Subsidies. The Commission may not regulate generation or accomplish the same objective by nullifying state generation regulation that Congress expressly preserved under the FPA. 16 U.S.C. § 824(b)(1); *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932) (affirming state authority to tax the generation of electric energy even though the energy would be sold at wholesale in interstate commerce).[8]

b. If FERC's rationale for not mitigating federally-subsidized resources' offers is wrong, then the December 19 Order is unduly discriminatory and unjust and unreasonable because the "replacement rate" unjustifiably treats resources supported by State subsidies less favorably than those supported by federal subsidies.

c. The December 19 Order is also arbitrary and capricious and unjustly discriminatory because it allows capacity offers to net out some—but not all—non-capacity revenues and financial benefits. Suppliers not subject to the MOPR—because the Commission has not defined their non-capacity revenues and benefits as impermissible State Subsidies or because the Commission has grandfathered or exempted them—are free to offer their capacity at any price, including zero. These offering resources are free to net out myriad non-capacity revenues or benefits, including those derived from (among other things) sales in other PJM markets, out-of-market payments under PJM's tariff, bilateral sales not related to (or at least sufficiently removed from) state procurement and purchasing directives, sales of physical generation byproducts, and sales of non-energy products and services. They also are free to net out the revenues or benefits they derive from federal subsidies and certain state or local programs (such as general economic development or siting) that the Commission has carved out of the State Subsidy definition. In contrast, new resources of any type that receive revenues or benefits defined as "State Subsidies" are prohibited from netting those revenues against their costs in setting their offers. State Subsidies

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[7] We use the term "subsidy" or "subsidies" herein for convenience, but emphasize that the December 19 Order defines "State Subsidy" so broadly as to sweep in revenue that ordinarily would not be described that way. This includes (by way of example, not limitation) revenue received by renewable resources for selling energy to retail utilities as a "result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law." December 19 Order P 9. It also includes revenue received by a generator for selling RECs to an LSE who uses them to show certify compliance with state Renewable Portfolio Standards or similar laws.

[8] Even if mitigating a capacity offer would not "nullify" the subsidy, it unquestionably diminishes the intended effect to support development or retention of state-preferred resources. The December 19 Order's targeting of only state generation subsidies crosses the jurisdictional divide and interferes impermissibly with the exercise of authority that the FPA reserved to the States.

reduce capacity offers and affect auction outcomes in the same way as other revenues that other resources may net from their offers. The Order wrongly subjects State-Subsidized Resources to different and less favorable treatment not based on any rational, relevant difference. The Order purports to justify this result on the grounds that the overwhelming majority of state subsidies are "nearly directed at or tethered to," December 19 Order P 68, the PJM Capacity Market but this characterization is unsound and cannot withstand analysis.

d. The State Subsidy definition is unworkably vague and overbroad and should be narrowed if it is not abandoned altogether. At a minimum, the Commission should revise the definition to eliminate inconsistencies with the policies described in the rest of the Order and to clarify that State Subsidies do not include revenue received by winning bidders in States' competitive procurement of suppliers or power supplies to serve default-service retail load.

e. The Order's limiting of the Competitive Entry Exemption so that it is available only to winners of fuel-neutral procurements and not to winners of competitive clean-energy procurements, is arbitrary, capricious, unjustly discriminatory, and not reflective of reasoned decision-making. That a state's competitive solicitation is tailored to procure a specific desired product does not make it non-competitive or unjustly discriminatory. The Order's exclusion of competitive clean-energy procurements is contrary to its treatment of resources that compete to provide energy and ancillary services in PJM's markets. Resources are not all similarly situated to provide spinning reserves or black start service (or to produce energy during shortage events), just as they are not all similarly situated to provide the emission-free energy that States and consumers desire. There is no more reason to mitigate offers from winners of States' competitive clean-energy procurements than there is to mitigate offers from those who compete successfully to sell energy and ancillary services to PJM. The Order's discrimination against state clean-energy procurements also is contrary to the Commission's long-standing acknowledgment that states may direct the procurement activities of their retail utilities and may tell them what kinds of power to buy.

4. The Order is unjust and unreasonable because it will cause PJM to procure excessive capacity at excessive prices.

III. STATEMENT OF ISSUES

The issues presented in this rehearing petition are whether the December 19 Order is arbitrary and capricious,[9] unjust, unreasonable, or unduly discriminatory,[10] or otherwise contrary to law,[11] because it:

1. Departs without reasoned explanation from core design principles and precedent, which established the BRA as a residual mechanism to procure capacity as a "last resort," "after LSEs have had an opportunity to procure capacity on their own," which they offer into the BRA as price-takers. *PJM Interconnection*, *L.L.C.*, 115 FERC ¶ 61,079, PP 71, 91 (2006); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, P 13 (2006); *PJM Interconnection*, *L.L.C.*, 135 FERC ¶ 61,022, P 4 (2011) (subsequent history omitted).

2. Departs without reasoned explanation from core design principles and precedent that prices produced by a competitive *residual* market—the prices needed to elicit enough competitive supply to satisfy *unmet* needs—are just and reasonable. *Id.*

3. Selectively rejects, in arbitrary and unjustly discriminatory fashion, the principle that competitive capacity offers reflect suppliers' *net costs* (i.e., net of revenue earned from selling other products and services) and economic resources are the ones with the lowest net costs. *Id.*; *see also PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,151, P 14 (2016); PJM Reliability Pricing Model Transmittal Letter 7, *PJM Interconnection*, *L.L.C.*, Docket Nos. ER05-1410-000 and EL05-148-000 (Aug. 31, 2005), eLibrary No. 20050902-0088 ("PJM Reliability Pricing Model Letter"). Specifically, the Order fails to justify its different treatment of revenue defined as "State Subsidies" as compared to revenue from (1) sales in PJM's energy and ancillary service markets, (2) out-of-market payments under PJM's tariff, (3) bilateral wholesale sales, (4) retail energy sales, (5) sales of physical generation by-products (e.g., steam, heat, carbon dioxide, coal ash, or urea), (6) sales of state-created generation emissions allowances, or (7) sales of other products or services (e.g., information technology or licensing of intellectual property)—all of which are revenues that resources not subject to the MOPR will deduct when developing their capacity offer prices.

4. Wrongly treats resources' receipt of certain revenues (defined as "State Subsidies") as market-distorting and requiring mitigation, even though the "State

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[9] 5 U.S.C. § 706(2); *Motor Vehicle Mfrs. Ass'n of the United States*, *Inc. v. State Farm Mut. Auto Ins. Co*., 463 U.S. 29 (1983); *Burlington Truck Lines*, *Inc. v. United States*, 371 U.S. 156 (1962).

[10] 16 U.S.C. §§ 824d, 824e; *St. Michaels Utils. Comm'n v. FPC*, 377 F.2d 912, 915 (4th Cir. 1967).

[11] 5 U.S.C. § 706(2).

Subsidies" affect BRA offers and clearing prices in the same way as other subsidies and revenues that do not trigger mitigation. Specifically, the Order fails to justify its different treatment of "State Subsidies" as compared to federal subsidies and state subsidies for general economic development or local siting, which are not mitigated.

5. Relies on neologisms instead of reasoning, and distorts judicial field-preemption concepts, to attempt to justify mitigating only those resources that receive what the Commission deems to be subsidies "nearly directed at or tethered to," December 19 Order P 68, FERC-jurisdictional markets. *Oneok, Inc. v. Learjet, Inc.,* 135 S. Ct. 1591 (2015)*; Hughes v. Talen Energy Mktg., LLC*., 136 S. Ct. 1288 (2016).

6. Adopts a mistaken and unprecedented model of wholesale electric competition—one that seeks to nullify (selectively and arbitrarily) the advantages and disadvantages conferred on capacity suppliers by other state and federal laws—even though federal law protects "competition, not competitors" (e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)), all energy sources are subsidized (*ISO New England Inc*., 158 FERC ¶ 61,138, at 61,892 (2017) (Bay, Commissioner, concurring), and the Commission previously has disclaimed the obligation to try to "create a level competitive playing field among generators." (Order 888, *infra* note 35, FERC Stats. & Regs. at 31,890).

7. Nullifies or at least impedes fulfillment of state generation policy, even though the FPA preserved state authority to tax, subsidize, and regulate the economic aspects of electricity generation. *Utah Power & Light Co. v. Pfost,* 286 U.S. at 181; S. Rep. No. 74-621, at 48 (1935); H.R. Rep. No. 74-1318, at 8 (1935); 16 U.S.C. § 824(b)(1); *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 205 (1983); *New York v. FERC*, 535 U.S. 1, 24 (2002).

8. Finds, without reasoning or support, that mitigation would nullify federal subsidies but not State Subsidies. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

9. Produces absurd results as applied to capacity offers by resources that receive both federal and State Subsidies, which the Order would treat as both subject to MOPR mitigation and exempt from mitigation. Efforts to deal with this absurdity, perhaps by backing out only the state support, will frustrate not only the state program but also the federal one, as federal subsidies are sized to achieve an intended level of total support. *See, e.g.,* 26 U.S.C. § 45(b)(3)(A)(i)-(iv).

10. Treats state-imposed environmental costs differently from state-derived environmental revenue without justification. The Order allows state-imposed costs to flow through the wholesale market, increasing wholesale costs. *E.g.*, Order 888, *infra* note 35, FERC Stats. & Regs. at 31,891; *PJM Manual 15: Cost Development Guidelines*, PJM, 23-24 (rev. 33, effective Dec. 3, 2019), https://www.pjm.com/-/media/documents/manuals/m15.ashx ("PJM Manual");

Joseph Bowring, *Capacity Markets in PJM*, 2 Econ. of Energy & Envtl. Policy 47, 57 (2013), https://www.pserc.cornell.edu/empire/2_2_a03.pdf ("Capacity Markets in PJM"). But the Order refuses, without adequate reasoning or support, to allow state-derived wholesale revenue to flow through the market and reduce wholesale costs.

11. Makes the Competitive Entry Exemption available only to resources forswearing revenues defined in the Order as "State Subsidies," thereby contaminating the Exemption with all the defects of that definition. In particular, the Order wrongly makes the exemption available for "fuel-neutral" procurements (which often are not really neutral) but not for competitive clean-energy procurements.

12. Discriminates unduly among resources that use the Competitive Entry Exemption but later receive a State Subsidy, imposing (without justification) much harsher penalties on new resources that claim the exemption and later choose to receive what the Order defines as a State Subsidy.

13. Includes a vague, ambiguous, and over-broad definition of "State Subsidies," the text of which (1) conflicts with the body of the Order and (2) could be read as requiring mitigation (contrary to 18 C.F.R. § 35.27(b)(1)) of payments or financial benefits that result or are derived from competitive procurements of commitments to serve default service load.

14. Requires PJM, contrary to precedent, to reject low net cost capacity offers that "accurately reflect[]" resources "low going-forward costs" and are "consistent with a competitive market outcome." *ISO New England Inc.,* 165 FERC ¶ 61,202, P 88 (2018); *accord. N.Y. Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,076, PP 79, 82-83 (2016); *Indep. Power Producers of N.Y. v. N. Y. Indep. Sys. Operator Inc.*, 150 FERC ¶ 61,214, PP 1, 2, 66, 68 (2015). This creates risk that the generators' offers will not clear and their "resource adequacy contributions to the system would not be counted." *ISO New England Inc.,* 165 FERC ¶ 61,202, P 85 (2018). Consequently, the Order will require PJM to buy more capacity than it needs, at higher prices than necessary—an "inefficient and unreasonable market outcome." *Id.* The December 19 Order improperly fails to consider this cost impact. *Id.*; *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *TransCanada Power Mktg. v. FERC*, 811 F.3d 1 (D.C. Cir. 2015).

IV. ARGUMENT

A. The December 19 Order departs from precedent without reasoned explanation and abandons core precepts underlying PJM's BRA.

The BRA was designed from the outset to be a backstop through which PJM could procure competitively any *additional* resources needed for reliability beyond what

the region's load-serving entities (LSEs) had already secured.[12] In its initial order approving the RPM, the Commission found it reasonable to allow PJM to procure capacity by auction as a "last resort," "after LSEs have had an opportunity to procure capacity on their own."[13] To avoid over-procurement of capacity, LSEs accounted for capacity procured outside the auction by offering those resources into the auction as price-takers.[14] This flexibility was the linchpin of the Commission's defense of RPM

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[12] As discussed further below, that residual design appropriately reflected the FPA's division of authority between States and the Commission. Under the FPA, States have authority over generation facilities. 16 U.S.C. § 824(b)(1). The Commission has authority over the transmission and sale (at wholesale in interstate commerce) of the electrical output of those facilities. *Id*. Courts have accepted the Commission's assertion of authority to set capacity prices because they affect energy prices. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009). But States retain primary authority to determine the mix of generation sources. *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 205 (1983) ("Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States."). *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) ("[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."); *New York v. FERC*, 535 U.S. at 1, 24 ("FERC has recognized that the States retain significant control over local matters," including "administration of integrated resource planning and utility buy-side and demand-side decisions . . . ; authority over utility generation and resource portfolios; and authority to impose nonbypassable distribution or retail stranded cost charges.") (internal quotation omitted).

[13] *PJM Interconnection*, *L.L.C*., 115 FERC ¶ 61,079, P 71 (2006). *See also PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, P 13 (2006) ("To meet the capacity needs of Load Serving Entities that failed to procure enough capacity through self-supply or bilateral contracts, PJM proposed to hold an auction each year, in which PJM would procure the remainder of the capacity requirement."); *PJM Interconnection*, *L.L.C*., 135 FERC ¶ 61,022, P 4 (2011) (describing RPM as being "for the procurement and pricing of unmet capacity obligations."). This remains the Commission's understanding. The December 19 Order itself acknowledges the residual nature of the auction: "Under the RPM, the procurement and pricing of *unmet* capacity obligations is done on a multi-year forward basis through an auction mechanism." December 19 Order P 18 (emphasis added) (citing *PJM Interconnection, L.L.C.,* 117 FERC ¶ 61,331, P 6 (2006) ("The Settlement [creating the RPM] provides that utilities can supply their energy needs through a combination of generation, transmission, and demand response, including energy efficiency.")).

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> An LSE's capacity that is procured in advance would be offered into the procurement auction at a price of $0, but it would receive the applicable market-clearing capacity price established in the auction. The LSE would be required to pay the capacity price as determined in the auction for the amount of capacity needed to meet its full capacity obligation. But the auction revenues received by the LSE for its capacity would be used to offset the LSE's purchase payments, thereby reducing its net bill. To the extent that the amount of capacity procured in advance fell short of its capacity requirement, its net bill would reflect the capacity price for the amount of its net capacity deficiency. Conversely, to the extent that the amount of capacity procured in

against claims that it usurped state jurisdiction over generation facilities.[15] From 2006 until this case, the Commission accepted the principle that prices produced by a competitive *residual* market—the prices needed to elicit enough competitive supply to satisfy *unmet* needs—are just and reasonable. The December 19 Order departs without reasoned explanation from that principle and precedent.

The BRA also has always included a limited mitigation mechanism designed to prevent the exercise of "buyer-side market power." Until now, however, this mitigation mechanism remained the exception, not the rule, and so did not undo the auction's residual character.[16] In general, the entry of new low-cost supply is a good thing in that it reduces prices.[17] In some circumstances, however, net capacity buyers can benefit economically from subsidizing uneconomic supply, because their savings as buyers may exceed the extra cost they incur to subsidize the resource. To prevent this, PJM's auction included a limited MOPR that sets a price floor for capacity offers from the types of new resources deemed to present a greater risk of price-suppressive behavior intended to

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> advance exceeded its capacity requirement, the LSE would be rewarded with a net payment.

115 FERC ¶ 61,079, P 91; *accord Hughes*, 136 S. Ct. at 1293 n.3.

[15] 115 FERC ¶ 61,079, P 172 ("Under the RPM proposal as filed, LSEs may either (a) build their own needed capacity or create an incentive for the construction of new capacity by entering into long-term bilateral agreements, (b) refrain from entering into bilaterals and pay the (presumably higher) prices set by the demand curve, or (c) develop transmission or demand response solutions to capacity problems.").

[16] The December 19 Order states (P 39) that a "purpose of the MOPR has been to address price suppression." But the case upon which the Commission relies makes clear that the MOPR was to address suppression in the specific circumstance in which a resource or participant had an incentive to engage in such behavior—and not simply because the resource received a state subsidy. *See id.* P 39 n.87 (citing 117 FERC ¶ 61,331, P 34 (explaining that the MOPR would apply to sellers that "may have incentives to depress market clearing prices below competitive levels")). There is no showing in the December 19 Order that the mere receipt of a State Subsidy provides an incentive for the recipient resource owner to attempt to use the subsidized resource to suppress auction prices.

[17] *See, e.g., Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.").

suppress prices artificially. From 2006 through 2011, the MOPR included an exemption for resources procured by states to address projected capacity deficiencies (the same reliability issue the auction itself is intended to address). In 2011, the Commission approved the revocation of that exemption but simultaneously approved changes to reduce to zero the offer floor price for non-gas fired resources, thus targeting the MOPR at new, gas-fired generation resources alone—i.e., those resources with the opportunity to suppress prices.[18] Until this case, the MOPR has not applied to any existing generation or to offers for new renewable generation. Thus, with limited exception of new, gas-fired resources, the BRA has until now retained its essentially residual character.

Even at the start of this case, the principle that PJM's auction should "procure[] and pric[e]" only "unmet capacity obligations"[19] retained some vitality. At the same time that the Commission found PJM's existing and proposed market rules to be unjust and unreasonable because they allowed state-supported resources to affect prices in PJM's capacity auction, the Commission proposed a potential replacement rate that would have let LSEs remove from the auction individual, subsidized supply resources and commensurate amounts of load and reserves.[20] While the implementation details would have been important, this construct would have preserved the BRA's essential residual

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[18] *See generally PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (2011), *on reh'g and compliance,* 137 FERC ¶ 61,145, *on further reh'g,* 138 FERC ¶ 61,194 (2012), *review denied sub nom., N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014). While the changes approved by the Commission extended the MOPR to cover new, state-sponsored generation, it did so in response to requests that the Commission address state-mandated, gas-fired capacity contracts later struck down by the Supreme Court on preemption grounds. *See Hughes*, 136 S. Ct. 1288. Moreover, consistent with the original purpose of the MOPR, other changes that the Commission approved at the same time limited the MOPR to those resources deemed "more efficient" for purposes of suppressing capacity prices (i.e., natural gas-fired generators). 135 FERC ¶ 61,022, P 153. The Commission therefore avoided concerns regarding over-mitigation.

[19] 135 FERC ¶ 61,022, P 4.

[20] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236, PP 8, 160 (2018) (June 2018 Order).

character, while minimizing interference with state and LSE generation-development decisions. The December 19 Order inexplicably (and without serious effort at explanation) abandons this proposal.

The December 19 Order also selectively rejects, in arbitrary and unjustly discriminatory fashion, another underpinning of the market design: that competitive capacity offers reflect suppliers' *net costs* (i.e., gross cost minus non-capacity revenue) and that economic resources are the ones with the lowest net costs. The netting of expected revenue is at the core of the market's design for an obvious reason: the purpose of the auction is to meet regional reliability needs at the lowest reasonable cost to consumers, and the payments capacity suppliers need are defined by the difference between their total costs and the revenue otherwise available to them.[21] The failure to accord like rate treatment to all revenue sources in setting auction bids is contrary to this purpose.

Consider two hypothetical resources with the same fixed costs but different expected levels of non-capacity revenue. The resource with greater non-capacity revenue requires less money from the capacity market to enter or stay in operation, and therefore is willing to accept a lower capacity price. This means—by design—that competitive capacity offers will reflect more than differences in gross costs or location. It means—again by design—that competitive capacity offers reflect differences in the resources' ability to provide (and receive revenues for the provision of) products *other* than capacity.

[21] *See*, *e.g.*, PJM Reliability Pricing Model Letter at 7 (arguing that RPM was needed to fill the gap that existed between the cost of investment in efficient new generation and the net revenue available to generators in PJM "from all sources.").

If a resource can, for example, provide black start service, it will receive additional revenue that is unavailable to otherwise identical resources that cannot provide the service. And the additional expected revenue reduces the more capable resource's competitive capacity offer price.[22]

Economically, it makes no difference whether the non-capacity revenue comes from sales in PJM's energy and ancillary service markets, bilateral wholesale sales, out-of-market payments under PJM's tariff, retail energy sales, sales of physical generation by-products (e.g., steam, heat, carbon dioxide, coal ash, or urea), sales of state-created generation attribute credits or emissions allowances, or sales of other products or services (e.g., information technology or licensing of intellectual property). Under the PJM market design, capacity payments function as "make whole" payments,[23] and revenue from any source reduces the competitive price at which a generator is willing to provide capacity.[24] But the December 19 Order discriminates unjustly, and arbitrarily and capriciously, in its treatment of different revenues. The Order wrongly treats resources' receipt of some

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[22] Again, it is worth emphasizing that this difference results not from any difference in the resources' gross costs or in the quantity or location of the capacity the resources provide. The difference results solely from the resources' ability to make a profit selling other products and services.

[23] As PJM has previously explained to the Commission, "Capacity Market Sellers' revenues from energy and ancillary services markets alone may not be enough to encourage new supply investment. Accordingly, . . . the RPM capacity market provides an opportunity for market participants to earn enough revenue to cover their fixed and going- forward costs." *PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,151, P 14 (2016) (summarizing PJM brief).

[24] In describing the "Unit-Specific Exemption," the December 19 Order refers (P 16) to it as a "safety valve" that "helps to avoid over-mitigation of resources that demonstrate their offers are economic based on a rational estimate of their expected costs and revenues without reliance on out-of-market financial support through State Subsidies." But, as Commissioner Glick notes in his dissent, the Unit Specific Exemption "does not free resources from mitigation because they are still subject to an administrative floor, just a lower one." Glick Dissent P 44 n.84. Moreover, there is nothing "rational" about an estimate of costs and revenues that arbitrarily excludes a revenue source. The December 19 Order later recites (P 154) that energy and ancillary revenue offsets "reflect the revenues resources are actually likely to earn." State Subsidies are earned by eligible resources and should be treated identically to other revenue sources.

revenues as market-distorting and requiring mitigation, some revenues as market-distorting but not triggering mitigation, and other revenues as not market distorting.[25]

Under the Order, resources not subject to the MOPR—either because the revenues they receive have not been defined as "State Subsidies" triggering mitigation or because the Order exempts or grandfathers them—are free to offer capacity in the auction at any price, down to zero. In contrast, the Order's arbitrary targeting and exclusion of revenue it defines as "State Subsidies" prevents the disfavored resources from competing to offer capacity at prices reflecting their real net costs, and requires them to submit higher-priced offers less likely to clear. Indeed, the December 19 Order concedes that the exclusion of state subsidy revenues is arbitrary:

> We disagree with arguments that State Subsidies should be considered as revenue for either resources that have never cleared a capacity auction or existing resources, as this would defeat the purpose of the rate modifications directed in this order, which is to prevent State-Subsidized Resources from submitting uncompetitive offers as a result of State Subsidies.

Id. P 153. In other words, revenues received through state subsidies are excluded because the purpose of the Order is to effectuate their exclusion. The passage merely restates, but neither explains nor justifies, the Commission's assertion that offers net of certain revenues disfavored by the December 19 Order are "uncompetitive." While this tautology makes the Commission's intention clear, it is not a defensible rationale for the Commission's conclusion.

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[25] And then there are other revenues whose classification remains for further study. December 19 Order P 70 (Voluntary, bilateral contracts that result in revenues are not subject to the MOPR "at this time.").

The December 19 Order's sole rationale for not crediting the revenue of state supported generation attributes as compared to other kindred revenues, such as sales of emission allowances under EPA's acid rain program,[26] is that the state supported revenues arise from state laws that "are most nearly 'directed at' or tethered to the new entry or continued operation of generating capacity in the federally-regulated multi-state wholesale capacity market administered by PJM."[27] These newly invented standards have no basis in law and are, at bottom, nonsensical.

The December 19 Order attempts to support applying the MOPR where resources are receiving state subsidies "nearly directed at or tethered to" the FERC-regulated capacity markets by citing to the Supreme Court's decisions in *Oneok*[28] and *Hughes*.[29] But this claimed linkage fails because in neither decision does the Court refer to state subsidies "nearly" directed at or tethered to the FERC-regulated capacity markets. In *Oneok*, the Court upheld the application of state antitrust law to natural gas pipelines engaged in anticompetitive practices (such as false price reporting) because the "target" at which the state law aimed was not the federally regulated wholesale markets. This is an all or nothing analysis: either a state law is targeted at the FERC-regulated markets or it is not. The December 19 Order fails to explain how it could be the intent of a state law to "nearly" (or almost) target a FERC-regulated market. An intent to target the wholesale capacity market either exists and can be found in the state law or it does not. The same is

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[26] *See* 40 C.F.R. § 73.80.

[27] December 19 Order P 68 (quoting *Oneok*, 135 S. Ct. at 1602) (citing *Hughes*, 136 S. Ct. at 1299).

[28] 135 S. Ct. 1591.

[29] 136 S. Ct. 1288.

true of *Hughes*, in which the Court found the state generator support program preempted because it was tethered to the market in "condition[ing] payment of funds on capacity clearing the auction."[30] Again, this is an all or nothing test. It is nonsensical to speak of state laws that "nearly" include a legal compulsion of conditioning the payment of funds on capacity clearing the auction.

Tellingly, the December 19 Order identifies no specific state subsidy statute (or regulation) that suffers from the defect of being nearly directed at or tethered to the PJM capacity market. Instead, with limited exception, the December 19 Order impermissibly ascribes such an intent or effect universally and indiscriminately to any state law that affords a subsidy (or revenue stream) to state favored resources. This conclusory characteristic of being "nearly" directed at or tethered to the FERC-regulated capacity markets is so devoid of content as to be arbitrary and capricious. The December 19 Order's treatment of self-supply as a State Subsidy is illustrative. The Order inexplicably finds that the age-old practice of making retail rate payments to vertically-integrated state regulated utilities constitutes a state subsidy that is "nearly" directed at or tethered to the wholesale capacity markets. The Commission's say-so invocation of a phrase devoid of meaning does not constitute reasoned decision-making.

B. The Order proceeds from a mistaken premise contrary to Commission precedent.

According to the December 19 Order (P 17 n.38), the Commission "determined many years ago that the best way to ensure the most cost-effective mix of resources is selected to serve the system's capacity needs was to rely on competition." And, the Order

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[30] 136 S. Ct. at 1299.

asserts, "[t]hat model cannot work if we allow State Subsidies to distort the economic selection of adequate power supplies for the multi-state PJM region." *Id.*

There are at least two fundamental problems with these assertions. First, as shown above, the Commission decided many years ago that competition was the best way to supply the region's *residual* capacity needs.[31] Second, the December 19 Order errs by adopting a mistaken and unprecedented model of wholesale electric competition: one that requires nullifying—selectively and arbitrarily—the advantages and disadvantages conferred on various capacity suppliers by other state and federal laws.

The model adopted by the Order is simply not the law. The Nation's antitrust laws and federal competition policy are intended to protect "competition, not competitors."[32] While the Commission is not charged directly with enforcing antitrust laws, those laws "give understandable content to the broad statutory concept of public interest" the Commission is charged with protecting.[33] The "directives contained in [Sections] 205 [and] 206" to protect against undue discrimination with respect to any sale of electric energy for resale in interstate commerce are informed by the "responsibility to consider . . . the anticompetitive effects of regulated aspects of interstate utility operations." *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-59 (1973).

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[31] *See* 135 FERC ¶ 61,022, P 4 (describing RPM as being "for the procurement and pricing of unmet capacity obligations."); *accord* December 19 Order P 18.

[32] *Brown Shoe Co.*, 370 U.S. at 320; *Brunswick Corp. v. Pueblo Bowl-O-Mat*, *Inc*., 429 U.S. 477, 484, 488 (1977) (finding it "inimical to the purposes" of federal antitrust law to award damages "where the sole injury alleged is that competitors were continued in business, thereby denying [plaintiffs] an anticipated increase in market shares."). Indeed, the Supreme Court has questioned whether the "loss of windfall profits that would have accrued" had the competitors gone out of business "even constitutes 'injury' within the meaning" of the antitrust laws. *Brunswick Corp*., 429 U.S. at 488.

[33] *PJM Interconnection, L.L.C.*, 150 FERC ¶ 61,041, P 25 (2015).

That governmental action affects competitors' costs and revenues, and favors some competitors over others, does not make it anti-competitive; this Commission takes such actions every day.[34] State, local, federal, and international law confer myriad advantages and disadvantages on different generators and other capacity suppliers. As observed by former Commissioner Bay (who before that was the Commission's Director of Enforcement), a world "based on an idealized vision of markets free from the influence of public policies . . . . does not exist, and it is impossible to mitigate our way to its creation."[35] "The fact of the matter," he continued, is that:

> [A]ll energy resources receive federal subsidies, and some resources have received subsidies for decades.[36] Yet the MOPR is only concerned with state subsidies, not federal ones, though both can have a similar impact on markets. And even with respect to state conduct, the MOPR's review is incomplete at best.

Id. at 61,892-93.[37] Among other things, he observed, the MOPR does not "examine whether existing resources have previously benefited from a state subsidy." 158 FERC

[34] *See Tex. Gas Transmission*, *LLC*, 164 FERC ¶ 61,156, P 26 (2018) ("Although other pipelines . . . may potentially lose business as a result of [Commission-approved action], this is not the end of the analysis, as the antitrust laws were enacted for 'the protection of competition, not competitors.'"(quoting *Brown Shoe Co.*, 370 U.S. at 320)).

[35] *ISO New England Inc*., 158 FERC ¶ 61,138, at 61,892 (2017) (Bay, Commissioner, concurring). Commissioner Bay emphasized that "[t]rue attempts to exercise buyer-side market power (or monopsony power) would constitute anti-competitive behavior and should be addressed." But he disagreed with the "morphing" of the MOPR "from an examination of monopsony power to an examination of whether states have provided support or a subsidy to a resource that is selling into the capacity market." *Id.*

[36] U.S. Energy Information Administration (EIA), *Direct Federal Financial Interventions and Subsidies in Energy in Fiscal Year 2013* (2015), https://www.eia.gov/analysis/requests/subsidy/archive/2013/pdf/subsidy.pdf.

[37] *See also* Allison Silverstein, *If I'd Written the DOE Grid Study Recommendations*, Utility Dive (Oct. 2, 2017), https://www.utilitydive.com/news/silverstein-if-id-written-the-doe-grid-study-recommendations/506274/ ("Every type of energy resource today receives some type of support or subsidy. Oil and gas get depletion allowances, renewables get production tax credits, investment tax credits and R&D, nuclear generation gets insurance, R&D and construction work in progress, natural gas gets depletion allowances and R&D, and so on."); EIA, *Direct Federal Financial Interventions and Subsidies in Energy in Fiscal*

¶ 61,138, at 61,893 (Bay, Commissioner, concurring). In short, he explained, "the MOPR suffers from a troubling lack of coherence that calls into question the soundness of its underlying rationale." *Id.* While Commissioner Bay was discussing New England's market rules, the same now can be said of the MOPR provisions the December 19 Order directs PJM to adopt.

The Commission's pro-competitive goals neither require nor authorize it to nullify the benefits and burdens conferred on individual competitors or groups of them by other laws. In Order 888, the Commission's seminal act to open the electric power industry to competition, the Commission expressly disclaimed the obligation to try to "create a level competitive playing field among generators."[38] Instead, the Commission explained that "all power generation technologies have different costs," and "sellers come to the power markets with a variety of advantages and disadvantages" conferred by state and federal law.[39] The Commission's authority to remedy undue discrimination and promote competition does not extend to neutralizing these advantages and disadvantages to "equalize" costs or "ensure 'economic fairness.'"[40] "Such homogenization of

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Year 2016 (Apr. 2018), https://www.eia.gov/analysis/requests/subsidy/; Oil Change International, *Dirty Energy Dominance: Dependent on Denial—How the U.S. Fossil Fuel Industry Depends on Subsidies and Climate Denial* (Oct. 2017), http://priceofoil.org/content/uploads/2017/10/OCI_US-Fossil-Fuel-Subs-2015-16_Final_Oct2017.pdf.

[38] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 75 FERC ¶ 61,080, FERC Stats. & Regs. at 31,890 (Order 888), *clarified*, 76 FERC ¶ 61,009 (1996), *modified*, Order No. 888-A, 78 FERC ¶ 61,220, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[39] *Id.*

[40] *Id.*

competitors, or their costs, has never been a goal of the FPA."[41] Promoting wholesale competition means ensuring that the wholesale rules are fair and non-discriminatory. It does not mean attempting to nullify the wholesale market effect of economic benefits and burdens created by other laws.[42] And while that is true in general,[43] it is particularly true of benefits and burdens resulting from state or local laws regarding environmental protection. At the same time that Congress acted to open the wholesale electric industry to competition in the Energy Policy Act of 1992, Congress directed that "Nothing in this title . . . shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities."[44]

C. The Order violates the FPA, past Commission precedent, and is arbitrary, capricious, and unjustly discriminatory, in implementing the MOPR to target and impede selected state policies.

The December 19 Order dramatically, but incompletely and arbitrarily, expands the universe of resources barred from competing in the BRA on the basis of their real net

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[41] *Id.*

[42] *Id*. at 31,901 (Hoecker, Commissioner, concurring): "[S]tate authority is traditionally employed to ensure that power production conforms to local economic, environmental, and resource diversity policy preferences. . . . To the extent that state requirements to own or purchase a certain amount of generation from, say, renewable source are enshrined in utility supply portfolios, those states have direct influence on the economic and environmental consequences of energy consumption in that jurisdiction. Moreover, such requirements ought to be compatible with open access transmission. However, it will be important that state authority over resource procurement be exercised on a not unduly discriminatory basis. In other words, a PUC may not treat in-state and out-of-state suppliers differently. If access over the network is non-discriminatory in nature, the federal regulatory and constitutional interests are arguably satisfied.").

[43] *See* Protest of Clean Energy Advocates 206-07, *PJM Interconnection, L.L.C.*, Docket No. ER18-1314-000 (May 8, 2018), eLibrary No. 20180507-5222 (Affidavit of Robert Gramlich, explaining that "[p]rices have been deemed just and reasonable even when public policies affected them," and "FERC's regulatory framework has been to set market rules in a manner that accounts for public policies in the same way as other exogenous factors that impact markets.").

[44] Energy Policy Act of 1992, Pub. L. No. 102-486, § 731, 106 Stat. 2776, 2921 (1992).

costs and allowed to participate only with offers at or above inflated, administrative price floors. Before the Order, PJM's MOPR applied to and potentially repriced only offers for new natural gas-fired resources.[45] Going forward, the MOPR will continue to apply to new gas-fired resources. It also will apply to resources of any type, either new or existing, that receive revenue defined as a "State Subsidy," unless the resource is either grandfathered or exempt.[46] The Order defines a "State Subsidy" to be:

> [A] direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is (1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that (2) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce, or (3) will support the construction, development, or operation of a new or existing capacity resource, or (4) could have the effect of allowing a resource to clear in any PJM capacity auction.

Id. As explained below, this definition arbitrarily, capriciously, and unjustly discriminates as between "State Subsidies" and (1) federal subsidies, (2) other state subsidies, (3) revenue derived from selling physical generation byproducts (such as steam, heat, coal ash, or carbon dioxide), or (4) revenue derived from selling intangible products and services (such as intellectual property or information technology), including those created by state or federal law (such as surplus emissions allowances).[47] In any case, the Order

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[45] *See* December 19 Order P 21.

[46] *Id*. P 9.

[47] State cap-and-trade programs generally increase the costs of fossil-fueled resources, which must secure and retire allowances sufficient to cover their emissions. *See* section IV.C.4 below. Sometimes, however,

plainly and without justification treats revenue from sales of RECs less favorably than revenue from sales of federally-created emissions allowances. The Order also is arbitrary and capricious in allowing state-imposed environmental costs to flow through PJM's markets, thereby increasing wholesale costs, while prohibiting state-derived environmental revenue from flowing through and reducing wholesale costs.[48]

1. The December 19 Order's disparate treatment of capacity offers supported by governmental subsidies is unduly discriminatory, arbitrary and capricious, and otherwise contrary to law.

At the core of the FPA is a straightforward rule of law: similarly situated customers must be treated similarly. "The FPA 'fairly bristles' with concern over undue discrimination."[49] FPA Section 205 prohibits public utilities from granting any undue preference or advantage to any person or subjecting any person to any undue prejudice or disadvantage in the context of any sale within FERC's jurisdiction.[50] FPA Section 206 requires FERC to ensure that no rate or charge is unduly discriminatory or preferential.[51] The Commission has a "mandate under sections 205 and 206 of the FPA to ensure that, with respect to any . . . sale of electric energy for resale in interstate commerce by a

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generators have surplus allowances which they sell for a profit. That net revenue—just like the net revenue a renewable resource derives from selling renewable energy credits (RECs)—results from state law, and decreases the price at which the generator would be willing to sell capacity to PJM. The December 19 Order mitigates the offers from new renewable resources but is unclear as to whether the Commission would regard the net revenue from sales of state-created emissions allowances as a "State Subsidy" triggering mitigation. If the December 19 Order treats the net revenue from sales of RECs and sales of surplus emission allowances differently, it is unjustly discriminatory. *See* section IV.C.3 below.

[48] *See* section IV.C.4 below.

[49] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC ¶ 61,119, P 40, *order on reh'g and clarification*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g and clarification*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

[50] 16 U.S.C. § 824d(b).

[51] *Id.* § 824e(a). *See also St. Michaels Utils. Comm'n v. FPC*, 377 F.2d at 915.

public utility, no person is subject to any undue prejudice or disadvantage."[52] In subjecting some seller capacity offers supported by certain kinds of governmental subsidies to MOPR mitigation while exempting offers supported by other different governmental subsidies, the December 19 Order is contrary to the Commission's FPA obligations, and, as such, unsustainable. Our position is that subsidized resources should be treated identically: the receipt of neither federal nor state subsidies should trigger application of the MOPR. MOPR mitigation should be applied only to prevent the exercise of buyer-side market power, where a net buyer supports the sale of a resource's capacity in the BRA at a loss because its savings as a buyer (from the reduced clearing price applied to its net short position) will exceed its loss as a seller.

a) The December 19 Order unduly discriminates against seller capacity offers supported by State Subsidies as compared to seller capacity offers supported by other governmental subsidies.

The Order's replacement rate fails to ensure that similarly situated sellers can offer into PJM's mandatory capacity auction on the same rates, terms and conditions of service. Perhaps nowhere is this more evident than the December 19 Order's differing treatment of seller capacity offers from resources supported by State Subsidies as compared to offers from resources supported by federal subsidies.[53] By subjecting to the MOPR the capacity auction offers of certain existing and all new State-Subsidized

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[52] Order 888, FERC Stats. & Regs. at 31,669.

[53] We use the term "subsidy" or "subsidies" here for convenience, but emphasize that the December 19 Order defines "State Subsidy" so broadly as to sweep in revenue that ordinarily would not be described that way. This includes (by way of example, not limitation) revenue received by renewable resources for selling energy to retail utilities as a "result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law." December 19 Order P 9. It also includes revenue received by a generator for selling RECs to an LSE who uses them to show certify compliance with state Renewable Portfolio Standards or similar laws.

Resources—but exempting the offers of all federally subsidized resources—the December 19 Order materially and fundamentally violates the FPA's prohibition against undue discrimination and renders the newly-established rates unlawful.

There is no factual basis for this disparate treatment. The December 19 Order finds that, absent mitigation, seller capacity offers supported by federal subsidies have the same supposedly distortive and harmful impact on the PJM capacity market as the Order claims result from seller capacity offers supported by State Subsidies.[54] But the December 19 Order permits federally-subsidized resources to bid without mitigation while subjecting to the MOPR similar offers supported by State Subsidies.[55] And there is no doubt as to the impact of this distinction. As the December 19 Order concedes, allowing federally subsidized resources to bid without mitigation favors them over State-Subsidized Resources in competing for capacity market sales.[56]

The Commission justifies this disparate treatment on grounds that Congress's creation of a subsidy evidences its intent to advantage the recipient resources competitively, and that subjecting them to the MOPR would nullify federal law. But at the same time, the December 19 Order finds that applying the MOPR to state-subsidized offers would not nullify state action because the states can choose to have their ratepayers or taxpayers pay for these resources—regardless of whether they obtain PJM capacity market revenues.

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[54] December 19 Order P 89.

[55] *Id.*

[56] *Id.*

None of this withstands analysis. If subjecting federally subsidized offers to MOPR mitigation is a nullification of Congressional intent, the same must be true with respect to state-subsidized offers. Under Part II of the FPA, Congress reserved to the states the regulation of generation, including necessarily the ability to subsidize generation production. 16 U.S.C. § 824(b)(1). Conversely, if the December 19 Order fails to establish that subjecting federally-subsidized offers to MOPR bid mitigation is a nullification of Congressional intent, then the Order is both arbitrary and unduly discriminatory.

To be clear, this does not mean that the proper corrective action is to subject all capacity offers supported by governmental subsidies to the MOPR. Expanding the December 19 Order's sweeping definition of "State Subsidy" to encompass federal subsidies could well subject every PJM capacity offer to mitigation, moving PJM's auction even further away from true competition based on resources' actual net costs. The result would be an administrative construct that procures even more surplus capacity at even more excessive prices than will result from the December 19 Order. Expansion of the MOPR to encompass federal subsidies also is likely to trigger even more endless attendant litigation and deleterious market uncertainty. The record in this case shows that federal subsidies—including federal grant programs, research and development investments, and tax breaks that provide a "benefit" that "support the construction, development, or operation of a new or existing capacity resource, or . . . could have the effect of allowing a resource to clear in any PJM capacity auction"[57]—are wide-ranging

[57] December 19 Order P 67.

in scope and extensive in magnitude. In the words of former Chairman Bay, "[t]he pervasiveness of public policies that provide subsidies or impose costs on resources makes it futile to attempt to unwind them."[58] In short, there is no more of a case to be made to MOPR federally-subsidized resources than their state-subsidized counterparts. As Commissioner Glick's dissent to the December 19 Order cautions, "the conclusion . . . to be draw[n] from the record in front of [the Commission] is not that there is an urgent need to mitigate the effects of state public policies, but rather that [the Commission] should be taking a hard look at whether a mandatory capacity market remains a just and reasonable resource adequacy construct in today's rapidly evolving electricity sector."[59] If all federally-subsidized resources must be MOPR-exempt, then all State-Subsidized Resources must be as well.

The FPA permits differences in a public utility's rates, terms and conditions of service where they are based upon proper factual differences.[60] There is no adequate factual difference that justifies the differential treatment of state and federal subsidies adopted in the December 19 Order. The June 18 Order found that capacity bids from "supplier[s] that participate[] in the [centralized] PJM wholesale capacity market" that receive "out-of-market" state revenues posed an "untenabl[e] threat[]" to "the integrity and effectiveness" of PJM's centralized capacity auction.[61] The December 19 Order finds that market capacity offers supported by federal subsidies "distort competitive outcomes

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[58] *N.Y. State Pub. Serv. Comm'n*, 158 FERC ¶ 61,137, at 61,866 (2017) (Bay, Chairman, concurring).

[59] Glick Dissent P 67.

[60] *See e.g., St. Michaels Utils. Comm'n*, 377 F.2d at 916.

[61] June 2018 Order P 1 & n.1.

in the PJM capacity market in the same manner as do State Subsidies."[62] Yet the December 19 Order subjects to the MOPR only offers from State -Subsidized Resources, and not their federal counterparts. The December 19 Order's only justification for this difference is the unsupported and unsound assertion that federal law compels the Commission to do so.

The December 19 Order categorically exempts federally-subsidized offers on the ground that, were the Commission to do otherwise, it would "disregard or nullify the effect of [the] federal legislation" establishing the subsidy.[63] Indeed, the Commission finds that it is beyond its authority under the FPA to prevent "a PJM capacity resource [from] rely[ing] on a federal subsidy that provides the resource with a competitive advantage over other resources Congress has not chosen to assist in the same way."[64] The Order engages in no statute-specific analysis in support of the sweeping contention that *every* federal law providing a resource subsidy would be nullified or disregarded were the Commission to subject the resource's wholesale sales to the MOPR. But if the December 19 Order is correct on this point, then the same is true of all State-Subsidized Resources, meaning that they must likewise be MOPR-exempt.

It should be clear that when a state subsidizes a particular generating resource, it is acting pursuant to express federal authorization and consistent with Congressional intent. FPA Section 201(b) accords the states authority "over" all "facilities used for the generation of electric energy" except as otherwise specifically provided in FPA Parts II

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[62] December 19 Order P 89.

[63] *Id.*

[64] *Id.*

and III. 16 U.S.C. § 824(b)(1). When Congress enacted the FPA, it did so knowing that states were engaged in the economic regulation of electric generation—including generation in interstate commerce—and that under Section 201(b) they could, and almost certainly would, continue to do so. In 1932, in the seminal decision of *Utah Power & Light Co. v. Pfost*, the Supreme Court held that states could economically regulate electric generation, even when the electricity produced is transmitted in interstate commerce, because "the process of generation" is "essentially local."[65] In 1935, in drafting what became FPA Part II, and in response to the Court's decision in *Utah Power & Light Co.*, Congress considered affording the Commission authority over electric generation facilities that produce energy transmitted and sold at wholesale in interstate commerce.[66] Congress chose not to "usurp" such state authority.[67] In short, in the FPA Congress preserved states' authority to tax, subsidize, and otherwise economically regulate generation.[68] And though Congress undoubtedly is aware of State generation subsidies—including renewable portfolio standards that have been in place for decades and now exist in twenty-nine states plus the District of Columbia[69]—it has taken no steps to curtail them.

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[65] 286 U.S. at 181. In *Utah Power & Light Co.*, the Supreme Court found no Commerce Clause issue with Idaho taxing the generation of electric energy in state for sale to customers in multiple states. *Id*.

[66] S. Rep. No. 74-621, at 48 (1935).

[67] H.R. Rep. No. 74-1318, at 8 (1935).

[68] *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 205 (1983) ("Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States.").

[69] FERC, Div. of Energy Mkt. Oversight, *Energy Primer*, FERC, 52 (Nov. 2015), https://perma.cc/XPC8-8TQQ.

The only reasonable conclusion is that Congress intends to favor state-subsidized resources in like fashion to those subsidized under other federal statutes, or at least intends to allow states to do so. The December 19 Order never explains why resources subsidized by states must be subject to the MOPR, even though the FPA recognizes and preserves state authority to regulate generation, when resources subsidized by branches of the federal government under other law must be exempt.

b) If Congress did not intend for all federally subsidized resources to be MOPR-exempt, then the disparate treatment of governmentally subsidized resources is unduly discriminatory.

The December 19 Order's sole justification for exempting from the MOPR capacity offers supported by federal subsidies[70] is that to do otherwise would disregard or nullify "the effect of [other] federal legislation."[71] The assertion does not withstand scrutiny.

Absent express evidence of Congressional intent to the contrary, it is presumed that "the powers or directions under several [federal] acts . . . subsist together."[72] The December 19 Order fails to identify any federal law providing a resource subsidy that evidences a Congressional intent that the terms of the resource's offer into a FERC-

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[70] Meaning subsidies under federal law other than state subsidies provided for under Section 201(b) of the FPA.

[71] December 19 Order P 89.

[72] *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 504 (1936). The December 19 Order purports to rely upon the principle of statutory construction that the specific controls over the general and that later enacted provisions control over earlier ones. But because the December 19 Order fails to engage in any statute specific analysis, its reliance on these doctrines lacks any foundation. Its reliance on the specific as opposed to the general is unavailing because federal legislation providing for a resource subsidy, such as the Production Tax Credit, deals with matters unrelated to the regulation of federal wholesale markets under the FPA. And later enacted Congressional provisions unrelated to the FPA do not control or limit the scope of FERC's authority absent repeal by implication as discussed *infra*.

regulated centralized capacity market auction be exempted from FPA rate regulation.[73] The Commission identifies no instance where Congress stated its intent to "competive[ly] advantage [a federally subsidized resource] over other resources" by means of limiting the Commission's exclusive jurisdiction over wholesale sales in interstate commerce.[74] Repeal by implication is disfavored.[75] Accordingly, "when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict."[76]

The December 19 Order cites (P 10 n.28) Supreme Court authority that separate federal statutory schemes are to be reconciled unless unworkable. In *Silver v. New York Stock Exchange*,[77] the Court was faced with whether exchange practices regulated by the Securities Exchange Act were exempt from the reach of the federal antitrust laws. In finding no repeal by implication, the Court explained that:[78]

> The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and "[i]t is a cardinal principle of construction that repeals by implication are not favored." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); *see Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-67 (1945); *California v. FPC*,

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[73] The December 19 Order (P 89) incorrectly dismisses the question of whether Congress expressly declared its intent for a given federal subsidy to override the Commission's market rules as a matter beyond "this Commission's place." Failure to engage that question fatally undercuts the determination in the December 19 Order.

[74] *Id.*

[75] *Posadas,* 296 U.S. at 504.

[76] *Id. See also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (repeal by implication is not to be inferred "unless the later statute 'expressly contradicts the original act' or unless such a construction 'is absolutely necessary'" (quoting *Traynor v. Turnage*, 485 U.S. 535, 548 (1988)).

[77] 373 U.S. 341.

[78] *Id.* at 357.

> 369 U.S. 482, 485 (1962). Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.

While the Court's precedent establishes that any finding of repeal by implication turns upon a specific analysis of the statutory schemes at issue, the December 19 Order is devoid of any such assessment. Congressional intent is specific to individual pieces of legislation; the Order's attempt to ascribe intent wholesale to unrelated statutes is unsubstantiated and unsound.

For example, it defies reason to conclude that Congress's intent in creating the Tennessee Valley Authority (TVA) and authorizing sundry TVA projects is the same as its intent in providing for financing under the Rural Electrification Act or in authorizing the Production Tax Credit (PTC). In the absence of the requisite statutory analysis, it is not reasonable to find that subjecting capacity bids by TVA resources into the PJM capacity market would defeat the TVA legislation. TVA would go about its utility business regardless. Likewise, applying the MOPR to PTC subsidized resources in PJM would have no impact on the many PTC-subsidized resources nationwide that sell their production outside the PJM capacity auction.

Accordingly, there is no basis for the December 19 Order's conclusion that capacity offer mitigation would nullify federal legislation subsidizing certain resources but not state-exercises of FPA-preserved generation authority that do the same thing. And thus, the December 19 Order's failure to provide for equivalent treatment of capacity offers supported by state and federal subsidies is a fatal defect. The December 19 Order finds (incorrectly) that all offers supported by governmental subsidies distort the

market.[79] As regards the application of the MOPR to capacity offers supported by state subsidies, it rejects any materiality threshold either for the amount of the state-subsidized capacity offer or the amount of the subsidy itself.[80] We explain elsewhere in this petition why those views are off-base: why they are inconsistent with the auction's design as a residual market comparing resources' net costs; why revenue from selling clean energy or environmental attributes affects sellers' net costs the same way as other non-capacity revenue; and why the Commission neither can nor should try to nullify wholesale market impacts of advantages and disadvantages conferred on generators by a plethora of local, state, federal, and international laws. But if the Commission is going to act based on its fallacious reasoning, it must do so even-handedly. The same reasoning applies to capacity offers supported by federal subsidies, and because the December 19 Order fails to mitigate such offers, the resulting rate is necessarily unjust and unreasonable. As explained, the Commission's failure to subject capacity offers supported by federal subsidies to the MOPR is likewise unduly discriminatory.

We note that resolution of this concern has enormous implications. Billions of dollars in federal subsidies support the construction, development, or operation of capacity resources, and have or could have the effect of allowing a resource to clear in any PJM capacity auction.[81] For example, tens of thousands of megawatts (MW) of natural gas-fired generation are bid into the PJM capacity auction. That generation plainly benefits from low natural gas prices that flow in substantial part from "federal tax

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[79] December 19 Order P 89.

[80] *Id.* PP 98-99.

[81] *See* Glick Dissent P 28 (and references cited therein).

benefits for intangible drilling costs and for investment depletion related to oil and natural gas wells," estimated in 2015 to amount to $4.7 billion annually."[82] Similarly, the U.S. government in 2017 provided roughly $1 billion in tax credits to producers of "refined" coal, who pass on the savings to coal-fired electric generators.[83] It is likewise beyond reasonable dispute that the Price Anderson Act materially benefits nuclear units to operate and bid in the PJM capacity market by providing extensive liability coverage that commercial operators would otherwise have to supply and fund themselves. Overall, the federal government provides tens of billions of dollars in subsidies every year that benefit electric generators directly and indirectly, with most of that benefit historically going to fossil-fueled generators.[84]

The December 19 Order advances no legitimate reason for treating capacity offers supported by federal subsidies fundamentally different from such offers supported by State-Subsidies, nor could it. The undue discrimination is patent, and renders the December 19 Order unjust and unreasonable. Again, this is not to say that the proper course is to subject all such offers supported by governmental subsidies to the MOPR. Instead, the Commission should go back to the drawing board and address the problem afresh and without resort to undue discrimination in the regulation of similarly situated capacity offers.

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[82] Comments of the Institute for Policy Integrity at New York University School of Law 29-30 (Oct. 2, 2018), eLibrary No. 20181002-5281(citing U.S. Office of Mgmt. & Budget, *Progress Report of Fossil Fuel Subsidies* 1, https://www.treasury.gov/open/Documents/USA%20FFSR%20progress%20report%20to%20G20%202014%20Final.pdf. *See also id.* at 29-30 & nn.99-105 (and studies cited therein).

[83] *See* Brian C. Prest & Alan Krupnick, *How Clean Is "Refined Coal"? An Empirical Assessment of a Billion-Dollar Tax Credit*, *Resources for the Future* 1, Report No. 19-05 (rev. Nov. 2019).

[84] *See* EIA, *Direct Federal Financial Interventions and Subsidies in Energy in Fiscal Year 2016* (Apr. 2018), Tables 1 and 3, https://www.eia.gov/analysis/requests/subsidy.

2. The December 19 Order's differing treatment of capacity offers by federally subsidized resources as compared to State-Subsidized Resources leads to absurd results.

The December 19 Order's MOPR exemption for federally subsidized resources leaves unaddressed how capacity offers supported by resources that benefit from both federal and state subsidies should be treated. There are myriad such resources that bid capacity into PJM, such as wind farms supported by state RECs and federal tax credits, or nuclear units subsidized at the state and federal levels. Applying the literal terms of the December 19 Order, such offers appear to have been placed in the untenable position of being both subject to and exempt from the MOPR. That is an absurd result and the law does not countenance absurd results. Because it appears to be impossible to implement the December 19 Order's treatment of capacity offers that are supported by both federal and state subsidies, the Order is not in accordance with law and the resulting rates, terms, and conditions of service are unlawful.

Further, even if it were possible to treat dual-subsidized resources like Schrodinger's cat—both mitigated and not mitigated simultaneously, or perhaps mitigated in part, with only the state REC revenue backed out—such machinations likely would frustrate the intent of both the state *and* federal programs. Congress, when it enacts or reauthorizes a subsidy, does so cognizant of other subsidies available to the same resources, and it sizes or conditions the federal program to achieve an intended total amount of support.[85] The December 19 Order renders state support available only at the

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[85] *See, e.g.,* 26 U.S.C. § 45(b)(3)(A)(i)-(iv) (providing that the amount of the federal Production Tax Credit for a project for any taxable year shall be reduced to reflect "grants provided by the United States, a State, or a political subdivision of a State for use in connection with the project," "proceeds of an issue of State or

potential expense of forgoing PJM capacity auction revenue. Whichever revenue stream the resource forgoes, the December 19 Order will reduce the total revenue available apart from the federal subsidy. And that leaves just two options, both at odds with Congress's intent. Either the resource will receive less total revenue than Congress intended when enacting the federal subsidy, or Congress will have to increase the federal subsidy to make up the difference.

3. The December 19 Order's targeting of disfavored state subsidies and sparing of general economic development and siting subsidies is unduly discriminatory.

The December 19 Order excludes from the MOPR capacity offers that are supported by state subsidies to promote generic industrial development or local siting.[86] The December 19 Order nowhere finds that capacity offers supported by these legislative programs impact the market differently from capacity offers supported by other state subsidies. The December 19 Order instead finds that "the support at issue is available to all businesses and is not 'nearly directed at' or tethered to the new entry or continued operation of generating capacity in the . . . capacity market administered by PJM."[87] Those statements are unsupported and unsound. A brownfields development subsidy is not available, for example, to an off-shore wind project. More generally, every siting and parcel-development subsidy is economically sized and suited to some particular resource or set of resources. A variety of considerations may foreclose some resources from

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local government obligations used to provide financing for the project the interest on which is exempt from tax," "the aggregate amount of subsidized energy financing provided (directly or indirectly) under a Federal, State, or local program provided in connection with the project," and "the amount of any other credit allowable with respect to any property which is part of the project").

[86] December 19 Order P 83.

[87] *Id.*

eligibility, such as development subsidies for a parcel not situated near a gas pipeline or a valley parcel not suitable for a wind resource. In any event, the December 19 Order deems a state's purpose in subsidizing a particular resource is immaterial to its capacity market impact.

The December 19 Order's invocation of state subsidies "nearly directed at or tethered to"[88] the PJM capacity market is a category error. State subsidies are either preempted or not under the FPA. There is no "nearly." That the practical effect of a state subsidy may enable a resource to enter the market or continue to bid its capacity in the market is of no moment because the state is regulating state-jurisdictional production and not FERC-regulated wholesale sales.[89] The December 19 Order fails to explain, and cannot show, why a state subsidy intended to support economic development is not "nearly directed" at the wholesale market while a state subsidy intended to redress and ameliorate the harm of greenhouse gas emissions is so directed. The Commission is not relying on a principled distinction as among similarly situated capacity offers, but, instead, upon an undefined, invented term that is subject to application as the Commission sees fit. The December 19 Order's inclusion of defined State Subsidies and exclusion of state industrial development subsidies is unduly discriminatory, and the resulting rate unjust and unreasonable.

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[88] *Id.* P 68.

[89] *See Coal. for Competitive Elec. Supply v. Zibelman*, 906 F.3d 41, 53-54 (2d Cir. 2018).

4. The Order arbitrarily and capriciously allows state-imposed environmental costs but not state-derived environmental revenue to flow through the wholesale market.

The Order also is arbitrary, capricious, and unjustly discriminatory in allowing state-imposed environmental costs but not state-derived environmental revenue to flow through the wholesale market. If a generator incurs costs to comply with state environmental regulations, then the Commission routinely allows those costs to flow through wholesale markets and increase wholesale rates.[90] For example, fossil-fueled generators in PJM routinely include emission allowance costs among the fuel costs reflected in their energy-market offers.[91] Because PJM's energy and capacity markets are linked, including state-imposed environmental costs in energy-market offers means that those costs flow through both the energy and capacity markets. As PJM's market monitor has explained, "[n]et revenue is the equilibrating mechanism between the energy market and the capacity market."[92] "The net revenue used in capacity market calculations includes net revenue from energy and ancillary services markets."[93] Energy-market net revenues are "the difference between gross revenue from selling power at the relevant nodal LMP and marginal costs, which include the cost of fuel, short run marginal

[90] *See generally* Order 888, FERC Stats. & Regs. at 31,891 ("[L]egitimate costs of environmental compliance . . . should be reflected in jurisdictional rates to the extent prudently incurred.").

[91] *See* PJM Manual at 23-24. PJM also allows resources to include opportunity costs resulting from "operational limitations due to energy or environmental limitations imposed on the generating unit by Applicable Laws and Regulations." Thomas Hauske et al., *Opportunity Cost Calculator v2: Energy Market Opportunity Costs, Non-Regulatory Opportunity Costs*, PJM, 4 (Nov. 2015), https://www.pjm.com/-/media/etools/emkt/opp-cost-calc/emkt-opportunity-cost-calculator-v2-instructions.ashx?la=en.

[92] Capacity Markets in PJM at 57.

[93] *Id*. at 57 n.31.

operating and maintenance costs and emissions costs."[94] Thus, including emissions costs in energy-market offers decreases net revenue, and therefore increases the net costs reflected in capacity auction offers.

State-derived environmental revenue is the flip side of state-imposed environmental costs. States sometimes regulate in ways that require emitting resources to incur expenses to avoid or internalize the social costs of their emissions. Other times states regulate in ways that provide revenue to non-emitting resources in recognition of the social value of displacing those emissions. And sometimes states use both mechanisms in tandem.

The December 19 Order leaves unaffected the ability of emitting resources to include state-imposed environmental costs in their offers, which increases wholesale energy and capacity costs. In contrast, the December 19 Order for the first time excludes state-derived environmental revenue from affected resources' capacity offers, preventing them from reducing wholesale capacity costs. The December 19 Order offers no sound basis in law or policy for its different treatment of state-driven environmental costs, which increase wholesale rates, and state-driven environmental revenue which ought to reduce them.

5. As framed by the December 19 Order, the Competitive Entry Exemption is unjust, unreasonable, and unduly discriminatory.

The Competitive Entry Exemption, as set out in the December 19 Order, is unjust, unreasonable, and unduly discriminatory, for at least two reasons. First, the exemption is

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[94] *Id*. at 57.

unduly limited and discriminates unjustly as among resources receiving revenue through competitive mechanisms other than PJM's capacity auction. As structured in the December 19 Order, the Competitive Entry Exemption is available only to resources forswearing those revenues that the Order defines as "State Subsidies." The Exemption therefore inherits all the defects of that definition and is infected by all of its unjust discrimination. While the Order is unclear about this, it appears to treat as a State Subsidy the revenue earned by a resource through a competitive state clean-energy procurement—but not the revenue from a comparable procurement that is supposedly "fuel-neutral." *See* December 19 Order PP 73-74. If so, that is unjust, unreasonable, and unduly discriminatory.

The December 19 Order articulates no reason why fair competition in the capacity auction permits netting of revenue for other services only if all resources are similarly situated to compete to provide those services. And even if such a principle could be justified, the December Order does not apply it even-handedly. A state's procurement of emission-free energy from generators capable of supplying it is no more discriminatory and no less competitive than PJM's procurement of black start service or other ancillary services that only some generators are capable of providing. The December 19 Order does not regard the netting of ancillary service revenue as antithetical to fair competition in the capacity auction, even though only some potential capacity resources can also provide those ancillary services. The December Order holds state clean-energy procurements to a different standard, without any reasoned basis.

Second, the December 19 Order is unreasonable and unjustly discriminatory as to certain resources that use the Competitive Entry Exemption but later receive a State

Subsidy. If a currently existing resource claims the Competitive Entry Exemption for a delivery year but later accepts a State Subsidy for the year, it forfeits the right to capacity payments for that year only.[95] In contrast, if a new resource claims the Competitive Entry Exemption in its first year then subsequently accepts a State Subsidy, the December 19 Order not only conscripts that year's capacity payments; it bars the resource from receiving capacity payments potentially for decades.[96] The Commission asserts that its draconian response is necessary to deter gamesmanship and timing of subsidies, but neither explains its concern nor demonstrates why less severe penalties would be insufficient. As it stands, the Order discriminates without apparent justification between already-existing resources and new (or newly existing) resources that use the Competitive Entry Exemption.

6. If the Commission continues down this path, it should, at minimum, modify and clarify the definition of State Subsidy.

Aside from the arbitrary and unjustly discriminatory focus on certain state-derived benefits—which affect the market no differently than other, seemingly permissible benefits—the definition is unworkably vague and over-inclusive. As written, this definition appears to require mitigation of any offer from any resource that receives any of the four prongs enumerated:[97]

> [D]irect or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit

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[95] December 19 Order P 162.

[96] *Id.* The Order does not specify whether the death-penalty-triggering State Subsidy must be one received later in the first year in which the resource enters or whether a State Subsidy received years later, after the new resource becomes an existing resource, carries the same consequences.

[97] December 19 Order P 9.

> that is (1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that (2) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce, or (3) will support the construction, development, or operation of a new or existing capacity resource, or (4) could have the effect of allowing a resource to clear in any PJM capacity auction.

For example, because prongs (3) and (4) are preceded by the word "or," they could be read as independently sufficient bases for treating a benefit as a State Subsidy, even if prongs (1) and (2) are not satisfied. That reading, however, would be inconsistent with the body of the order, which makes clear that the Commission intends the MOPR to apply only to certain revenues derived from state law. Thus, if the Commission ill-advisedly holds to the course charted in the December 19 Order, it should revise the definition to clarify that all four prongs must be met for a financial benefit to be deemed a State Subsidy.

The Commission also should clarify that prongs (1) and (2) are not intended to cover payments or financial benefits that result or are derived from competitive procurements of commitments to serve default service load. Pursuant to state law, New Jersey conducts annual "Basic Generation Service" (BGS) auctions in which suppliers compete for the right to supply tranches of electric distribution companies' (EDCs) default-service load. Similarly, Maryland and the District of Columbia oversee competitive procurements for wholesale supply for their respective Standard Offer Service (SOS) loads. Winning bidders are paid an all-in price to provide full-requirements service (including capacity, energy, ancillary services, transmission, and any

other service PJM may require) for a percentage of the electric distribution companies' load. Suppliers are required to fulfill all the requirements of a PJM LSE and to satisfy the state's renewable portfolio standard requirements. Like other LSEs, BGS and SOS suppliers may have owned or contracted resources to offer into PJM's BRA to offset their obligations as purchasers. Reading the State Subsidy definition literally, one might conclude that the payments from the EDCs to the BGS or SOS suppliers, standing alone, could be treated as a State Subsidy rendering the LSEs' capacity resource offers subject to mitigation even in the absence of other revenue treated as such a subsidy. The Commission should clarify that BGS or SOS payments, standing alone, are outside the State Subsidy definition or qualify for the Competitive Entry Exemption.

Alternatively, the Commission should grant rehearing. Treating the EDC payments to BGS or SOS suppliers as a State Subsidy triggering mitigation of the BGS or SOS suppliers' PJM capacity auction offers would harm competition rather than protect it. It would subject BGS and SOS suppliers to unnecessary, purposeless, and unjustly discriminatory risks, which, ultimately, would mean needlessly and unreasonably high costs for New Jersey, Maryland, and District of Columbia retail ratepayers. The December 19 Order identifies no basis in law, fact, or Commission precedent for such a decision. To the contrary, the Commission has been careful in the past to preserve and not impede state authority to conduct competitive procedures to procure resources to serve retail load. *See* 18 C.F.R. § 35.27(b)(1).

D. The Order is unjust and unreasonable because it will cause PJM to procure excessive capacity at excessive prices.

The consequences of the December 19 Order's over-mitigation are dire. As we have explained, the Order will prevent thousands of megawatts of new and existing

resources from offering capacity into PJM's auction at the resources' actual net cost, i.e., taking into account the revenues they receive for providing, for example, clean energy and clean energy attributes in response to state initiatives. The Order will instead require PJM to re-price and artificially inflate the offer prices for those resources, and thereby remove low-cost supply from the capacity market.

Several predictable (and perhaps intended) consequences flow from these decisions. Some of the re-priced offers will not clear, depriving the resources of a major revenue stream. And consequently, some of those resources will not be built or will retire early. Those that are built will continue operating, less profitably or with states and retail ratepayers picking up more of their costs. Either way, the December 19 Order necessarily will diminish the effectiveness of the states' clean-energy initiatives and increase their costs.

To the extent the states' clean-energy initiatives continue notwithstanding the extra costs imposed on state ratepayers pursuant to the December 19 Order, those new resources will provide effective capacity and will contribute to PJM resource adequacy and reliability. By forcing PJM to reject those resources' low cost capacity offers and, if the repriced offers fail to clear, to ignore those resources' resource adequacy contributions altogether, the December 19 Order injures both PJM, which must buy more capacity than is needed to meet the region's reliability requirements, and the region's wholesale ratepayers, who will be compelled to pay the higher than necessary costs associated with buying excess capacity.

The Commission previously has recognized that this result is inefficient and unjust and unreasonable, and has therefore required regional transmission organizations

(RTOs) to accept price-taker capacity offers from resources that have been retained for reliability or fuel security reasons through out-of-market contract payments. In *ISO New England Inc.*,[98] for example, the Commission required the RTO to accept price-taker capacity offers from one of New England's largest generating resources even though the resource would be receiving substantial out-of-market payments under cost-of-service contracts. As the Commission explained:[99]

> If resources needed for fuel security are not entered into the FCA as price-takers, they risk not clearing in the FCA and their resource adequacy contributions to the system would not be counted. . . . [S]uch an outcome would result in a higher clearing price and a higher procurement quantity, which would create an inefficient and unreasonable market outcome.

When there are (or will be) potential capacity suppliers that will be able and willing to provide capacity regardless of capacity auction prices, the Commission has recognized that "including such resources in the [auction] as price takers" avoids such "artificial and inefficient" wholesale market outcomes.[100] Moreover, the Commission has held in such situations that allowing low or zero capacity offer prices "accurately reflects" the resource's "low going-forward costs"[101] and are "consistent with a competitive market outcome."[102] The December 19 Order provides no reasoned basis for departing from this precedent and requiring PJM to over-procure capacity at excessive prices.

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[98] 165 FERC ¶ 61,202 (2018).

[99] *Id*. P 85 (citation omitted).

[100] *Id.*

[101] *Id.* P 88.

[102] *Id.*; *accord. N.Y. Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,076, PP 79, 82-83 (2016); *Indep. Power Producers of N.Y. v. N. Y. Indep. Sys. Operator Inc.*, 150 FERC ¶ 61,214, PP 1, 2, 66, 68 (2015).

That result is especially unjust and unreasonable in light of PJM's already excessive reserve margins. "PJM's 2018 summer target reserve margin was 16.1%. The actual margin of excess power was more than twice that, at 32.8%, and the anticipated reserve margin for 2021, according to the North American Electric Reliability Corporation, is 45%."[103] In fact:[104]

> PJM today "has more excess reserves than the Electric Reliability Council Of Texas Inc. has total reserves," Joe Bowring, president of PJM's independent market monitor, Monitoring Analytics, said during S&P Global Platts' Financing U.S. Power Conference in October.
>
> . . . .
>
> Still, new capacity additions—specifically natural gas plants—continue to outpace new demand and retirements, and PJM ratepayers continue to be burdened with excess capacity well beyond required levels. Summer peak load in 2018 was approximately 147,000 MW, so at a 32.8% reserve margin, that's 24,549 MW of excess capacity on the system, above the 16.1% target reserve margin—more than the total generation capacity of Georgia.

Such excessive capacity margins are the exact opposite of what one would expect of the largest wholesale market in the world. One of the primary advantages of power pooling and power markets is supposed to be an increased ability to share reserves among participants and reduce the total quantity required.[105]

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[103] Stephanie Tsao & Richard Martin**,** *Overpowered: PJM market rules drive an era of oversupply*, S&P Global Market Intelligence (Dec. 3, 2019), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/54111666.

[104] *Id.*

[105] *See*, *e.g.*, *PJM Interconnection*, *L.L.C.*, 138 FERC ¶ 61,230, P 101 (2012), *vacated on other grounds sub nom. Ill. Commerce Comm'n v. FERC*, 756 F.3d 556 (7th Cir. 2014).

Expanded mitigation, like that adopted in the December 19 Order, will needlessly cost PJM ratepayers billions of dollars annually.[106] There is simply no good reason to inflict that outcome on PJM ratepayers.

CONCLUSION

For all of the foregoing reasons, the Commission should grant rehearing and provide relief as requested herein.

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[106] Glick Dissent P 50 ("[T]he mitigation scheme imposed by today's order will likely cause a large and systematic increase in the cost of capacity—at least 2.4 billion dollars per year.").

Respectfully submitted,

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January 21, 2020

CERTIFICATE OF SERVICE

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

Dated on this 21st day of January, 2020.

/s/ Scott H. Strauss
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