UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.	)))	**Docket No. ER21-2582-000**

PROTEST OF THE NRG COMPANIES

Pursuant to Rule 211 of the Rules of Practice and Procedures of the Federal Energy Regulatory Commission ("FERC" or "Commission"), the NRG Companies[1] ("NRG") respectfully protest PJM Interconnection, L.L.C.'s ("PJM") July 30, 2021 filing largely eliminating the Minimum Offer Price Rule ("MOPR") ("PJM Filing"). In its place, PJM proposes a meaningless MOPR that will not address the price suppression caused by out-of-market subsidies, leaving a gap in the PJM Tariff that PJM itself declared was unjust and unreasonable just three years ago.

In 2018, the Commission agreed and found that "subsidies allow resources to suppress capacity market clearing prices" to such a degree that the then PJM capacity market was no longer just and reasonable.[2] To remedy this, the Commission approved a comprehensive MOPR.[3] PJM, in offering the instant filing, has done a complete 180-degree turn, asking the Commission to eliminate the MOPR in all but name. This would leave the Tariff void of any mechanism to address price suppression caused by out-of-market subsidies. Robust retail markets and price protection for all customers rely on robust wholesale markets, including robust and workable capacity markets. Removing guardrails protecting against price suppression from

[1] For the purpose of this filing, the NRG Companies are NRG Power Marketing LLC and Midwest Generation LLC.
[2] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 at P 149 (2018) ("2018 Order").
[3] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) ("2019 Order").

the capacity market can only harm the competitive market in both the near and long-term. The Commission may not take such action without departing wholly from its 2018 finding.

PJM has not provided a justification for the substantial departure, nor has it provided changed circumstances to support such a turn. Accepting the PJM Filing would be contrary to both Commission and court precedent and an abdication of the Commission's duty under the Federal Power Act ("FPA"). For all the reasons discussed herein, NRG recommends that the Commission reject PJM's Filing. If so inclined to take further action, the Commission should require PJM to develop a comprehensive proposal that offers adequate protection from market power. The Commission should only accept a PJM filing to eliminate the MOPR, if and when PJM establishes a mechanism to adequately address price suppression in the capacity market.

I. BACKGROUND

A. NRG Companies

The NRG Companies are each subsidiaries of NRG Energy, Inc., which through its subsidiaries, engages in the sale of electricity and natural gas to residential, commercial and industrial customers, supported by NRG's wholesale generation. As an integrated power company, affiliates of the NRG Companies currently serve approximately 6.7 million retail customers and own approximately 23,000 MW of generation across the United States. Additionally, NRG, though its affiliates, provides power and natural gas to the business-to-business markets in North America, as well as retail services, including demand response, commodity sales, energy efficiency and energy management solutions to commercial and industrial customers.

Currently, the NRG Companies own approximately 5,000 MW of generation in PJM. However, as a result of the most recent PJM Base Residual Auction for the 2022 to 2023 delivery year, NRG Energy, Inc. announced the near-term retirement of a significant portion of its PJM coal generating assets – approximately 1,600 MW at three facilities:

- Indian River Unit 4 is an approximately 410 MW coal-fired generating unit in Millsboro, Delaware.[4]
- Will County Unit 4 is an approximately 510 MW coal-fired generation facility in Will County, Illinois.
- Waukegan Units 7 and 8 are coal-fired generation units with a combined capacity of approximately 682 MW in Waukegan, Illinois.

The Indian River unit has been in operation since 1980 and Waukegan Unit 7 and 8 and Will County 4 since 1958, 1962 and 1963, respectively.

B. MOPR History

The MOPR in its original form was included in the initial version of the Reliability Pricing Model implemented by PJM in 2007.[5] The initial PJM MOPR was intended to "address[] the concern that net buyers might have an incentive to depress market clearing prices by offering some self-supply at less than a competitive level."[6] The Commission found that the MOPR was "a reasonable method of assuring that net buyers do not exercise monopsony power by seeking to lower prices through self-supply."[7] In subsequent years, 2009[8] and 2011,[9] the existing MOPR was revised and continuously accepted by the Commission.

In 2018, the Commission issued an Order in response to both a complaint filed by generators and a Section 205 filing made by PJM and found that PJM's existing tariff was unjust

[4] On July 30, 2021, PJM identified reliability impacts resulting from the proposed deactivation of the unit.
[5] *See PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006).
[6] *Id.* at P 103.
[7] *Id.* at P 104.
[8] *See PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275 (2009).
[9] *See PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (2011), *Rehearing Order,* 137 FERC ¶ 61,145 (2011).

and unreasonable because it failed to protect the wholesale capacity market from out-of-market subsidies. Specifically, the Commission stated:[10]

> We find, based on the evidence in Docket Nos. EL16-49-000 and ER18-1314-000, et al., that PJM's existing Tariff is unjust and unreasonable and unduly discriminatory. It fails to protect the integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market support to keep existing uneconomic resources in operation, or to support the uneconomic entry of new resources, regardless of the generation type or quantity of the resources supported by such out-of-market support. The resulting price distortions compromise the capacity market's integrity. In addition, these price distortions create significant uncertainty, which may further compromise the market, because investors cannot predict whether their capital will be competing against resources that are offering into the market based on actual costs or on state subsidies. Ultimately, these problems with PJM's existing Tariff result in unjust and unreasonable rates, terms, and conditions of service.

In 2019, the Commission approved an expanded MOPR that, in addition to new entrant natural gas resources, applied to new and existing capacity resources that received, or were entitled to receive a state subsidy, unless the resource qualified for an exemption ("Expanded MOPR").[11] The Commission approved the expanded scope of the MOPR in response to efforts to provide out-of-market subsidies to new and existing resources "that threatened to depress market clearing prices below competitive levels."[12]

C. PJM Filing

In the present PJM Filing, PJM does a complete 180-degree turn from its prior MOPR filings and proposes to largely eliminate the current MOPR rules except in very narrow—and altogether unlikely-cases. The proposal would eliminate: (i) the current MOPR for new entrant natural gas resources effective with the 2023/2024 delivery year and (ii) the expanded MOPR

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[10] 2018 Order at P 150.
[11] 2019 Order at PP 37-38.
[12] *Id.* at P 39.

established in FERC's December 2019 Order to address out-of-market subsidies. Under the PJM proposal, the MOPR would potentially apply to two sets of resources.

First, the MOPR would apply only in instances of what PJM refers to as sell offers that are actual exercises of buyer-side market power. These are instances where PJM determines, or the seller certifies, that it has load interests and intends to use the generation resource to exercise buyer-side market power.[13] Specifically, PJM proposes "to define this term in the Tariff as 'anti-competitive behavior' by a Capacity Market Seller with a load interest of any kind, i.e., a 'responsibility for serving load within the PJM region,' whether through its own load service obligation, that of an affiliate, or through a contractual arrangement with a LSE 'for the overall benefit of the Capacity Market Seller's (and/or affiliates of Capacity Market Sellers) portfolio of generation and load or that of the directing entity with a 'Load Interest.'"[14]

Second, PJM will also file at the Commission and ask the Commission to make the determination in any instance where there may be sell offers for generation capacity resources that will receive material benefits from a state policy in exchange for the sale of an FPA-jurisdictional product *and* such support is conditioned on either the resource clearing an RPM Auction or the seller offering the resource at a specific price level.[15] Rather than directly applying the MOPR where a "bid to clear" requirement exists, PJM proposes that the Commission be tasked with making the determination via a Section 205 filing at FERC.

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[13] PJM Filing at 3.
[14] *Id.* at 23-24.
[15] *Id.* at 42-47.

II. PROTEST

A. PJM's Proposal to Eliminate the MOPR is Not Just and Reasonable

i. PJM's Proposal Renders the MOPR Meaningless

PJM accurately notes that it does not have to show the existing MOPR is unjust and unreasonable.[16] However, under the FPA, PJM does have to show that the proposed tariff without the MOPR, or anything meaningful to replace the MOPR, is just and reasonable. It has failed to do so. PJM recognizes that the market still requires a MOPR,[17] but nonetheless proposes a meaningless version of the MOPR.

In place of the existing MOPR, PJM proposes to apply the MOPR to (i) sell offers deemed to be an exercise of market power and (ii) sell offers based on resources receiving "Conditioned State Support" that includes a "bid and clear requirement" into the capacity auction. Neither of these measures offers any meaningful protection to the market against resources offering into the capacity market at below their costs.

First, in proposing that MOPR would apply to resources that themselves certify their intention to exercise seller market power, or to those offers for which PJM could discern the intent was that exercise, the proposed Tariff is both absurd and unreasonably vague. The Commission should understand that those promoting state sponsored subsidies or extracting subsidies from state government rarely announce themselves in terms of intending to suppress wholesale market prices. Clear intent rarely would be announced if proponents of state subsidies know they may skirt an important market rule merely by avoiding announcing this intent, and instead operating pretextually or worse. PJM's proposal is thus a regulatory construct that will invite obfuscation in state policymaking—even at a time when the most significant public

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16 *Id.* at 21.
17 *Id*.

corruption scandals in modern utility history have occurred in the context of the very state subsidies the MOPR addresses.[18] Such a subjective mechanism should not be tolerated by this Commission. A black-letter approach that takes a view of the *effect* subsidies have on the wholesale market's rate the Commission regulates is necessary, as the Commission previously found.

Second, PJM has included a more black-letter requirement around the application of the MOPR to resources receiving conditioned state support that includes a "bid and clear requirement." This element of PJM's proposal does not offer the market any additional protection since state policies that have this characteristic are unlawful under the Supreme Court decision in *Hughes.*[19] In *Hughes,* the Supreme Court found that "condition[ing] payment of funds on capacity clearing the auction" was a "fatal defect" and was thus, preempted by federal law.[20] PJM itself recognizes the "critique that this standard is the same one applied by the courts for determining whether a state policy is preempted by the FPA."[21] PJM's proposed Tariff revision is at best redundant, and an inappropriate attempt to reduce to administrative regulation a question that is a settled matter of law. Clearly, a superfluous provision in the Tariff does not address the 2018 Commission's determination—made after *Hughes*—that PJM rates without a mechanism to address non-preempted, but distortive state policies' price-suppressive effects are not just and reasonable. There is no need for the Commission to approve a vestigial MOPR.

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[18] *See* Department of Justice's actions regarding FirstEnergy in Ohio and Commonwealth Edison in Illinois: https://www.justice.gov/usao-sdoh/pr/firstenergy-charged-federally-agrees-terms-deferred-prosecution-settlement; See Deferred Prosecution Agreement, *United States of America v. FirstEnergy Corp.*, Case No.: 21-cr-00086 (filed July 22, 2021); https://www.justice.gov/usao-ndil/pr/commonwealth-edison-agrees-pay-200-million-resolve-federal-criminal-investigation.
[19] *See Hughes v. Talen Energy Mktg., LLC,* 578 U.S. ___, 136 S.Ct. at 1299 (2016).
[20] *Id.*
[21] PJM Filing at 43.

Further, the newly proposed limited MOPR would not offer any clear protection from any below-cost offers from subsidized resources beyond what already exists as a matter of settled law. As discussed above, since PJM's newly proposed MOPR only guards against subsidies with a bid and clear requirement and situations where capacity resources with load interests could suppress clearing prices for their benefit, there is nothing in PJM's proposal to address capacity market offers that are below a generator's costs. Under the current PJM proposal, a resource receiving an out-of-market subsidy could offer into the capacity market at zero, without recourse.

The newly proposed limited MOPR is not a serious attempt to address the potential price suppression caused by below-cost offers. It renders the PJM Filing unjust and unreasonable.

ii. PJM's Proposal Fails to Adequately Protect the Market and Creates an Unjust and Unreasonable Gap in the Tariff

A meaningful MOPR must protect against artificially low offers. The Commission is required to set rates for its regulated entities that are both just (compensatory) and reasonable (fair to the consumer).[22] The just and reasonable standard protects not just consumers from unreasonably high rates, but it also protects sellers from being required to provide service at unreasonably low rates. As the Supreme Court found in *Hope,* "[t]he rate-making process under

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[22] *See Farmers Union Cent. Exchange, Inc. v. Federal Energy Regulatory Comm.*, 734 F.2d 1486, 1502 (D.C. Circuit 1984) stating:

> When the inquiry is on whether the rate is reasonable to a producer, the underlying focus of concern is on the question of whether it is high enough to both maintain the producer's credit and attract capital. To do this, it must, inter alia, yield to equity owners a return "commensurate with returns on investments in other enterprises having corresponding risks," as well as cover the cost of debt and other expenses. . . . When the inquiry is whether a given rate is just and reasonable to the consumer, the underlying concern is whether it is low enough so that exploitation by the [regulated business] is prevented.

the [FPA] . . . , involves a balancing of the investor and the consumer interests."[23] That means that generators – both new and existing – must have a reasonable opportunity to recover their fixed costs and a fair rate of return on their investments.[24] Indeed, the Commission has acknowledged that "in a competitive market, [it] is responsible . . . for assuring that [generators are] provided the opportunity to recover [their] costs."[25]

Continuously allowing a bucket of resources the opportunity to bid into a capacity auction at a level below a reasonable estimate of their actual cost eviscerates any "reasonable opportunity" owners of existing generating facilities providing reliability service to PJM of earning a return on and of equity from the Commission-jurisdictional wholesale markets.[26] Permitting entire classes of new entrants to enter a market that is already oversupplied with capacity, without any form of mitigation – or even review – will crater the market. Yet that is exactly what PJM proposes here.

PJM makes this proposal in spite of the fact that in the 2018 Order, the Commission expressly found that "subsidies allow resources to suppress capacity market clearing prices" to such a degree that the PJM's capacity market was no longer just and reasonable.[27] Further, PJM itself recognized in 2018 that without any sort of protection from out-of-market subsidies, its tariff was unjust and unreasonable. In PJM's 2018 filing urging the Commission to take action

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[23] *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944).
[24] *See* 16 U.S.C. § 824d(a); *Hope,* 320 U.S. at 603 (1944); *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692–93 (1923).
[25] *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311 at P 29 (2005); see also, e.g., Price Formation in Energy and Ancillary Servs. Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators, 153 FERC ¶ 61,221 at P 2 (2015) (the "goals of proper price formation" include "ensur[ing] that all suppliers have an opportunity to recover their costs"); *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,196 at P 49 (2003) ("[W]e believe that competitive prices over the long run should recover both the fixed and variable costs of efficient generating units[,] and we fear investors may decline to invest in needed generation . . . if they do not see a reasonable expectation of recovering their costs.").
[26] *See Bridgeport Energy, LLC*, 113 FERC ¶ 61,311 at P29 (2005).
[27] 2018 Order at P 149.

to protect the capacity market from out-of-market subsidies, PJM exclaimed "[d]oing nothing, however, is not an option."[28] Now, a little more than three years later, PJM asks the Commission to do just that and to unwind its prior MOPR orders.

The thousands of pages of evidence and reasons set forth in Docket No. ER18-1314 demonstrating how out-of-market subsidies artificially decrease capacity prices resulting in an unjust and unreasonable rate, remain true. In the 2018 filing, PJM represented that the filing "demonstrate[d] that the time ha[d] come to fill a gap in the PJM Tariff, which currently ha[d] no way to address the adverse impacts of certain state subsidies on the PJM capacity market's ability to promote robust supply competition and send appropriate price signals."[29] PJM's 2018 Filing, along with an Affidavit of Mr. Adam J. Keech, Executive Director, Market Operations, "show[ed] that a subsidized zero-priced offer from that single plant would reduce capacity revenues for sellers of tens of thousands of megawatts of capacity in large portions of the PJM Region."[30] In his Affidavit, Mr. Keech likewise showed that "[s]ubsidized, below-cost capacity offers can result in significant and widespread clearing price reductions that are attributable to the subsidies."[31] Nonetheless, the present PJM Filing disregards these concerns.

The PJM Filing lacks any discussion of a generator's ability to provide service at reasonable rates in the PJM market. In stark contrast to the 2018 PJM Filing, where PJM noted that, "[a]s the Commission explained . . . , the ultimate goal of capacity markets 'is to produce a level of investor confidence that is sufficient to ensure resource adequacy at just and reasonable

[28] Capacity Repricing or in the Alternative MOPR-Ex Proposal: Tariff Revisions to Address Impacts of State Public Policies on the PJM Capacity Market, *PJM Interconnection, L.L.C.*, Docket No. ER.18-1314 (filed April 9, 2018) at pg. 17 ("2018 PJM Filing").
[29] *Id.* at 5.
[30] *Id.* at 16.
[31] *Id.* at 19; 2018 PM Filing, Attachment E Affidavit of Adam J. Keech on Behalf of PJM Interconnection, L.L.C. ¶ 6 ("2018 Keech Affidavit").

rates.'"[32] The 2018 PJM Filing also recognized that the impacts on suppliers of out-of-market subsidies and their effect on capacity prices are relevant under the FPA, which requires rates that balance "the investor and the consumer interests."[33] There are no such concerns addressed, yet alone raised, in the present PJM Filing.

The PJM filing points to an Affidavit of Professor Peter Cramton in an effort to suggest the concerns raised in 2018 about price suppression *may* be overstated.[34] Even if all of the assumptions and modeling done by Professor Cramton are taken at face value, at best the analysis shows that "there is no reliability difference" between the current MOPR and the proposed MOPR.[35] Whether or not there is a reliability difference between the existing MOPR and the proposed MOPR, that is not a refutation of PJM's 2018 assertions that out-of-market subsidies will suppress the *rates* of the market that the Commission is responsible for. Such conclusion completely ignores the fact that the FPA requires more than just providing reliability but to providing just and reasonable and unduly discriminatory rates.

B. PJM Fails to Justify its 180-Degree Turn in Advocating for the Need to Protect the Market from Subsidized Resources Three Years Ago to Now Proposing to Leave the Impacts of Such Resources Unaddressed

PJM has thrown in a variety of attempted justifications for the elimination of the MOPR in an effort to support its filing and its about-face position. However, none of these assertions amount to a justification to leave the market without protection from the price suppression caused by of out-of-market subsidies. PJM has proposed to eliminate the ounce of prevention as well as the pound of cure leaving the competitive market vulnerable and susceptible to actions the Commission has not yet evaluated.

[32] 2018 PJM Filing at 12.
[33] *Id.* at 32, fn. 86 (citing *Hope*, 320 U.S. at 603).
[34] PJM Filing at 16-18.
[35] *Id.* at 17.

i. States Withdraw From the Market

PJM expresses concern that the Expanded MOPR will lead states and utilities to withdraw from the capacity market. Specifically, PJM opines that the Expanded MOPR has led to "unnecessary conflicts between PJM's capacity market and state resource policies," which have the potential to cause significant loads to be removed from the market.[36]

First, the suggestion that the Expanded MOPR is causing egregious harm to the PJM market and concerns that Expanded MOPR would increase capacity prices and solidify the then current resource mix[37] are woefully contradicted by the results of the recent PJM Base Residual Auction for the 2022 to 2023 delivery year. As an example, in that auction the $50.00 MW-Day clearing price for RTO was the lowest price in the eight prior years and significantly lower than the 2021-2022 clearing price of $140.00 MW-Day.[38] Further, more solar and wind assets cleared the auction than in previous auctions and approximately 6,500 megawatts of coal generation did not clear the auction.[39] In fact, as a direct result of the PJM BRA results for the 2022 to 2023 delivery year, NRG has announced the retirement of 1,600 MW of its own coal fired generation in PJM prior to the next delivery year.[40] Thus, there is no evidence that the Expanded MOPR has harmed the capacity market.

Second, even assuming the concern is valid, a concern that some states and utilities will not like the rules and thus, leave the market is not an exemption to maintaining just and

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[36] PJM Filing at 6.
[37] 2019 Order, Dissenting Statement at PP 3-4 (Glick, Comm'r, dissenting).
[38] PJM, 2022-2023 Base Residual Auction Results, *available at*: https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2022-2023/2022-2023-base-residual-auction-report.ashx
[39] PJM, "RPM Commitment by Fuel Type", *available at*: https://pjm.com/-/media/markets-ops/rpm/rpm-auction-info/rpm-commitment-by-fuel-type-by-dy.ashx (reflecting 1,512 megawatts of cleared solar assets, while only 570 megawatts of solar cleared in the prior auction and 1,728 megawatts of wind assets cleared the most recent auction, as compared to 1,417 megawatts of wind clearing in the prior year.
[40] *See supra*, Section I.A.

reasonable rates. Under the FPA, the Commission has jurisdiction over rules affecting the rates of transmission or sale of energy in interstate commerce,[41] and the Commission has the duty to ensure that jurisdictional rates are just and reasonable. The market-based prices derived from capacity markets are just and reasonable only "where neither buyer nor seller has significant market power."[42] Failing to mitigate a state policy that ultimately suppresses capacity prices, which PJM's proposal does, would result in unjust and unreasonable rates.

ii. Failure to Deter State Subsidy Programs

PJM also expresses concern that "the Expanded MOPR has little chance of deterring state subsidy programs."[43] It was not and should not be the goal of Expanded MOPR to deter state subsidy programs, but rather the MOPR should protect the market from unjust and unreasonable and unduly discriminatory rates should states enact subsidy programs. States should remain able to choose whatever policies they deem necessary to fulfill the states goals, whether environmental, jobs, or other. However, if that state elects to provide financial support to certain generation resources or classes of resources within the wholesale market, the Commission is required under the FPA to maintain just and reasonable rates in the market and the wholesale markets should not allow uneconomic costs of those policies to spread to other suppliers and to customers in the state providing subsidies or other states.

iii. Double-Payment

PJM also tosses in a concern over double-payment,[44] which has been raised on multiple occasions in the various MOPR dockets, but found to be without merit. PJM suggests that the existing MOPR ultimately results in consumers in states where the subsidies originated paying

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[41] *See* 16 USC § 824d.
[42] *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990).
[43] PJM Filing at 7.
[44] *Id.* at 9.

twice, both for the excluded resource through the subsidy and for the resource committed through the capacity auction.[45] In the 2018 Order, the Commission itself recognized that while in the past the Commission has found it "acceptable or beneficial to avoid requiring customers to pay twice for capacity as a result of state policy decisions[,]" the "courts have concluded that it need not do so."[46] Specifically, the United States Court of Appeals for the Third Circuit has held that states "are free to make their own decisions regarding how to satisfy their capacity needs, but they 'will appropriately bear the costs of [those] decision[s],' . . . including possibly having to pay twice for capacity."[47]

If a state so chooses to subsidize its generation, it does so presumably because the state is choosing to have its ratepayers pay for something additional the state values. Here, the above market extra costs are being driven by a state's election to pay more to encourage certain outcomes that would not necessarily result from a marketplace that solves only for cost and reliability. If these states and PJM do want the market to solve for something more than this, PJM could make a Tariff filing that incorporates this externality—such as a carbon price or a market to price and acquire renewable energy certificates (akin to NRG's Forward Clean Energy Market concept or the New Jersey Board of Public Utilities Integrated Clean Energy Market proposal).[48] But PJM has not.

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[45] *Id.* at 9.
[46] 2018 Order at P 69.
[47] *N.J. Bd. Of Pub. Util. v. FERC*, 744 F.3d 74, 97 (3d Cir. 2014) (citing *Conn. Dep't. of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009).
[48] *See infra,* Section II.D. *See also*, The Brattle Group, "New Jersey Board of Public Utilities to Explore Resource Adequacy Alternatives Featuring Integrated Clean Capacity Market Framework by Brattle Consultants" (Feb. 3, 2021), *available at*: https://www.brattle.com/news-and-knowledge/publications/integrated-clean-capacity-market-a-competitive-market-for-powering-the-clean-electricity-future.

States should not be allowed to externalize the costs of their subsidy decisions onto competitive capacity market participants. Any concern about ratepayers paying for the attributes a state elects to value should not preclude the Commission from requiring PJM to implement the most economically sound mechanism to prevent the subsidized units from suppressing capacity prices. After all, undermining the efficiency of the PJM market will only result in demanding higher private capital rates of return if the market has been compromised or illiquid if it has become structurally unsound, increasing overall consumer costs.

iv. "Hermetic Seal"

Throughout the filing, PJM argues that to continue to apply the Expanded MOPR would be an attempt to '"hermetically seal" the capacity market from the reality of state actions—a path which is not sustainable and an over-correction that itself works against the determination of just and reasonable rates."[49] "Hermetic seals" are on one end of the spectrum and doing nothing, which this PJM Filing amounts to, is on the other end. In its 2018 Filing, PJM recognized that the U.S. Supreme Court noted that "organized electricity markets cannot expect to be 'hermetically sealed' from all manner of distortions that might make prices imperfectly competitive."[50] However, in 2018 PJM accurately concluded that "programs which target large-scale, unit specific resources represent a serious escalation in the status quo and threaten the longstanding balancing that has allowed PJM's markets to meet the Commission's 'workably competitive' standard for the organized wholesale electricity markets."[51] The same remains true today.

[49] PJM Filing at 11-12.
[50] 2018 PJM Filing at 15.
[51] *Id.* at 15-16 (citing *See*, e.g., *PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,053, at P 53 2005); Order No. 888 at 31,655 (stating that independent system operators "have the potential to provide significant benefits (e.g., to help provide regional efficiencies, to facilitate economically efficient pricing, and,

PJM could have offered any number of other constructive methods and tools to address the stated concerns above while maintaining some semblance of supporting efficient market prices. They did not. None of PJM's alleged concerns with the Expanded MOPR provide a justification supporting PJM's attempt to eliminate the MOPR and leave the market without protection from price suppression.

C. PJM Does Not Show "New Circumstances" Warrant the Elimination of the MOPR.

PJM suggests that other PJM capacity market rules reasonably ameliorate the risk, if any, of possible adverse outcomes from moving beyond the Expanded MOPR.[52]

First, PJM suggests the PJM Variable Resource Requirement Curve ("VRR") and its downward sloping demand curve help protect against possible exercise of buyer-side market power. The VRR curve and its downward sloping curve have been in place since the implementation of RPM in 2007,[53] and neither offers any new protection not previously present in 2018 or 2019.

Second, PJM makes an empty assertion that the Expanded MOPR does not account for the changed circumstances associated with the imminent implementation of PJM's Effective Load Carrying Capacity ("ELCC") rules. PJM reasons that ELCC's revisions to the capacity accreditation for intermittent resources will in turn limit the capacity auction price impacts of intermittent resources and this was not accounted for in the 2018 market analyses.[54] PJM fails to show how changing the capacity factors on a small subset of renewable resources could magically remedy the deleterious impacts on the capacity market of subsidized resources.

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especially in the context of power pools, to remedy undue discrimination and mitigate market power) and will further our goal of achieving a workably competitive market.").

[52] PJM Filing at 18.

[53] *See PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, at PP 99-109 (2007).

[54] PJM Filing at 19.

D. Alternative Path Forward

It seems as if PJM prioritized state policy above all else and has neglected its mandate to protect the market from unjust and unreasonable and unduly discriminatory rates. That is not the answer. While wholesale markets are evolving to better accommodate state policy, it is critically important that PJM not compromise functionality on behalf of its member states' and district's individual strategies. Rather than eliminate the MOPR altogether, the Commission should recognize that in order to fulfill its obligations under the FPA, as discussed in Section II.A above, and to protect the capacity market from price suppression, it should direct PJM to roll up its sleeves and come up with another solution. In evaluating the MOPR itself rather than the limited MOPR proposed in the present filing, PJM could consider a Tariff change that would evaluate whether the scale of effects on the wholesale market's rate necessitated the application of a MOPR. This approach would avoid the inherent subjectivity of weighing intent as currently proposed by PJM.

PJM took a two-step approach, address the MOPR first and figure out the rest later, which is untenable. Rather than undertaking a multi-step process and tackling MOPR and then considering a comprehensive review of the PJM capacity market or the potential for clean capacity and energy auctions within PJM,[55] the Commission should direct PJM to undertake a comprehensive approach. The Commission should reject PJM's Filing and encourage PJM to develop a solution to remedy the gap in the PJM Tariff if the MOPR is removed. If the Commission has concerns with the existing MOPR, it could exercise its authority under Section

[55] Letter from PJM Board to Stakeholders, dated April 6, 2021, *available at*: 20210406-board-letter-regarding-capacity-market-minimum-offer-price-rule-and-initiation-of-the-critical-issue-fast-path-process.ashx (pjm.com) (directing PJM stakeholders hold discussions to modify the MOPR and listing a host of issues to be subsequently pursued).

206 of the FPA[56] to direct PJM to establish a just and reasonable market design. NRG believes that a just and reasonable rate could be accomplished through various approaches but would require the Commission to give PJM clear direction on what would be acceptable.

NRG encourages the Commission to utilize more holistic market-based solutions that can address many of the underlying drivers behind the ongoing tension between state policy and wholesale electricity markets. For example, to the extent these tensions are driven by the desire for carbon reduction or other societal goals, NRG has offered in this and other forums a path—the Forward Clean Energy Market ("FCEM")—that relies on the power of competition and provides states direct access into governance to directly address these tensions. At its core, FCEM accommodates state-induced demand for low- or no-carbon electricity production, and relies on heads-up competition to determine the best, most efficient use of consumer dollars to meet those goals.

FCEM and similar constructs, like the New Jersey Board of Public Utilities' Integrated Clean Capacity Market Framework, advance concepts around regional markets for environmental state policy goals, and specifically rely on cooperation among the Commission and the states to achieve an efficient outcome. Choosing an approach that relies on cooperative federalism necessitates, at a minimum, consultation and possibly joint decision-making. There are multiple pathways forward that could enable the Commission and the affected states to consider the interdependencies of their policymaking and regulations. Whether via federal-state boards, delegated authority, or some other mechanism, coordination in the spirit of cooperative federalism can achieve the parallel goals of efficient regional markets with just and reasonable rates and ambitious state policies.

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[56] *See* 16 U.S.C. § 824e (2012) (stating that the Commission may act under Section 206 "upon its own motion or upon complaint").

III. CONCLUSION

For the aforementioned reasons, NRG respectfully requests that the Commission reject PJM's Filing.

Respectfully submitted,

/s/ Cortney Slager
Cortney Slager
Assistant General Counsel – Regulatory
NRG Energy, Inc.

Dated: August 20, 2021

Certificate Of Service

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

Dated at Atlanta, Georgia this 20th day of August, 2021.

/s/ Jennifer Hsia