ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 11-4245, *et al.* (consolidated for certain purposes)

NEW JERSEY BOARD OF PUBLIC UTILITIES, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

OPENING PROOF BRIEF ON BEHALF OF
CROSS-PETITIONERS/RESPONDENTS PJM POWER PROVIDERS GROUP
AND PSEG ENERGY RESOURCES & TRADE LLC

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Proof Brief Filed: September 28, 2012

CORPORATE DISCLOSURE STATEMENT

Pursuant to 3d Cir. L.A.R. 26.1.1 and Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned, counsel of record for PJM Power Providers Group ("P3"), hereby states as follows:

P3 is composed of the following: Calpine Corporation; DPL Energy, LLC; Edison Mission Group; EquiPower Resources Corp.; Essential Power, LLC; Exelon Corp.; GenOn Energy Management, LLC; IPR-GDF SUEZ North America, Inc.; NextEra Energy Resources, LLC; NRG Energy Inc.; PPL Corporation; and PSEG Energy Resources & Trade LLC ("PSEG"). The corporate disclosure statements for members of P3 are made separately herein.

Calpine Corporation ("Calpine") is a publicly-held independent power producer in the United States and Canada. The SPO Advisory Corp. and certain of its subsidiaries and affiliates own greater than a ten percent ownership interest in Calpine. Neither the SPO Group nor its upstream owners are publicly-held companies. Luminus Management LLC and certain of its subsidiaries and affiliates ("Luminus Group") also collectively own greater than a ten percent ownership interest in Calpine. Neither the Luminus Group nor its upstream owners are publicly-held companies.

The Dayton Power and Light Company ("DP&L") is an affiliate of DPL Energy, LLC and a subsidiary of DPL Inc. ("DPL"), which is, in turn, a direct wholly-owned subsidiary of AES DPL Holdings, LLC, which is, in turn, a wholly-owned subsidiary of The AES Corporation ("AES"). AES is a publicly-held energy and utility holding company. As the parent of DPL Energy, LLC, AES is a publicly-held corporation that will not be a party to this proceeding, but will have a financial interest in the outcome of this proceeding. China Investment Corporation owns approximately fifteen percent of AES.

Edison Mission Energy is a wholly-owned subsidiary of Mission Energy Holding Company, which is a wholly-owned subsidiary of Edison Mission Group Inc., which is a wholly-owned subsidiary of Edison International, a publicly-held energy and utility holding company. No publicly-held company owns more than ten percent of Edison International.

EquiPower Resources Corp. is a privately-held power generation company that owns and/or operates a portfolio of electric generating facilities in the Mid-Atlantic and New England Regions as well as in Texas and New York. EquiPower Resources Corp. is owned by Energy Capital Partners, a private equity firm focused on investing in North America's energy infrastructure.

Essential Power, LLC is a privately-held merchant generation company that owns and operates electric generating facilities in the Mid-Atlantic and New England regions.

Exelon Corp. ("Exelon") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and has its principal offices at 10 South Dearborn Street, Chicago, Illinois 60603. Exelon has no parent company, and no publicly-held company has a ten percent or greater ownership interest in Exelon.

IPR-GDF SUEZ North America, Inc. is a subsidiary of International Power plc, which is a publicly-held energy company and subsidiary of the global energy group GDF SUEZ. No publicly-held company owns more than ten percent of GDF SUEZ.

The GenOn Parties are GenOn Energy Management, LLC; GenOn Chalk Point, LLC; GenOn Mid-Atlantic, LLC; GenOn Potomac River, LLC; GenOn REMA, LLC; and GenOn Wholesale Generation, LP. P3 member GenOn Energy Management, LLC and the other GenOn Parties are each indirect wholly-owned subsidiaries of GenOn Energy, Inc. GenOn Energy, Inc. is a publicly-held energy company and does not have any parent corporation. No publicly-held company currently owns ten percent or more of GenOn Energy.

NextEra Energy Resources, LLC and its affiliate, NextEra Energy Generators, are indirect wholly-owned subsidiaries of NextEra Energy, Inc. (f/k/a FPL Group, Inc.), a publicly-held energy and utility holding company. The following subsidiaries of NextEra Energy, Inc. have issued publicly-held securities:

Florida Power & Light Company, FPL Group Capital Trust I, FPL Recovery Funding LLC, ESI Tractebel Acquisition Corp., ESI Tractebel Funding Corp., and NextEra Energy Capital Holdings, Inc (f/k/a/ FPL Group Capital Inc.). No other parents, affiliates, or subsidiaries of NextEra Energy Generators are publicly-held or publicly-traded. No publicly-held company has a ten percent or greater ownership interest in NextEra Energy, Inc.

NRG Energy Inc. is a publicly-held energy and utility holding company. T. Rowe Price, a publicly held company, is the beneficial owner of approximately 10.5% of the securities of NRG Energy, Inc. No other publicly held company has a 10% or greater ownership interest in NRG Energy Inc.

The PPL Companies are PPL Electric Utilities Corporation; Lower Mount Bethel Energy, LLC; PPL Brunner Island, LLC; PPL EnergyPlus, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL New Jersey Biogas, LLC; PPL New Jersey Solar, LLC; PPL Renewable Energy, LLC; and PPL Susquehanna, LLC. Each of the PPL Companies is a direct or indirect subsidiary of P3 member PPL Corporation, a publicly-held energy and utility holding company. No other publicly-held company has a ten percent or greater ownership interest in the PPL Companies, or in PPL Corporation.

PSEG is a wholly owned, indirect subsidiary of Public Service Enterprise Group Incorporated ("Enterprise"), a publicly-held energy and utility holding company. PSEG is a wholly owned, direct subsidiary of PSEG Power, LLC a direct subsidiary of Enterprise. No other publicly-held company has a ten percent or greater ownership interest in PSEG.

All of the foregoing commercial entities are, or represent the interests of, suppliers who sell energy, capacity, and ancillary services within the service territory of the transmission system operated by PJM. All capacity suppliers within the PJM footprint have a direct financial interest in the outcome of this proceeding.

Respectfully submitted,

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September 28, 2012

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JURISDICTIONAL STATEMENT

On February 1, 2011, PJM Power Providers Group ("P3") filed a complaint against PJM Interconnection, L.L.C. ("PJM") with the Federal Energy Regulatory Commission ("Commission" or "FERC") under section 206 of the Federal Power Act ("FPA"), 16 U.S.C. § 824e. P3 requested that FERC direct PJM to revise the minimum offer price rule ("MOPR") in auctions for electric generation capacity because the MOPR failed to prevent artificial suppression of capacity prices by state-sponsored, out-of-market subsidies to select generators. Ten days later, PJM filed tariff revisions with FERC under FPA section 205, 16 U.S.C. § 824d, proposing to adopt certain changes P3 requested in its complaint.

In its orders below, FERC accepted in part, and rejected in part, the revised rules PJM proposed. *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (Apr. 12, 2011) ("MOPR Order"), JA___-___, *reh'g denied*, 137 FERC ¶ 61,145 (Nov. 17, 2011) ("Rehearing Order"), JA___-___, *reh'g denied*, 138 FERC ¶ 61,194 (Mar. 15, 2012) ("Compliance Rehearing Order"), JA___-___ (collectively the "MOPR Orders"). P3 and PSEG Energy Resources & Trade LLC ("PSEG") timely requested rehearing of the MOPR Order on May 12, 2011 and timely petitioned for judicial review after the Rehearing Order on November 28, 2011. The petitions were transferred to this Court on December 16, 2011. This Court has jurisdiction to review FERC's orders under FPA section 313(b), 16 U.S.C. § 825*l*(b).

FERC's MOPR Orders are final and aggrieve all competitive capacity suppliers in PJM because the limited modifications FERC accepted to PJM's tariff still permit indeed, already have permitted state-subsidized resources to depress capacity prices to artificially low levels that are unjust and unreasonable.

STATEMENT OF ISSUES

Petitioners P3 and PSEG respectfully submit that FERC's determinations below include five errors in reasoned decisionmaking that render the MOPR Orders arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), and result in electric generation capacity rates that are unjust, unreasonable, and unduly discriminatory or preferential under FPA sections 205 and 206, 16 U.S.C. §§ 824d(a)-(b), 824e(a). The questions presented are:

1. Whether FERC erroneously permitted new generation resources to submit offers below 100% of benchmark cost in PJM capacity auctions, thus allowing *per se* uneconomic offers to depress capacity prices below just and reasonable levels. *See* MOPR Order at P 70, JA___; P3 Rehearing at 7-13, JA___-___; Rehearing Order at P 47, JA___.

2. Whether FERC erroneously allowed PJM to calculate MOPR offsets for sales of energy and ancillary services using only real-time market prices, thus systematically lowering MOPR values by deliberately disregarding known and measurable data indicating actual commitment patterns at lower prices in the day-

ahead market. *See* MOPR Order at P 46, JA___-___; P3 Rehearing at 14-17, JA___-___; PSEG Rehearing at 5-10, JA___-___; Rehearing Order at P 31, JA___.

3. Whether FERC erroneously allowed PJM to calculate MOPR offsets for energy and ancillary services based on the highest revenues historically received by any resource within a planning zone, thus systematically lowering MOPR values by deliberately disregarding known and measurable data indicating the price a resource would receive at its actual location. *See* MOPR Order at P 47, JA___; P3 Rehearing at 17-19, JA___-___; Rehearing Order at P 30, JA___.

4. Whether, contrary to precedent, FERC erred in permitting resources to escape mitigation forever after clearing only one capacity auction, thus allowing permanent distortion of capacity prices through selective participation in auctions during anomalous market circumstances. *See* MOPR Order at P 176, JA___; P3 Rehearing at 19-24, JA___-___; PSEG Rehearing at 5-6, 10-13, JA___-___, ___-___; Rehearing Order at PP 130-31, JA___.

5. Whether, contrary to precedent, FERC erred in imposing mitigation on new capacity resources that demonstrate they do not receive any direct or indirect out-of-market subsidies. *See* MOPR Order at P 123, JA___; P3 Rehearing at 24-26, JA___-___; Rehearing Order at P 75, JA___-___.

With the exception of the five errors outlined above, the MOPR Orders were correctly decided, and contrary arguments raised by other petitioners lack merit.

RELATED CASES AND PROCEEDINGS

No related cases are pending before this Court. Similar jurisdictional and policy questions are pending in *New England Power Generators Ass'n v. FERC*, Nos. 12-1060, *et al.* (D.C. Cir. docketed Jan. 27, 2012), on review of FERC's orders in a parallel complaint case regarding subsidized price suppression in the regional capacity auctions administered by ISO-New England, Inc.

One of the significant market power reforms at issue below was whether to exempt from scrutiny any capacity offers made by generation resources built to comply with state mandates. Regulatory initiatives in New Jersey and Maryland added urgency to this long-standing dispute, although the legality of those state regulatory initiatives was not at issue in these FERC proceedings.

New Jersey enacted legislation requiring state utilities to procure new generation capacity through standardized contracts that guarantee recovery of the difference between the contract price and PJM's capacity price. *See* S. No. 2381, 214th Leg. (N.J. 2011); P3 Complaint, Ex. 2, JA___-___. A complaint for injunctive relief against the New Jersey Board of Public Utilities ("NJBPU") challenging the constitutionality of the New Jersey statute on FPA preemption and Commerce Clause grounds is pending in New Jersey federal district court. *See PPL EnergyPlus, LLC v. Solomon*, No. 11-745, 2011 WL 5007972 (D. N.J. Oct. 20, 2011) (denying motions to dismiss). Challenges to the NJBPU's Long-Term

Capacity Agreement Pilot Program are also pending in state court. *See In re Long-Term Capacity Agreement Pilot Program*, Docket Nos. A-4467-10T1 & A-5192-10T1 (N.J. Sup. Ct. App. Div. docketed May 13, 2011).

The Maryland Public Service Commission ("MDPSC") directed Maryland utilities to issue requests for proposals that subsidize uneconomic participation in the PJM capacity auction through contracts for differences that effectively guarantee the price resources will receive for energy and capacity regardless of the clearing price in the PJM capacity auction. *See In re Whether New Generating Facilities Are Needed to Meet Long-Term Demand for Standard Offer Service*, No. 9214, Request for Proposals for Generation Capacity Resources Under Long-Term Contract (Md. P.S.C. Dec. 29, 2010) ("Maryland RFP"); P3 Complaint, Ex. 3, JA___-___. A complaint for injunctive relief challenging the Maryland RFP on FPA preemption and Commerce Clause grounds is pending in Maryland federal district court. *See PPL EnergyPlus, LLC v. Nazarian*, No. 12-1286 (D. Md. Aug. 3, 2012) (denying motions to dismiss). A state court appeal of the Maryland RFP is also pending. *See In re Petition of Calpine Corp.*, Nos. 24-C-12-002853, *et al.* (Md. Cir. Ct. Baltimore City docketed May 11, 2012).

Counsel are unaware of other related cases under 3d Cir. L.A.R. 28.1(a)(2).

STATEMENT OF THE CASE

This case concerns the rules governing auctions for electric generation capacity in the regional energy market administered by PJM pursuant to a FERC-jurisdictional tariff. One of these rules—the MOPR—determines the minimum price at which capacity may be offered in order to avoid or mitigate the exercise of monopsony market power by capacity purchasers. P3, a non-profit organization that supports the development of properly designed and well-functioning markets in the PJM region,[1] filed a complaint at FERC on February 1, 2011 contending that the MOPR provided inadequate protection against artificial suppression of capacity prices by state-sponsored, out-of-market subsidies. *See* JA___-___. The generators' complaint addressed several market power issues, including concerns raised by New Jersey legislation and a Maryland administrative order, both of which required state-regulated purchasers to enter contracts with suppliers conditioned upon the supplier's agreement to constrain its offers in PJM capacity auctions. *See id.*, Exs. 2 & 3, JA___-___. Based on those concerns, P3 requested an expedited ruling from FERC in advance of PJM's annual Base Residual Auction, or BRA, scheduled for May 2011.

[1] The viewes expressed in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue. For more information on P3, visit www.p3powergroup.com.

PJM responded to P3's complaint on February 11, 2011 by proposing a revised MOPR that adopted, in part, several modifications to the rule requested in P3's complaint. Unlike tariff changes requested in a complaint, which cannot alter an existing tariff without affirmative approval from FERC under FPA section 206, the revisions that a public utility like PJM proposes to make to its own tariff under FPA section 205 take effect by operation of law after sixty days unless FERC issues an order rejecting or suspending the new rules. *See* 16 U.S.C. § 824d(e).

P3's complaint and PJM's tariff filing were opposed by a variety of intervenors at FERC, including the state utility commissions and associated state agencies of New Jersey and Maryland, several electric cooperatives and municipal utilities along with their respective trade associations, and certain generators positioned to enter contracts under the new mandates imposed by New Jersey and Maryland. Intervenors who supported the MOPR amendments submitted by PJM, or the further modifications requested by P3, included the Pennsylvania Public Utility Commission, the PJM Independent Market Monitor ("IMM" or "Market Monitor"), several energy companies who are not members of P3, and two generator trade associations.

FERC issued its MOPR Order on April 12, 2011. JA___-___. FERC accepted in part, and denied in part, the tariff revisions proposed by PJM and directed PJM to submit a compliance filing to reflect clarifications and changes described in the MOPR Order. Different or additional modifications to the MOPR requested in the P3 complaint were accordingly denied or deferred. Several parties, including P3 and PSEG, timely requested rehearing of FERC's MOPR Order on May 12, 2011. *See* JA___-___; JA___-___. On the same day, PJM timely submitted its compliance filing, JA___-___, which several parties protested as inconsistent with the MOPR Order.

On June 13, 2011, FERC issued a tolling order granting rehearing for further consideration to prevent the MOPR Order from becoming final by operation of law. JA___-___. FERC also directed its staff to convene a technical conference to allow all interested parties "to fully explore the issues raised on rehearing regarding the applicability of PJM's MOPR to self-supply." *Id.* at P 6, JA___. The technical conference was held on July 28, 2012. *See* JA___-___ (Notice); JA___-___ (Agenda).

FERC issued its Rehearing Order on November 17, 2011. JA___-___. FERC granted in part, and denied in part, the requests for rehearing of the MOPR Order. *Id.* at P 1, JA___. FERC also accepted in part, and rejected in part, PJM's May 12, 2011 compliance filing and directed a further compliance filing. *Id.*

After the Rehearing Order issued, some parties chose to seek judicial review, while other parties filed further requests for rehearing at FERC to challenge FERC's determinations regarding PJM's compliance filing. P3 and PSEG timely petitioned for review on November 28, 2011 in the United States Court of Appeals for the District of Columbia Circuit, which transferred the petitions to this Court on December 16, 2011 following a multi-circuit lottery under 28 U.S.C. § 2112.

On March 15, 2012, FERC issued its Compliance Rehearing Order denying rehearing with regard to PJM's compliance filing. JA___-___. Following that order, a second petition for review filed by the Load Petitioners was consolidated with this proceeding on March 22, 2012.

STATEMENT OF FACTS

I. THE FEDERAL POWER ACT

Section 201 of the FPA, 16 U.S.C. § 824(b), gives FERC "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). This jurisdiction includes not only the transmission and sale of electric energy itself, but also sales or allocations of electric generation capacity (*i.e.*, the ability to produce electric energy). *See, e.g., Mississippi Power & Light Co. v. Mississippi ex rel Moore*, 487 U.S. 354 (1988); *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009) ("*Connecticut DPUC*"). "The Act allows regulated utilities to set rates unilaterally by tariff; alternatively, sellers and buyers may agree on rates by contract." *NRG Power Mktg. v. Maine Pub. Utils. Comm'n*, 130 S. Ct. 693, 698 (2010).

Section 205 of the FPA, 16 U.S.C. § 824d, directs FERC to ensure that all rates, terms, and conditions for the "transmission or sale of electric energy subject to the jurisdiction of the Commission" are "just and reasonable" and not unduly discriminatory or preferential. 16 U.S.C. § 824d. To achieve that purpose, FPA section 205 gives FERC broad authority to regulate any contract, rule, or practice "*affecting*" FERC-jurisdictional rates. *Id*. (emphasis added); *see, e.g.*, *Mississippi Power*, 487 U.S. at 374; *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (explaining that FERC's authority is "not limited to 'rates' *per se*").

Section 206 of the FPA, 16 U.S.C. § 824e, authorizes FERC to investigate, on complaint or on the agency's own initiative, whether existing rates are lawful. Like section 205, FERC's remedial jurisdiction extends to "any rule, regulation, practice, or contract *affecting* such rate[s]." 16 U.S.C. § 824e(a) (emphasis added); *see, e.g.*, *Connecticut DPUC*, 569 F.3d at 483-84. The complainant or FERC bears the burden to show that an existing rate or charge is "unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. § 824e(b); *see, e.g.*, *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002). If that burden is met, FERC "shall determine the just and reasonable rate . . . to be thereafter observed and in force, and shall fix the same by order." 16 U.S.C. § 824e(a). The effective date of a rate change "shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint." 16 U.S.C. § 824e(b).

II. PJM AND THE RELIABILITY PRICING MODEL

PJM is a regional transmission organization ("RTO") that provides transmission service and administers centralized wholesale electricity markets in a thirteen-state mid-Atlantic region that extends from New Jersey to Illinois and serves 50 million consumers. *See Maryland Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1284 (D.C. Cir. 2011); *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 473 (7th Cir. 2009). PJM owns no transmission or generation facilities, but provides transmission service using facilities ceded to PJM's operational control by the region's transmission owners. *Illinois Commerce Comm'n*, 576 F.3d at 473.

RTOs are voluntary organizations promoted by FERC to separate transmission ownership from control, so that owners cannot favor transmission of their own generation over that of their competitors. *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004). An RTO's control over the transmission system, combined with its administration of a centralized energy market, allows the RTO to ensure "least-cost dispatch" of generation resources to meet real-time demand at each location on the grid through the use of "locational marginal pricing," or LMP. *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 524-25 (D.C. Cir. 2010). LMP is designed to "promote efficient use of the transmission grid, promote the use of the lowest-cost generation, provide for transparent price signals, and enable transmission grid operators to operate the grid more reliably." *Id.* at 526 (quoting *California Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274 at P 63 (2006)).[2]

Like other RTOs, "PJM is responsible for preventing interruptions to the delivery of electricity in [its] region by ensuring that its system has sufficient generating capacity." *Maryland Pub. Serv. Comm'n*, 632 F.3d at 1284. To enforce this requirement, a mechanism must be adopted to ensure that load-serving entities ("LSEs")—the utilities that sell electricity to end-use consumers—have adequate economic incentive to purchase the reserve capacity that they need, and to provide incentives to generating utilities to build as much capacity as is needed to supply peak demand. *See Connecticut DPUC*, 569 F.3d at 479; *Central Maine Power Co. v. FERC*, 252 F.3d 34, 38 (1st Cir. 2001).

In August 2005, PJM filed a proposal to replace its old pricing model with what it called the Reliability Pricing Model ("RPM"), arguing that the old system did not sufficiently encourage investment in generation capacity. *See Maryland*

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[2] "With an LMP-based rate structure, prices are designed to reflect the least-cost of meeting an incremental megawatt-hour of demand at each location on the grid, and thus prices vary based on location and time. Each LMP consists of three components: (i) the cost of generation; (ii) the cost of congestion; and (iii) the cost of transmission losses." *Sacramento Mun. Util. Dist.*, 616 F.3d at 524. "Under the LMP system, [an RTO] takes into account the limits on available transmission capacity when determining the price of energy at each node in its transmission grid. This results in higher energy prices at nodes that require the use of congested transmission lines and lower prices in less congested areas." *Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239, 250 (D.C. Cir. 2007); *accord Blumenthal v. FERC*, 552 F.3d 875, 878-79 (D.C. Cir. 2009).

Pub. Serv. Comm'n, 632 F.3d at 1284. The old capacity construct required LSEs to procure specified amounts of capacity or pay a deficiency charge. FERC agreed with PJM that the old construct was "unjust and unreasonable as a long-term capacity solution, because it fail[ed] to set prices adequate to ensure energy resources to meet its reliability responsibilities." *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at P 5 (2006) ("RPM Order"). FERC found certain aspects of PJM's proposal just and reasonable, but set others for hearing. *See id.* at P 6.

After extensive negotiations, FERC conditionally approved a settlement setting forth the RPM rules now found in Attachment DD of PJM's tariff. *See PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006) ("RPM Settlement Order"). The RPM rules were further refined in a series of orders on rehearing of, and compliance with, the RPM Settlement Order. *See PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, *reh'g denied*, 121 FERC ¶ 61,173 (2007), *order on compliance*, 122 FERC ¶ 61,264 (2008). The resulting RPM capacity design has five principal features. *See* RPM Settlement Order at P 6.

First, every LSE in PJM "is required to supply or purchase resources to provide sufficient electricity to meet the reliability targets for its service areas." *Id.* PJM is therefore divided into several separate Locational Delivery Areas, or LDAs, generally defined by transmission constraints, within which available generation must be sufficient to provide reliable service. *See id.*

Second, "utilities can supply their energy needs through a combination of generation, transmission, and demand response, including energy efficiency." *Id.*

Third, capacity prices are "set through an auction market with a demand curve that reflects the reliability value of increased supply." *Id.* "Utilities that prefer not to participate in the auction market and that meet certain other requirements may procure a pre-determined amount of supply outside the auction sufficient to ensure reliability for their customers." *Id.* This alternative to the auction is called the "Fixed Resource Requirement option," or FRR. *Id.* at P 17.

Fourth, "[to] increase the opportunities for competition from new entry," annual auctions are held "three years in advance [of actual delivery] to ensure that reliability goals are met and that current generators as well as new generators can be assured of sufficient revenues to either retain their current investment in PJM, or invest in constructing new generating units." *Id.* at P 6. The three-year forward auction is called the Base Residual Auction, or BRA, and it is supplemented by a series of incremental auctions to reflect changes in expected availability or demand as the delivery year approaches. *See id.* at P 28.

RPM requires that "all available capacity must be offered in the Base Residual Auction and incremental auctions to receive a capacity payment or satisfy a capacity obligation." *Id.* at P 33. The auction's parameters are governed by a Variable Resource Requirement Curve, or VRR Curve, that reflects (i) the amount of capacity needed in each LDA and (ii) a price range based on the estimated Cost of New Entry, or CONE, for a new peaking unit in each LDA. *Id.* at P 16. The auction accepts capacity offers for each LDA starting with the lowest and produces a single capacity clearing price for all suppliers in each LDA. That single price is equal to the last offer necessary to meet the LDA's reliability needs.

Fifth, and most relevant to this case, RPM "includes a number of design features that discourage the exercise of market power and market manipulation generally." *Id.* at P 6. These rules are intended to protect competition as a whole by controlling both seller market power (*i.e.*, monopoly market power) and buyer market power (*i.e.*, monopsony market power).

All capacity sellers are bound by a strict price cap known as the Avoidable Cost Rate, or ACR. The ACR is set forth in Section 6.4 of Attachment DD to PJM's tariff. In its last compliance order in the RPM proceeding, FERC denied PJM and its Independent Market Monitor any discretion to exempt sellers from the price caps through an individualized review process. *PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,264 at PP 52-60 (2009).

The subject of this case is the mitigation rule applied to capacity buyers—the Minimum Offer Price Rule, or MOPR—which is set forth in Section 5.14(h) of Attachment DD to PJM's tariff. The MOPR applied to curb buyer market power has always been more relaxed than the ACR applied to curb seller market power.

III. THE MINIMUM OFFER PRICE RULE

In its original form, prior to this case, the MOPR employed three screens to identify and correct the exercise of buyer market power to suppress capacity prices below a competitive level: (i) a conduct screen; (ii) an impact screen; and (iii) an incentive or net-short test.

Under the conduct screen, PJM establishes a benchmark price to determine whether a sell offer may be too low to be competitive, and thus require mitigation. MOPR Order at P 6, JA____. The benchmark offers for different generator asset classes are based on each generator type's net costs of new entry, or Net CONE.[3] The conduct screen focuses on two types of readily-built gas-fired plants: a gas-fired combustion turbine (CT) or combined cycle turbine (CC). *See id.* at P 6 n.13, JA____. For those two kinds of units, an offer below 80% of Net Cone would fail the screen. *Id.* For other kinds of units, a screen failure would occur at 70% of the Net CONE for a combustion turbine. *Id.*

An offer that fails the conduct screen is subject to the impact screen, which is conducted by rerunning the auction to determine whether a new entry offer

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[3] In order to determine a new entrant's Net CONE, as opposed to its gross costs, PJM estimates the revenue that a new unit is expected to receive through sales of energy (*i.e.*, power generated for ultimate consumption) and ancillary services (*i.e.*, power generated at PJM's direction to keep the transmission system in balance). This is known as the Energy and Ancillary Services Offset, or E&AS Offset.

would reduce the clearing price by 20% to 30% in the relevant locational deliverability area, or $25/MW-day. *Id.* at P 6 n.14 , JA____.

The third screen was an incentive test, or net-short requirement. *See id.* at P 6, JA____. That test was designed to determine whether a capacity market seller and its affiliates have an incentive to depress prices due to a substantial "net-short position"—that is, buying substantially more capacity from the auction than they are selling—in the relevant RPM auction. *Id.* at P 6 n.15, JA____.

A sell offer that failed all of these screens would be rejected and replaced by an offer subject to a mitigated price—90% or 80% of the benchmark price, depending on the resource type. *See id.* at P 6, JA____. Thus, not withstanding this cumbersome process, an offer that failed the MOPR screens would still be permitted to submit a mitigated offer 10% to 20% below the benchmark price.

Importantly, however, MOPR review was entirely avoided by a wide variety of exceptions—most of which remain untouched by the proceeding below. First, the MOPR does not apply to any existing resource, only new entrants. *See id.* Second, the MOPR does not apply to any upgrades or additions to existing resources or to any of the following resource types: nuclear, coal, hydroelectric, or Integrated Gasification Combined Cycle facilities. *Id.* at P 6 n.16, JA____. Third, prior to the orders on review, the MOPR contained a blanket exemption for "resources undertaken pursuant to a state mandate." *Id.* at P 6, JA____. That exemption was eliminated below. *See id.* at PP 139-43, JA____. Fourth, the original MOPR only applied to the first auction in which a planned generation resource was offered, regardless of whether the resource cleared in that auction. *Id.* at P 158, JA____. Now, the MOPR applies only until a resource clears one auction, regardless of whether it is a BRA or an incremental auction. *See id.* at P 176, JA____. And finally, as the proceeding below revealed, the original MOPR appeared to provide an automatic exception for units "designated as self-supply," *i.e.*, units that an LSE sponsor intends to build in order to serve its own load. *Id.* at P 183, JA____. The orders below resolved that ambiguity by holding that there is no such exemption. *See id.* at PP 191-97, JA____-____.

IV. THE PROCEEDING BELOW

A. THE P3 COMPLAINT

The proceeding below began when P3 filed a complaint pursuant to FPA section 206, arguing that the MOPR was not an effective tool for identifying or curbing buyer market power and that it should be amended in several ways. *See* P3 Complaint, JA____-____. The complaint was supported by the expert testimony of Dr. Roy Shanker. *See id.*, Ex. 1, Shanker Test., JA____-____. Specifically, P3 argued that it was unreasonable for the MOPR conduct screen to be triggered only by offers more than 20% or 30% below the benchmark price; P3 requested instead that all offers below the benchmark price be subject to scrutiny and mitigation. P3 Complaint at 22, 29-34, JA____, ____-____. P3 argued that the impact test should be eliminated because it unreasonably allowed new offers to suppress prices by up to 30%, *id.* at 23, 36, JA____, ____, and P3 requested elimination of the defective net-short tests for similar reasons, *id.* at 41-47, JA____-____. In addition to requesting the revision or elimination of all three MOPR screens, P3 also requested elimination of the exemptions for self-supply and state-mandated resources, *see id.* at 48-54, JA____-____, as well as all exemptions based on resource type, *id.* at 54-56, JA____-____.

P3 further argued that it was unreasonable to limit mitigation to only one auction, contending that a resource should be required to clear two auctions before escaping mitigation. *Id.* at 25-26, 37, JA____-____, ____. As a way of streamlining the entire process, P3 advocated that FERC permit PJM to adopt a "No-Subsidy Off-Ramp" for any new resource whose sponsor affirms it will not receive any form of out-of-market subsidy or preferential treatment by state regulators. *See id.* at 34-36, JA____-____.

Finally, P3 requested expedited action on its complaint, given the advent of initiatives in New Jersey and Maryland to support new generation entry through out-of-market payments to generators. MOPR Order at P 2, JA____; *see supra* Related Cases and Proceedings at 4-5.

B. THE PJM TARIFF FILING

In response to P3's complaint, PJM filed tariff revisions under FPA section 205 that adopted several of P3's requested reforms, but declined others. PJM proposed to raise the conduct threshold to 90% of the benchmark price. *See* MOPR Order at P 53, JA____. PJM also proposed to eliminate the net-short requirement, *see id.* at P 76, JA____, and the impact screen, meaning that an offer would be mitigated if it failed the offer screen, *see id.* at PP 92-93, JA____-____. PJM proposed to replace the existing state-mandate exemption with one providing that FERC, not PJM, would decide whether to grant an exemption. *Id.* at PP 125-26, JA____-____. However, PJM contended that its tariff was not intended to have a self-supply exception and offered new language to clarify that point. *See id.* P 184, JA____.

Unlike P3, PJM proposed to require entities claiming capacity costs below the benchmark price to (i) make an FPA section 206 filing with FERC demonstrating the unreasonableness of applying the benchmark to its circumstances, *id.* at PP 109-10, JA____, and (ii) to calculate its expected operating expenses using a specified formula. *Id.* at PP 34-36, JA____-____. In addition, rather than eliminate resource-type exemptions, PJM proposed new exemptions for wind and solar resources. *Id.* at P 145, JA____.

Finally, as relevant here, PJM proposed to clarify the calculation of energy and ancillary services offsets under the MOPR in two ways. First, PJM proposed to base the energy and ancillary services offsets on real-time prices in the energy market. *See id.* at P 32, JA____. And second, PJM proposed to estimate energy and ancillary services offsets based on the highest revenues historically achieved by any resource within the relevant zone. *See id.* at P 33, JA____.

C. THE MOPR ORDER

Following the submission of several protests, answers, and cross-answers, FERC issued the MOPR Order on April 12, 2011. *See id.*, JA____-____. FERC accepted most of PJM's proposed revisions, but also rejected or substantially modified others. To the extent P3's protest sought more aggressive improvements to the MOPR than PJM had proposed, P3's complaint was denied. *See id.* at P 70, JA____.

FERC agreed to eliminate the impact test and the net-short test, making failure of the conduct test the basis for MOPR scrutiny. *See id.* at PP 86-90 (net-short), JA____; *id*. at PP 101-08, JA____. With regard to the conduct test, FERC accepted PJM's proposal to raise the conduct screen trigger to 90% of benchmark costs, rejecting P3's proposal to require review of all offers below the benchmark cost. *See id.* at P 70, JA____. FERC rejected PJM's proposal to require those claiming unit-specific costs below the relevant benchmark to make their case to

FERC through FPA section 206 filings. Finding PJM's proposal would pose a burden and risk of substantial delay, FERC ruled instead that the unit-specific cost review process should be administered by PJM and the IMM, which were directed to explain with specificity the type of information that should be included in such requests and the standards by which the requests would be evaluated. *Id.* at PP 118-22, JA____. FERC also rejected PJM's proposal to require that a resource clear three auctions before escaping MOPR scrutiny, as well as P3's proposal to require clearing two auctions. FERC held instead that it was sufficient for a resource to clear in only one auction—either a Base Residual Auction or an incremental auction—to escape MOPR review. *See id.* at P 176, JA____.

FERC held that the state-mandate exemption was unjust and unreasonable, finding that states retained the ability either to (i) establish in the PJM review process that the bids associated with state-mandated capacity resources were cost-justified; or (ii) seek an exemption by filing an FPA section 206 complaint alleging that the MOPR was unjust and unreasonable as applied. *See id.* at PP 139-43, JA____. FERC also eliminated automatic clearing for self-supplied resources, agreeing with PJM that this was a "clarification" of the existing tariff, and holding that automatic clearing was inconsistent with the purpose of the original MOPR in any event. *See id.* at PP 191-92, JA____-_____.

FERC accepted PJM's proposed revisions to the energy and ancillary service offsets over P3's objections—specifically, that PJM should have calculated those offsets based on day-ahead prices, rather than real-time prices, and should have used the price at a resource's actual nodal location, rather than the highest zonal price. *See id.* at P 46, JA____-____ (real-time price); P 47, JA____ (highest zonal price in zone). And finally, as relevant here, FERC rejected P3's proposal to allow resources to escape MOPR review through the No-Subsidy Off-Ramp by attesting that a unit's offer is not supported by out-of-market subsidies or other preferences. *See id.* at PP 117, 123, JA____, ____.

D. THE REHEARING ORDER AND COMPLIANCE REHEARING ORDER

Numerous parties, including P3 and PSEG, sought rehearing of the MOPR Order. In response to these requests, FERC convened a technical conference on July 28, 2011 "to fully explore the issues raised on rehearing regarding the applicability of PJM's MOPR to self-supply." Tolling Order at P 6, JA____.

FERC issued its Rehearing Order on November 17, 2011. JA____-____. FERC granted in part, and denied in part, the requests for rehearing of the MOPR Order. *Id.* at P 1, JA____. FERC also accepted in part, and rejected in part, PJM's May 12, 2011 compliance filing and directed PJM to submit a further compliance filing. *Id.* The Rehearing Order did not change FERC's fundamental position on any of the issues presented in this petition, thus P3 and PSEG petitioned for review alongside New Jersey, Maryland, and the Load Petitioners.

Load Petitioners sought rehearing of the portion of the Rehearing Order dealing with compliance issues. FERC denied those request for rehearing in its Compliance Rehearing Order issued on March 15, 2012. JA____-____. The Load Petitioners filed a second petition for review, which was consolidated with this proceeding on March 22, 2012.

STANDARD OF REVIEW

Judicial review of FERC orders is governed by FPA section 313(b), 16 U.S.C. § 825*l*(b), and section 10(e) of the APA, 5 U.S.C. § 706(2). As relevant to the arguments presented in this case, the APA directs the Court to "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (C) in excess of statutory jurisdiction . . . ; [or] (E) unsupported by substantial evidence . . . ." 5 U.S.C. § 706(2). To survive this review, FERC "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). FERC acts arbitrarily when, considering the record as a whole, it "entirely fail[s] to consider an important aspect of the problem, [or offers] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

The question at the heart of this case is whether the tariff modifications FERC accepted in the MOPR Orders are "just, reasonable, and not unduly discriminatory or preferential" under FPA section 205, 16 U.S.C. § 824d. Because that broad standard is "incapable of precise judicial definition," the federal courts generally "afford great deference to the Commission in its rate decisions." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008). Judicial deference to FERC is broadest when, as here, "issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission." *California Pub. Utils. Comm'n v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) (internal quotations and citations omitted). "The Commission's discretion is, however, bounded by the requirements of reasoned decisionmaking" described above. *American Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010). "Among other things, an agency's failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious." *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011) ("*PSEG Energy*") (internal quotations and citations omitted).

The Commission's factual findings are conclusive if supported by substantial evidence. 16 U.S.C. § 825*l*(b); *see* 5 U.S.C. § 706(2)(E). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," taking into account "whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951) (internal quotation marks and citation omitted); *accord, e.g.*, *Sultan Chemists, Inc. v. EPA*, 281 F.3d 73, 78 (3d Cir. 2002) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988)). The substantial evidence standard "can be satisfied by something less than a preponderance of the evidence." *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (internal quotations and citations omitted). The question on judicial review "is not whether record evidence supports [petitioner]'s version of events, but whether it supports FERC's." *Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003).

Finally, certain petitioners contend that the MOPR Orders exceed FERC jurisdiction under the FPA. In evaluating this claim, this Court "must apply the familiar *Chevron* analysis" described in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984):

> Under this analysis, if "Congress has directly spoken to the precise question at issue . . . the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If, however, the "precise question at issue" is one about

> which Congress has been either "silent or ambiguous," then a reviewing court must defer to the agency's statutory interpretation if it is "based on a permissible construction of the statute." *Id.* at 843.

Southwestern Pennsylvania Growth Alliance v. Browner, 121 F.3d 106, 116 (3d Cir. 1997) (parallel citations omitted); *see also, e.g.*, *Mississippi Power*, 487 U.S. at 380 ("In considering the Federal Power Act question we will defer, of course, to FERC's construction if it does not violate plain meaning and is a reasonable interpretation of silence or ambiguity.") (Scalia, J., concurring).

SUMMARY OF THE ARGUMENT

The MOPR was an improvement to PJM's buyer market power mitigation measures. In several important respects, however, it did not go far enough. In particular, FERC never expressed any rational basis for rejecting our proposals to fix five obvious problems with the mitigation measures ultimately approved, leaving critical loopholes in the mitigation scheme.

First, FERC erred by allowing resources to offer capacity at 10% below their benchmark costs rather than adopting a threshold for mandatory review of a capacity offer any lower than 100% of benchmark costs. This, in effect, means that buyer-side market power can suppress prices by 10% below the best available estimate of competitive prices, using out-of-market subsidies or other preferential treatment. The unrefuted record evidence shows that the 10% discount would allow subsidized suppliers to profit by artificially driving prices down more than

$300 million per year in a single PJM zone. FERC justified its decision as the result of balancing the administrative burden that the review of sub-benchmark offers would impose on sellers. But in so doing, FERC failed to provide a reason for why bids below 100% should *not* be considered *per se* uncompetitive and simply ignored all of the evidence of harm to competition that would come from the 10% threshold. FERC's mere disagreement without responding meaningfully to P3's arguments and evidence in support of the full-benchmark proposal "renders its decision arbitrary and capricious." *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005).

Second, FERC incorrectly ordered the calculation of energy and ancillary services offsets based solely on real-time prices, which results in a significant understatement of the benchmark value for review of a capacity offer. FERC's failure to incorporate day-ahead prices, even though PJM capacity resources are subject to a must-offer requirement in the day-ahead market, substantially distorts the results of the offset calculations. The real-time market is more volatile, far fewer resources are committed in that market, and it is subject to higher price excursions. Not surprisingly, the record evidence demonstrates that an offset calculation based solely on the real-time market significantly overestimates energy and ancillary services revenues. FERC accepted PJM's proposal because (i) it was based on PJM guidelines (which we demonstrated are wrong) and (ii) FERC wrongly claimed that we did not offer a proposal to mix day-ahead and real-time prices. The second point simply ignores the fact that we proposed PJM use the methodology that the market monitor employs—a solution that is both feasible and supported by precedent. FERC's refusal to address the evidence that the real-time only offset proposal is unjust and unreasonable, and its rejection of a feasible, just, and reasonable solution, is arbitrary and capricious.

Third, FERC incorrectly ordered energy and ancillary services offsets to be calculated in deliberate disregard for a resource's actual location. Rather, FERC accepted PJM's proposal to estimate energy and ancillary services according to the highest price in any zone with its CONE area. As a result, if a resource is located anywhere *other* than where energy revenues are highest, the PJM approach will overestimate the resource's energy revenues and underestimate the MOPR review benchmark. This feature of PJM's proposal has the clear tendency to prevent triggering the MOPR threshold. P3's proposed nodal approach—a more granular and accurate approach to estimate a resource's energy revenues—was unreasonably rejected. FERC wrongly asserted that it was not required to consider P3's proposal, mixing up the different requirements of FPA sections 205 and 206 and improperly imposing the higher burden of FPA section 206. It adopted the PJM zonal proposal based on its mistaken view that it was consistent with prior practice. But this is not the case. PJM's zonal proposal was—in PJM's own words—an "adjustment" to the traditional approach, purposefully designed to ensure that new entrants would not fail the MOPR screen. FERC's decision here is not reasoned because it allows the deliberate use of incorrect revenue estimates even though correct ones are available. FERC's choice here lacks any foundation in law or the facts, and requires remand.

Fourth, FERC unreasonably determined that a new resource should be permitted to avoid MOPR mitigation permanently after clearing only one auction. FERC's decision cherry-picked a subpart of the Market Monitor's proposal, but omitted a key condition—one that would have avoided violating the FPA prohibition on undue discrimination. There is testimony or evidence in support of FERC's proposed and adopted rule. Allowing a resource to procure discriminatory subsidies after clearing a single auction undermines the whole effort to protect against both buyer market power and seller market power. Moreover, FERC failed to distinguish this decision from the rule it adopted for New York—the same rule on which P3's proposal was based. FERC's failure to distinguish its prior decision regarding the NYISO and its refusal to engage in P3's argument requires remand. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 57 ("[A]n agency changing its course must supply a reasoned analysis . . . .") (internal quotation marks omitted). FERC's decision here also conflicts with its recent decision in *Astoria Generating Co. v. New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189 (2012), because it rejects the notion—which FERC accepted below—that there is any place for "discriminatory subsidies" in capacity auctions. This pointed conflict on the very same question presents a "particularly appropriate" situation for remand. *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 209 (D.C. Cir. 2011).

Fifth, FERC wrongly rejected a No-Subsidy Off-Ramp allowing each supplier to affirm, subject to FERC's substantial civil penalty authority, that its offers in PJM's capacity auctions are not supported by out-of-market subsidies or preferential state regulatory incentives. It is a fundamental premise of market economics, repeatedly underscored in the pleadings and testimony below, that a supplier who has received no subsidy or other discriminatory out-of-market payments has no incentive to suppress prices. If such a supplier offers a new resource into the capacity market, the purpose cannot be to exercise market power. FERC and judicial precedent both hold that FERC has no basis for imposing price mitigation absent the potential exercise of market power. *See Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 968-70 (D.C. Cir. 2005); *Wisconsin Pub. Power Inc. v. FERC*, 493 F.3d 239, 264 (D.C. Cir. 2007). FERC's sole basis for rejecting the No-Subsidy Off-Ramp was the misguided notion that PJM would find it just as difficult to define prohibited subsidies as to apply that concept in ad hoc review. Leaving aside the flaws in that mistaken rationale, FERC compounded its error by declining to acknowledge or distinguish precedent, holding that mitigation is inappropriate in the absence of an opportunity to exercise market power. This error alone requires remand. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 57.

ARGUMENT

I. FERC ERRED IN PERMITTING RESOURCES TO OFFER CAPACITY AT 10% BELOW BENCHMARK COST WITHOUT REVIEW

The MOPR sets a threshold based on the estimated Net Cost of New Entry ("Net CONE") for a new capacity resource. Under the old rule, resources could offer capacity at 70% or 80% of their benchmark costs—that is, at a 20% or 30% discount—without prompting an inquiry into the basis of such a presumptively uneconomic offer. Importantly, the MOPR threshold does not forbid offers below the benchmark, it merely "indicates the point at which the burden to prove that an offer is economic falls on the seller making the below-threshold offer." MOPR Order at P 71, JA___. Given that extraordinary leeway, the MOPR was never triggered before P3's complaint. P3 Complaint at 21, JA___. In its orders below, FERC found the prior rule unjust and unreasonable and accepted PJM's proposal to raise the MOPR review threshold to 90% of benchmark cost (that is, a 10% discount). *See* MOPR Order at P 70, JA____. In doing so, FERC rejected P3's argument that the threshold for MOPR review should be raised to 100% of the benchmark cost of new entry. *See id.*

In its initial order, FERC held "that the revised 90 percent threshold strikes a reasonable balance between protecting against unreasonable exercises of market power and recognizing the imperfection of administrative estimates and the burden of the cost justification process." *Id.* On rehearing, FERC continued to focus on the "administrative burden on sellers" imposed by the review process, as compared to evidence indicating substantial market harm:

> [W]e disagree that any bid falling below 100 percent of the benchmark must *per se* be recognized as uncompetitive, or that, by setting the conduct screen at something less than 100 percent, the Commission is endorsing the acceptance of some permissible level of buyer market power. The conduct screen is an estimate of new entry costs, and some resources will have legitimately lower costs than the threshold. While these resources can seek a unit-specific exemption, this process is not costless to the resource making the sell offer, and we therefore continue to hold that the 90 percent screen reflects a reasonable balance of these factors.

Rehearing Order at P 47, JA____. That is neither a reasoned, nor complete, response to the arguments raised by P3 and other competitive suppliers. FERC's decision flies in the face of the record evidence and simply ignores arguments that FERC's endorsement of price suppression by more than $300 million in the first year alone *vastly* outweighs any asserted "administrative burden" on sellers who submit offers more than 10% below Net CONE.[4]

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[4] Argument and testimony on this point was extensive. *See* P3 Complaint at 29-32, JA___-___; *id.* Ex. 1, Shanker Test. at 21:3-13, 22:23-24:4, JA___-___, ___-___; EPSA Comments at 14-16, JA___-___; P3 Protest at 3-9, JA___-___; *id.* Ex. 4, Shanker Supp. Test. at 18:22-19:8, JA___-___; PPL Protest at 5-7, JA___-___; PSEG Protest at 4-5, JA___-___; P3 Answer at 6-9, JA___-___; *id.* Ex. 8, Shanker Ans. Test. at 5:16-6:5, JA____-____; P3 Rehearing at 7-13, JA____-____; PPL Rehearing at 3-4, 6-8, JA____-____.

The MOPR Orders permit the free exercise of buyer-side market power to suppress prices by 10% below the best available estimate of competitive prices. While the new rule is a distinct improvement, it remains unreasonable: so long as exercising buyer market power through out-of-market subsidies or other preferential treatment is at all profitable, it will happen to the degree permitted by the tariff. *See* P3 Rehearing at 8-9, JA____-____. The testimony of the market monitor and the statements of state officials confirm this fact, *see* P3 Complaint at 61-64, JA___-___, and the unrebutted evidence in this case shows that a 10% discount allows subsidized suppliers to profit by driving prices down over $300 million per year in only one of PJM's several zones. *See* P3 Rehearing at 8 & n.3, JA____ (quoting Shanker Test. at 21:3-13, JA___). In addition to harming existing suppliers, who face the market without the benefit of any state-sponsored subsidies, this unjustified 10% discount will undermine PJM's capacity markets by making most, if not all, competitive new entry unprofitable. That point was repeatedly raised below, *see, e.g.*, Shanker Test. at 22:23-24:4, JA___-___; Shanker Supp. Test. at 15:12-16:3, JA____-____, and is well-recognized in the law. *See, e.g.*, *Edison Mission*, 394 F.3d at 969 ("If prices are suppressed in a competitive market, a natural inference is that suppliers who could otherwise profitably enter will be deterred from entry.").

It was not a legitimate exercise of reasoned decisionmaking for FERC to respond by saying "we disagree," which is all that FERC did. Rehearing Order at P 47, JA____ ("[W]e disagree that any bid falling below 100 percent of the benchmark must *per se* be recognized as uncompetitive, or that, . . . the Commission is endorsing the acceptance of some permissible level of buyer market power."). That is a conclusion, not a reason, and FERC's bare disagreement was not a lawful basis to brush aside facially legitimate arguments supported by strong testimony. "An agency's 'failure to respond meaningfully' to objections raised by a party renders its decision arbitrary and capricious." *PPL Wallingford*, 419 F.3d at 1198 (quoting *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001)).

Having dismissed evidence indicating that a 90% threshold would allow subsidized resources to suppress capacity prices by hundreds of millions of dollars, FERC went on to observe that the process of reviewing offers below the MOPR threshold "is not costless." Rehearing Order at P 47, JA____. FERC "therefore continue[d] to hold that the 90 percent screen reflects a reasonable balance of these factors." *Id.*[5] This purported balancing was an empty exercise because FERC never bothered to estimate what the review costs for below-threshold offers might

[5] FERC's exclusive focus on reducing "the administrative burden on sellers" here is, at best, difficult to reconcile with FERC's denial of the No-Subsidy Off-Ramp. *See infra* Part V.

be, much less contend such costs would remotely approach the record evidence of market harm. In any event, all existing units with significant capital reinvestment must submit their data to the IMM for ACR value to establish their bid cap for approval without exception. *See, e.g.*, RPM Settlement Order at P 106; *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318 at PP 140-56 (2007) (detailing the review process for capital recovery factors). So, burdensome or not, the review mechanism is already there. Moreover, FERC completely ignored arguments and evidence addressing this very point, which we described as the "asymmetry" argument.

P3 and others repeatedly argued, and Dr. Shanker repeatedly testified, that setting the trigger for MOPR review at full benchmark costs should not result in any harm to competitive prices, particularly where the benchmark triggers only review, not denial, and suppliers may freely attempt to justify particular offers at *any* amount below the benchmark that satisfies independent review by the market monitor and PJM.[6] The testimony showed that setting a benchmark slightly too high will have minimal, if any, ill effects on the market (even without the review safety valve); in contrast, a benchmark that is even slightly too low will

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[6] Contrary to FERC's implication on rehearing, neither P3 nor any other supplier ever contested the possibility that "some resources will have legitimately lower costs than the threshold." Rehearing Order at P 47, JA____. We only argued that allegedly lower costs should be subject to review to *confirm* that they are legitimate.

significantly undermine the market. *See* P3 Complaint at 31-32, JA____-____; Shanker Test. at 22:23-24:4, JA____-____; P3 Answer at 7, JA____; Shanker Supp. Test. at 18:22-19:8, JA____; P3 Rehearing at 10-13, JA____-____. As Dr. Shanker explained in his response to PJM's proposal:

> The impacts of over- and under-mitigation are hugely asymmetric. Undermitigation drives out private entry and destroys the market. Over-mitigation, on the other hand, may increase some administrative costs or—under my proposals—potentially shift supply among competing parties, but it does not destroy the market. In these circumstances, notions like the 10% "rule of thumb" should be left at the door. . . . I am aware of no similar circumstances where an uncertainty adder is used when it has such extreme consequences.

P3 Rehearing at 13, JA____ (quoting Shanker Supp. Test. at 18:22-19:8).

We agree FERC's orders must strike "a reasonable balance." Rehearing Order at P 47, JA____. But that means balancing the harms caused by a benchmark that is too high against a benchmark that is too low. FERC simply declined to do so, notwithstanding prior remand for the same error. For example, in *Edison Mission*, the court rejected FERC's orders accepting automatic mitigation in New York's wholesale energy market because FERC "gave no reason to suppose that it does not also wreak substantial harm [by] curtailing price increments attributable to genuine scarcity," and found that FERC's failure to address "the potential ill effects of forcing down prices absent structural market distortions is the epitome of agency capriciousness." 394 F.3d at 969. FERC's refusal to address asymmetric market harm is particularly troubling here because

P3's first specification of error on rehearing pointedly stated that FERC's "complete failure to engage the asymmetry argument below, *see* P3 Complaint at 31-32, will require remand on judicial review if left uncured on rehearing." P3 Rehearing at 5-6, JA___-___ (citing *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294-95 (D.C. Cir. 2000); *see also* PPL Rehearing at 7-8, JA____-____.

Finally, FERC's decision to set the MOPR at 90% of Net CONE, rather than the full benchmark price, wrongly focused on the notion that "seeking a unit-specific exemption poses an administrative burden on sellers." Rehearing Order at P 47, JA____; *see* MOPR Order at P 70, JA____. As P3 explained, FERC's emphatic solicitude for a narrow and self-selecting class of sellers—*i.e.*, those who choose to offer capacity somewhere between 90% and 100% of the benchmark price—conflicts with fundamental principles of law. *See* P3 Rehearing at 13, JA___. The Supreme Court has long instructed that the purpose of the law is "'the protection of *competition*, not *competitors*.'" *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (same); *see also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 n.14 (1984); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (a Sherman Act claim "must allege and prove harm, not just to a single competitor, but . . . to competition itself"). Here again, however, FERC simply chose to ignore our argument, as well as the Supreme Court's guidance, that the avoidance of market harm should have been FERC's primary concern.

II. FERC ERRED IN CALCULATING ENERGY AND ANCILLARY SERVICES OFFSETS BASED ONLY ON REAL-TIME PRICES

In order to calculate the actual bidding floor for a resource, the MOPR takes into account other revenue streams available to that resource, principally the revenue from energy sales. The higher those sales revenues are estimated to be, the lower a new resource's capacity offer is allowed to fall. For example, a new plant with an amortized cost of $300/MW-day that expects to earn $200/MW-day from energy sales could offer to sell capacity for $100/MW-day. In combination, those sales would allow the plant to earn back its costs. However, a plant's energy revenues will differ, sometimes substantially, depending on whether it is dispatched in the day-ahead market (which tends to meet basic demand) or the real-time market (which tends to supply shortfalls from the day-ahead market at higher prices). Notwithstanding this demonstrable difference, FERC ordered that the MOPR offset for sales of energy and ancillary services would be based exclusively on real-time Locational Marginal Prices ("LMPs"). *See* MOPR Order at P 46, JA____-____; Rehearing Order at P 31, JA____.

FERC's decision "to calculate energy and ancillary services revenue offsets based solely on real-time prices," Rehearing Order at P 31, JA____, deliberately disregards known and measurable data concerning actual resource commitment patterns and prices. This methodology profoundly impacts the evaluation of resource costs under the MOPR because FERC's chosen method will "significantly *overstate* the [energy and ancillary service] revenues and thus significantly *understate* the benchmark value for triggering mitigation associated with the potential exercise of buyer market power." PSEG Rehearing at 8, JA___.[7]

Dr. Shanker demonstrated that the use of real-time revenue estimates results in substantial error because "[r]eal time prices are subject to material excursions on the high side." Shanker Supp. Test. at 22:5-6, JA___. This is true because "PJM has a 'must offer' policy for capacity resources in the day ahead market," *id.* at 22:7-8, JA___, which severely limits opportunities to participate in the real-time market at higher scarcity-driven prices. *Id.* at 22:7-8, JA___; *accord* P3 Protest at 10, JA___; PSEG Rehearing at 6-7, JA____-____. The Market Monitor's analysis confirmed this fact, showing that combined-cycle resources would actually be committed in the day-ahead market during 94% of the hours PJM's model assumed

[7] The record developing this point is substantial. *See* P3 Protest at 14-17, JA___-___; Shanker Supp. Test. at 21:14-26:10, JA___-___; PSEG Protest at 8, JA___; IMM Comments at 17, JA____; P3 Rehearing at 7-13, JA____-____; PSEG Rehearing at 5-10, JA____-____; *id.*, Ex. A., DePillo Aff., JA____.

they would be dispatched in the real-time market. IMM Comments at 17, JA____; *see also* DePillo Aff., JA____ (reporting roughly 90% commitment of PSEG's combined-cycle resources in the day-ahead market).

The resulting value suppression is very large: approximately $24/MW-day on average and as high as $53/MW-day in PJM's most constrained zone. *See* P3 Protest at 11, JA____ (quoting Shanker Supp. Test. at 24:7-25:2, 25:16-26:2, JA____-____). "This amount would be in the range of 10% to 20% of the price mitigation benchmark and thus represent values that could cause significant market distortions." PSEG Rehearing at 8, JA____.

Notwithstanding the unrebutted evidence that using real-time prices wildly overestimates energy and ancillary service revenues, FERC did not "find PJM's reliance on real-time prices unreasonable" and held that P3 and PSEG "have not established a sufficient record for [FERC] to find that PJM's proposal is unjust and unreasonable nor to establish a day-ahead method as just and reasonable." Rehearing Order at P 31, JA____.[8] Both conclusions are deeply flawed and unsupported by any evidence, much less substantial evidence.

[8] We focus only on the language in the Rehearing Order because FERC walked back on its original rationale. In the initial order, the only reason FERC gave for accepting PJM's proposal was that PJM used the "same basic methodology for [combustion turbine] and [combined-cycle] units that PJM uses to produce the Net CONE for a [combustion turbine] for RPM's [VRR] Curve." MOPR Order at P 46, JA____. On rehearing, however, FERC clarified "that deviations from

The sole reason FERC gave for accepting PJM's proposal was that it "is consistent with PJM's [Variable Resource Requirement ("VRR")] Curve guidelines." Rehearing Order at P 31, JA____. That is no answer to our argument that PJM's guidelines are wrong.

FERC also incorrectly claimed that "[n]either P3 nor PSEG provided a specific proposal for an appropriate mix of day-ahead and real-time prices." *Id.* That is not true. Our argument rested on a simple principle: "If a resource would have been dispatched in the day-ahead market," which is almost always the case, "the energy revenue offset should only reflect revenues at day-ahead market prices." P3 Protest at 11, JA____. To enforce this simple principle, we clearly proposed—twice—that PJM use the very same methodology "the market monitor *already employs* . . . to calculate thresholds *for seller-side* market power mitigation." *Id.* (emphasis added) (citing Shanker Supp. Test. 23:19-28, JA____); P3 Rehearing at 16, JA____ (same); *see* Shanker Supp. Test. at 26:7-10 (observing "that the IMM has all this information and can readily produce exact results").[9]

[combustion turbine] methodologies may be appropriate as the VRR Curve does not use [combined-cycle] units as the reference unit." Rehearing Order at P 28, JA____.

[9] P3's position was no surprise. Before this case began, P3 made the same proposal in 2010 when FERC directed PJM and other all other RTOs to adopt scarcity pricing reforms. *See Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g*, Order No. 719-A, FERC Stats. & Reg. ¶ 31,292 (2009), FERC Stats. & Regs.

The solution we proposed is plainly feasible, as demonstrated through routine practice; it has already been accepted as just and reasonable by FERC; and it is supported by a significant body of precedent holding that price mitigation in organized energy markets must be applied even-handedly to deter both monopoly (seller) and monopsony (buyer) market power.[10] *See, e.g.*, *Edison Mission*, 394 F.3d at 968-70; *Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,043 at P 78 (2005), *order on reh'g*, 112 FERC ¶ 61,086 (2005), *aff'd sub nom. Wisconsin Pub. Power Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at PP 32, 100 (2008); *Devon Power LLC*, 115 FERC ¶ 61,340 at P 114 (2006); P3 Complaint at 18, JA____ (citing

¶ 31,292 (2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009). Specifically, as it did below, P3 noted that PJM's "Energy and Ancillary Services Revenue offset does not account for day-ahead commitments" and "propose[d] that PJM calculate the offset for the reference resource in the same way that avoidable cost rates are calculated for individual units for the purposes of [seller] market mitigation." *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,057 at P 212 (2012). "PJM agree[d] with P3's suggested revision." *Id.* at P 221. FERC ruled that proposal was "beyond the scope" of that proceeding, which was "not designed to address capacity market issues." *Id.* at P 226.

[10] FERC itself emphasized the importance of this principle below, holding that "PJM needs to protect against both buyer market power and seller market power to ensure competitive, properly functioning markets." Rehearing Order at P 98 & n.47 (citing cases), JA____; *see Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) (characterizing a competitive market as one in which neither the buyer nor seller has significant market power); *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 at P 31 (2007) ("The direction in which the manipulative conduct moves the price is immaterial to its legality.").

these cases); *see also supra* Part I at 16-38 (discussing the asymmetric mitigation argument).

FERC's refusal to adopt, or even acknowledge, this straightforward solution will always *over*estimate energy and ancillary services revenues; it therefore will always *under*estimate the MOPR review threshold. We respectfully submit that it is a paradigmatic example of arbitrary and capricious decisionmaking for FERC to allow the deliberate use of incorrect revenue estimates when correct estimates are readily available and already being used.

III. FERC ERRED IN ESTIMATING ENERGY AND ANCILLARY SERVICES OFFSETS BASED ON THE HIGHEST REVENUES RECEIVED BY ANY RESOURCE IN ANY ZONE WITHIN A GIVEN CONE AREA

Like FERC's decision to calculate energy and ancillary service offsets using real-time prices in deliberate disregard of actual unit commitment data, FERC also chose to model energy and ancillary service offsets in deliberate disregard of a resource's actual location. Specifically, FERC accepted PJM's proposal to "estimate energy and ancillary services offsets based on the highest revenues historically achieved by any resource within the relevant zone," regardless of "the revenues received by a resource at its actual location."[11] Rehearing Order at P 30, JA____; *see* PJM Proposal at 10, JA____; MOPR Order at P 47, JA____.

[11] PJM's thirteen-state area includes five different planning regions composed of multiple zones. Energy prices—and thus the estimated cost of new entry used to

FERC's decision means that, if a resource is located anywhere within a zone *other* than where energy revenues are highest, PJM's approach will overestimate its energy revenues, and therefore underestimate the benchmark for MOPR review. *See* P3 Protest at 12-13, JA___-____; MOPR Order at P 36, JA____ (noting P3's objection that PJM's method "overstates the offset calculations and thus understates the Net CONE"); PJM Rehearing at 17-19, JA____-____. Moreover, PJM openly acknowledged that its purpose was to prevent the MOPR threshold from being triggered. As PJM explained, its "approach ensures that the sell offer of a new entrant will not fail the MOPR screen merely because it is located in a zone with higher LMPs than the zone in which the hypothetical reference resource was assumed to be built." PJM Proposal at 10, JA____. There is no doubt PJM's proposal is an excellent way to prevent resources from failing the MOPR screen, but that is not a proper objective, and neither FERC nor PJM bothered to defend it.

P3 argued that it is imminently feasible to calculate revenue offsets using actual locations (*i.e.*, a nodal approach), and that any administrative burden associated with subjecting "some economical resources with higher expected energy revenues to scrutiny" would be *de minimis* both in absolute terms and as

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create the MOPR benchmark—vary significantly between those areas. *See generally* Reliability Pricing Model Variable Resource Requirement (VRR) Curve, RPM Training – Appendix B (Feb. 2012), http://www.pjm.com/training/~/media/training/core-curriculum/ip-rpm/rpm-training-appendix-b-vrr-curve.ashx. CONE Values for the 2015/2016 Delivery Year ranged from $267/MW-day to $358/MW-day. *See id.* at 6.

compared to the substantial market harms such review would prevent. P3 Protest at 13, JA____. As we explained:

> Any truly economic resource located where energy revenues are higher could readily support a location-specific estimate of those revenues to the market monitoring unit or the Commission. Any inconvenience would be administrative and ephemeral. Conversely, adopting PJM's proposal on this issue would permit uneconomic resources to escape scrutiny entirely and cause permanent economic harm.

Id.; *see also, e.g.*, Shanker Supp. Test. at 26:2-5, JA____ (estimating that the various offsets under PJM's proposal would cause an "enormous change" and drive the mitigation threshold down "at least 30% below current best estimates").

FERC never engaged our arguments. Instead, FERC accepted PJM's proposal on two grounds—one nominally procedural and the other nominally substantive.

First, FERC played off the different standards of review under FPA sections 205 and 206. FERC asserted that, "[i]n accepting PJM's proposal" under FPA section 205, it was "not required to consider whether additional, alternative approaches might have also been reasonable." Rehearing Order at P 30, JA____. FERC then added that it was not "persuaded that P3's proposed approach is supported by the requisite finding that PJM's provision (and its reliance on zonal LMPs), as accepted in the April 12 Order, is unjust and unreasonable." *Id.* That is not the law.[12] While it is true that FERC is not required to *accept* an intervenor's alternate proposal if the rate proponent's proposal is found just and reasonable, FERC is unquestionably required to *consider*, and actually respond to, facially legitimate protests in a proceeding under FPA section 205. *See, e.g.*, *PSEG Energy*, 665 F.3d at 208-09 (quoting several decisions articulating this point).

FERC also erroneously suggested that the higher burden under FPA section 206—that is, to demonstrate a tariff is unjust or unreasonable—was triggered when PJM's proposal was "accepted in the April 12 Order." Rehearing Order at P 30, JA____. Again, that is not the law. Section 206 review is reserved for challenges to an existing rate that FERC has accepted in a final order no longer subject to judicial review. *See, e.g.*, *Midwest ISO Transmission Owners*, 373 F.3d at 1368. As the existence of this proceeding clearly indicates, PJM's proposal is not yet a final rate.

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[12] Precedent directly refuting FERC's position is legion. *See, e.g.*, *American Gas Ass'n*, 593 F.3d at 19 ("In cases where parties raise reasonable alternatives to the Commission's position, we have held that reasoned decisionmaking requires considering those alternatives."); *Central Maine Power Co.*, 252 F.3d at 44 ("Broadly speaking, agencies are expected to consider reasonable alternatives to proposed actions . . . ."); *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989) ("[W]here a party raises facially reasonable alternatives to FERC's decision . . . the agency must *either* consider those alternatives *or* give some reason . . . for declining to do so." (internal citation omitted)); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1511 & n.54 (D.C. Cir. 1984) ("It is well established that an agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.") (construing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 51).

Apart from FERC's bald assertions that it was not required to "consider" and was not "persuaded" by our arguments below, FERC offered only one reason for accepting PJM's proposal. FERC found "that use of zonal LMPs, rather than nodal LMPs, for the MOPR screens is appropriate, given this methodology's consistency with PJM's existing VRR Curve guidelines." Rehearing Order at P 30, JA____. That is not true. Neither P3's approach, nor PJM's approach, is "consistent" with prior practice. P3's proposal to use nodal revenues is more refined and accurate, while PJM's proposal is deliberately less refined and inaccurate.

As PJM itself explained, "PJM's Tariff provides that *the energy revenue estimate will be calculated for the zone in which* the gross CONE estimate assumed *the new power plant would be built*." PJM Proposal at 10 & n.16, JA____ (emphasis added) (citing PJM Tariff, Attach. DD § 5.10(a)(v)). PJM expressly described its proposal below as an "adjustment" to the traditional approach. *Id.* "Instead of basing the energy revenue estimate on the zone where the generic 'Reference Resource' is assumed to be built, PJM will base it on the zone within each CONE Area that has the highest energy revenue estimate." *Id.* And, as noted above, the express purpose of this "adjustment" was to "ensure[] that the sell offer of a new entrant will not fail the MOPR screen." *Id.*

In sum, FERC deliberately declined to consider our arguments below based on a misreading of the law, and the only substantive reason FERC gave for accepting PJM's proposal was not only false, but was contradicted by PJM itself. This is not reasoned decisionmaking and requires remand, which will provide an opportunity for FERC to explain how it is just and reasonable to allow the deliberate use of incorrect revenue estimates when correct estimates based on a resource's actual location are readily available and already being used.

IV. FERC ERRED IN PERMITTING RESOURCES TO ESCAPE MITIGATION FOREVER AFTER CLEARING IN ONLY ONE AUCTION

Prior to this proceeding, the MOPR provided that resources were automatically exempt from mitigation after merely participating in one auction, regardless of whether the resource cleared. *See* MOPR Order at P 158, JA____. This flaw rendered the MOPR toothless—since it allowed a resource, by first failing once, to automatically pass any time thereafter—and FERC was presented with three ways to close this loophole. In its complaint, P3 proposed to apply the MOPR threshold until a resource successfully clears two annual auctions because that "approach is the closest approximation to the Commission's recently-approved standard for the NYISO." *Id.* at P 160, JA____. PJM proposed a stronger three-year rule, requesting to apply the MOPR threshold in each annual auction up to and including the *second successive* annual auction *after* the auction in which a resource first clears. *Id.* at P 159, JA____. The Market Monitor proposed a hybrid rule allowing resources to escape MOPR review after clearing only one auction, *provided that* "its sponsor demonstrate that the unit is not receiving any subsidies." IMM Comments at 20, JA____.

FERC declined these recommendations and adopted a much narrower rule that allows resources to escape mitigation permanently after "clearing one of the PJM capacity auctions (base residual *or* incremental) at an offer price *near* its full cost of entry." MOPR Order at P 176, JA____ (emphasis added). In FERC's view, that is all that is required for a resource to prove "that it is needed by the market." *Id.* FERC eroded this rule even further on rehearing, when it affirmatively *authorized* resources to receive out-of-market subsidies after clearing only one auction. In FERC's view, "[r]egardless of whether discriminatory subsidies are being received, a resource that has cleared an RPM auction at a price above its offer floor is needed and considered a competitive resource and should be permitted to participate in the auction without an offer floor regardless of whether it also receives a subsidy." Rehearing Order at P 133, JA____; *accord id.* at P 132, JA____-____; MOPR Order at P 177, JA____.

FERC's decision is not the product of reasoned decisionmaking. It must be rejected as arbitrary and capricious for several reasons.

First, FERC purported to base its determination on the recommendation of the Market Monitor, claiming to "agree with the IMM that the appropriate duration is that the MOPR offer floor should apply to each new resource in the base residual and each incremental auction until the resource demonstrates that its capacity is needed by the market at a price near its full entry cost." MOPR Order at P 176, JA____. However, as previously noted, that was not the Market Monitor's complete recommendation. As we explained on rehearing, the Market Monitor's full recommendation included a second and indispensable condition that a project's "*sponsor demonstrate that the unit is not receiving any subsidies*, defined to be any revenues from outside the organized PJM markets, and has not contracted to receive any subsidies." P3 Rehearing at 22 (emphasis added), JA____ (quoting IMM Comments at 20, JA____).

> The Market Monitor recommends that the MOPR require that (i) a unit clear one [Base Residual Auction] based on either an offer of net CONE or its demonstrated individual net CONE, *and (ii) that its sponsor demonstrate that the unit is not receiving any subsidies*, defined to be *any revenues from outside the organized PJM markets*, and has *not contracted to receive any subsidies*.

IMM Comments at 20 (emphasis added). FERC dismissed that condition, holding for the first time in this proceeding that it does not matter whether "discriminatory subsidies are being received." MOPR Order at P 177, JA____.

The first problem with this determination is that it is simply wrong for FERC to claim to have adopted the Market Monitor's proposal, having stripped it of a key condition. That cherry-picking left FERC standing alone, adopting a proposal supported by no party, testimony, or evidence.

The second, and greater, problem is that FERC defied its statutory mandate. FPA section 205 does not allow FERC to "(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 16 U.S.C. § 824d(b); *accord* FPA section 206, 16 U.S.C. § 824e(a). That mandate is not advanced by orders that, on their face, repeatedly authorize "discriminatory subsidies." MOPR Order at P 177, JA____; Rehearing Order at P 133, JA____; *id.* at P 132, JA____-____. Perhaps FERC took refuge in the notion that these concededly "discriminatory subsidies" were not "unduly discriminatory" within the language of the FPA. 16 U.S.C. § 824e(a). If so, FERC did not say as much in its orders, and its express authorization of "discriminatory subsidies" begs for explanation. It is not enough for FERC to rely on its determination that clearing the market is sufficient to show that a resource is "needed." MOPR Order at P 177, JA____; Rehearing Order at P 133, JA____; *id.* at P 132, JA___. The real question is whether the "discriminatory subsidies" are "needed." The record shows they are not.

At a minimum, there is a significant tension between FERC's determination that "discriminatory subsidies" are permissible after a resource clears only one auction and the animating purpose of the MOPR reform "to protect against both buyer market power and seller market power to ensure competitive, properly functioning markets." Rehearing Order at P 98 & n.47, JA____. Clearing an auction should no more result in a free pass to exercise buyer-side market power than clearing a sale in the real-time market should result in a free pass to exercise seller-side market power (which is strictly controlled at all times by the Avoidable Cost Rate cap, or ACR).

FERC's decision also departs, without reasoned explanation, from its ruling on the same issue when it recently adopted the equivalent of the Minimum Offer Price Rule for NYISO, the In-City Installed Capacity Offer Floor. *See New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,178 at P 49 (2010), *reh'g denied*, 136 FERC ¶ 61,077 (2011), *appeal docketed sub nom. TC Ravenswood, LLC v. FERC*, No. 11-1305 (D.C. Cir. Aug. 25, 2011) ("*NYISO*"). Under that rule, resources become exempt only after they clear in at least twelve of the previous twenty-four monthly auctions "subject to a minimum period of mitigation of six capability period[s] (approximately three years)." *NYISO*, 133 FERC ¶ 61,178 at P 49;

> [W]e find reasonable NYISO's proposal to have the duration of in-City buyer mitigation turn on actual acceptance of the resource's capacity in the market at the offer floor. . . . [S]ubject to a minimum period of mitigation of six capability period[s] (approximately three years), mitigation would be lifted for a new in-City generation resource when . . . the capacity clears in 12 monthly auctions at the offer floor.

Id. at P 49. While *NYISO* required resources to clear for twelve auctions, each NYISO auction covers only one month. *Id.* Each capacity auction in RPM covers a delivery year. As Dr. Shanker explained, because NYISO's monthly auctions and PJM's annual auctions are both driven by the requirement to meet peak demand during the summer, NYISO's requirement that a resource clear twelve monthly auctions "is directly analogous" to requiring that a resource clear two annual auctions in PJM. Shanker Test. at 57:16-21, JA____.

FERC was plainly aware that P3's proposal was grounded in the *NYISO* rule. FERC acknowledged that fact in its MOPR Order at P 160, JA____. Moreover, P3 and PSEG argued that FERC's failure to distinguish *NYISO* on rehearing would require remand on judicial review. *See* P3 Rehearing at 24, JA____; PSEG Rehearing at 12-13, JA____. Nevertheless, FERC failed to distinguish the *NYISO* decision or even to engage P3's argument concerning that decision. Both errors require remand. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 57 ("'An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . .") (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)); *Tesoro Alaska*, 234 F.3d at 1294-95.

The conflict between the instant order and *NYISO* has recently been brought into sharper relief by FERC's decision in *Astoria Generating Co. v. New York*

Indep. Sys. Operator, Inc., 140 FERC ¶ 61,189 (2012). In *Astoria*, FERC "direct[ed] NYISO to redo its exemption determinations" for two plants that NYISO erroneously found to have passed the buyer-side market power test that exempts resources from NYISO's market power floor (that test being the functional equivalent of PJM's MOPR, as *Astoria* acknowledges too often to cite). *Id.* at P 1. *Astoria* conflicts with the finding we challenge here—that is, FERC's decision to permanently exempt from PJM's MOPR any resource that clears one annual or incremental auction—in two important ways. First, FERC required NYISO to re-apply its market power screen to Astoria despite the fact that Astoria had already "participated, and cleared, in several auctions held in past months," and that Astoria "will be subject to the applicable offer floor for the duration specified in NYISO's tariff" if it fails. *Id.* at P 141. Second, the reason that Astoria had to endure re-evolution was that FERC found "the contracting process that awarded the power purchase agreement to Astoria II was discriminatory." *Id.* at P 135. That is hardly consistent with FERC's determination here that, "[r]egardless of whether discriminatory subsidies are being received, a resource that has cleared an RPM auction at a price above its offer floor is needed and considered a competitive resource and should be permitted to participate in the auction without an offer floor regardless of whether it also receives a subsidy."

Rehearing Order at P 133, JA____; *accord id.* at P 132, JA____-____; MOPR Order at P 177, JA____.

We realize that, unlike inconsistency with prior orders that an agency fails to distinguish, inconsistency with subsequent orders does not require remand on judicial review. However, when a particular aspect of FERC's orders is inadequately explained, as we have shown here, then inconsistency with subsequent precedent makes remand "particularly appropriate." *PSEG Energy*, 665 F.3d at 209 ("Indeed, this is a particularly appropriate case for remand. Although FERC denied PSEG the relief it sought, it subsequently described the petitioners' position as 'an improvement' that 'addresses an inconsistency,' and it revised the tariff language [in a later proceeding] to make it applicable in future situations." (citation omitted)).

V. FERC ERRED IN IMPOSING MITIGATION ON RESOURCES THAT DEMONSTRATE THEY DO NOT RECEIVE DIRECT OR INDIRECT OUT-OF-MARKET SUBSIDIES.

P3 urged FERC to make the entire buyer-mitigation regime in PJM less burdensome for all stakeholders, and easier for PJM to administer, by creating an exemption—the "'No-Subsidy' Off-Ramp"—for any resource that affirms it will not receive any form of out-of-market subsidy or preferential treatment by state regulators, including selective inclusion of costs in the rate base of load-serving entities or financing through tax-preferred bonds. *See* P3 Complaint at 34-36, JA____; *id.*, Attach. A (proposing specific tariff language), JA____; *id.* Ex. 1, Shanker Test. at 5:5-9, 53:1-20, JA____, ____; MOPR Order at P 117, JA____; P3 Rehearing at 24, JA____. In the absence of such subsidies, competing resources face the market honestly, and there is no need for FERC to require minimum price mitigation under PJM's tariff at all, much less a lengthy and cumbersome process of individual resource review. *See* Shanker Test. at 19:1-18, JA____; P3 Rehearing at 24-26 (citing cases), JA____-____.

FERC tersely rejected the "No-Subsidy" exception as "unnecessary," explaining only that because "[a]ll parties have the opportunity to avoid mitigation by making a cost demonstration," FERC was "not persuaded that adding an additional exemption is warranted." MOPR Order at P 123, JA____. On rehearing, P3 countered that FERC's curt response "sidesteps the central concern" raised in P3's complaint. P3 Rehearing at 25, JA____.

First, the regime FERC approved, which allows resources to avoid mitigation by making an individualized cost demonstration to the Market Monitor and PJM, is plainly more cumbersome and subjective than requiring resources to affirm that their offers are not tainted by out-of-market subsidies or preferences.[13]

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[13] As P3 explained below, such an affirmation is not lightly made. FERC frequently imposes substantial civil penalties for manipulating energy markets or misrepresenting material facts to FERC, RTOs, or market monitors. *See* P3 Complaint at 35-36 & n.6, JA___; 16 U.S.C. § 825*o*-1 (authorizing FERC to levy

As P3 explained, that review process requires the Market Monitor, PJM, and FERC to "depend heavily on predictions about the long-term future in unit and resource costs, other parties' investments, future regulation and untold other contestable factors." P3 Rehearing at 25, JA____. Second, this process also frustrates the entire purpose of having a capacity auction. "If such factors could be predicted with absolute precision, there would be no need for capacity markets—central planning could fulfill the task at least as well." *Id.* The D.C. Circuit made the same observation with respect to New England's capacity auctions:

> [T]he point of an auction mechanism like the Forward Market is to use a best approximation of demand and the power of competitive bidding to help locate that price. Clairvoyant commissioners would have no need for such a useful pricing device, but the real world decision makers who use the Forward Market do so precisely for its ability to evaluate prices.

Connecticut DPUC, 569 F.3d at 484-85.

P3 advanced a simple, straightforward proposition: "[I]f independent, competitive capacity providers, without any financial incentive—however indirect or remote—to suppress capacity prices are willing to stake their own investments on the validity of their predictions, rather than that of third parties, there is no rational reason not to permit them to make their own economic choices without

civil penalties of $1 million per day per violation); 18 C.F.R. § 1c.2 (market manipulation); 18 C.F.R. § 35.41(b) (misrepresentation). *See generally* http://www.ferc.gov/enforcement/civil-penalties/civil-penalty-action.asp (last updated Aug. 30, 2012) (listing civil penalty actions since 2007).

mitigation and suffer (or benefit from) the consequences." P3 Rehearing at 25, JA____. In support of that proposition, P3 cited two D.C. Circuit decisions finding that there is no justification for regional markets to impose mitigation absent the potential exercise of market power. *See id.* at 26, JA____ (citing *Edison Mission*, 394 F.3d at 968-70, and *Wisconsin Pub. Power*, 493 F.3d at 264).[14]

In *Edison Mission*, the court remanded FERC's orders accepting Automated Mitigation Procedures in New York's wholesale energy market, where FERC failed to address arguments that "many, perhaps most, possibly all, of the bids triggering mitigation will be due not to market power but to temporary scarcity." 394 F.3d at 968. The court found that "the Commission gave no reason to suppose that it does not also wreak substantial harm [by] curtailing price increments attributable to genuine scarcity," and that FERC's failure to distinguish "its prior rulings acknowledging the potential ill effects of forcing down prices absent structural market distortions is the epitome of agency capriciousness." *Id.* at 969. Two years later, in *Wisconsin Public Power*, the court expressly relied on *Edison Mission* when it affirmed FERC's orders accepting a sunset provision for mitigation in the Midwest wholesale energy market, finding that "[t]he power

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[14] P3 earlier cited these same cases in support of the related proposition that, when mitigation is required to prevent the exercise of market power, mitigation must control both sides of the market "to ensure that prices are neither artificially inflated nor artificially suppressed." P3 Complaint at 18, JA____.

conferred on the monitor to impose mitigation is a substantial one, and it accordingly is reasonable for FERC to limit the discretion to use that power." 493 F.3d at 264.

On rehearing, as in its initial order, FERC swept away P3's arguments with a single sentence:

> While we do not disagree in principle with the general proposition of exempting from [the] MOPR resources shown to not be receiving a subsidy, we are not persuaded that determining what constitutes a "subsidy" or a "discriminatory payment," as opposed to evaluating net costs, will be a less subjective and more precise means of preventing uneconomic entry.

Rehearing Order at P 75, JA____. That response is a *non sequitur*: at no point did P3 suggest replacing the net-costs benchmark with the No Subsidy Off-Ramp or that it would be "a less subjective and more precise means of preventing uneconomic entry." *Id.*, JA____-____. While it should be self-evident that the No Subsidy Off-Ramp would significantly streamline the need for individualized review by PJM, that was plainly not P3's chief concern. FERC simply ignored P3's squarely-presented argument that there is no rational or lawful basis to impose mitigation on a supplier who affirms, subject to FERC's substantial civil penalty authority, that its offers in PJM's capacity auctions are not supported by out-of-market subsidies or preferential state regulatory incentives. *See* P3 Rehearing at

24-26, JA____-____. That is a legitimate complaint backed by substantial precedent; it deserved more than the back of FERC's hand.[15]

Courts have repeatedly stressed that, unless FERC "answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned." *PSEG Energy*, 665 F.3d at 209 (citations omitted). FERC compounded its error by failing to acknowledge, much less engage, P3's explicit reliance on *Edison Mission* and *Wisconsin Public Power*—which are never mentioned in the orders below. When FERC "glosses over or swerves from prior precedents without discussion," it "cross[es] the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp.*, 444 F.2d at 852. This Court should remand with instructions that FERC provide a reasoned explanation to this argument that adopts, or at least distinguishes, the relevant case law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-44.

While remand on this question is already required for the reasons just described, the Court should also find that FERC's limited basis for rejecting the

[15] That was not the only argument FERC ignored, either. An additional benefit of the No-Subsidy Off-Ramp, which P3 described at some length, is that it substantially addresses the concerns expressed by some public power parties regarding self-supply. *See* P3 Answer at 4, 10-12, JA____, ____-____; P3 Rehearing at 26, JA____. An open Request for Proposals that does not discriminate between new and existing suppliers would permit parties averse to capacity market price risk to lock in prices for extended periods, but that process would not be a useful tool for covert subsidies, thus allowing the resulting contract to escape mitigation through the No-Subsidy Off-Ramp.

No-Subsidy Off-Ramp is not the product of reasoned decision-making. FERC's theory was that PJM would have equal difficulty defining what a prohibited subsidy includes (when crafting a safe harbor) than PJM would have determining whether each supplier's offers are tainted by prohibited preferences (when conducting an individual review). Either way, PJM must apply the same concepts to develop a consistent standard. But, under FERC's rule, the auction rules are neither clearly defined in advance nor transparently applied: PJM and the Market Monitor confidentially, and separately, review all offers below the MOPR benchmark on an ad hoc and non-transparent basis.

As the dispute over PJM's compliance filing demonstrated, FERC's policy is self-defeating and has only shown confusion. *See* Rehearing Order at PP 245-47, JA___-___; Compliance Rehearing Order at PP 22-23, JA___. This confusion reached its zenith during the last auction, when the IMM and PJM reached opposite conclusions concerning the minimum allowable offer for "Project X" and the IMM filed a complaint with FERC to resolve the dispute, prompting several suppliers to follow suit. *See Indep. Market Monitor for PJM v. Unnamed Participant*, FERC Docket No. EL12-63 (May 1, 2012), *withdrawn as moot* (May 17, 2012); *Exelon Corp. v. Unnamed Participant and PJM Interconnection, L.L.C.*, FERC Docket No. EL12-66 (May 8, 2012), *withdrawn as moot* (May 18, 2012).

RESPONSIVE ARGUMENT

In accordance with this Court's June 12, 2012 order on joint motion to govern briefing, P3 and PSEG, as Cross-Petitioners/Respondents, address the arguments in the opening briefs for the Petitioners/Cross-Respondents: New Jersey Board of Public Utilities and New Jersey Division of Rate Counsel (collectively, "New Jersey"); Maryland Public Service Commission ("Maryland"); and Old Dominion Electric Cooperative, American Public Power Association, National Rural Electric Cooperative Association, North Carolina Electric Membership Corporation, Delaware Municipal Electric Corporation, American Municipal Power, Inc. and Southern Maryland Electric Cooperative, Inc. (collectively, "Load Petitioners"); as joined in whole or in part by Hess Corporation, Delaware Public Service Commission, Maryland Office of People's Counsel, Dominion Resources Services, Inc., and PJM Customer Coalition.

SUMMARY OF THE RESPONSIVE ARGUMENT

As discussed below, there are numerous fatal flaws in the various arguments raised by New Jersey, Maryland, and the Load Petitioners. One critical point, however—which was FERC's core ruling below—fully disposes of each of those arguments. The MOPR is designed to do one thing, and one thing only: to prevent unneeded and uneconomic new capacity from artificially suppressing FERC-regulated wholesale capacity rates. Any state in PJM can, at any time, sponsor the construction of any new generating plant it desires. Any state in PJM can, at any time, enter into any contract with any new generator it desires. Any load-serving entity in PJM can, at any time, build its own "self-supply" generating plant. The MOPR does nothing to stop any such commercial activities.

All the MOPR is designed to do is to prevent any new generator from offering to sell capacity into the RPM auction at an anti-competitively low rate, below actual cost. There is no legitimate commercial basis—beyond artificial price suppression—for sponsoring the construction of uneconomic, unneeded generation, when it would be cheaper simply to buy capacity at lower prices via the RPM auction. Why overpay?

The strenuous objections to FERC's decision raised by New Jersey, Maryland, and the Load Petitioners all boil down to complaints about the prospect of losing the ability to overpay for new generation in order to artificially suppress capacity prices, thereby creating some short-run benefits for load (through lower prices), but creating unjust, unreasonable and unduly discriminatory wholesale capacity prices. FERC correctly and rationally set those objections aside. Its decision to impose mitigation to prevent artificial capacity price suppression is, as the D.C. Circuit has held, at the "heartland" of its jurisdiction. *Connecticut DPUC*, 569 F.3d at 483. And FERC rationally explained the basis for its rejection of each and every argument the Load Petitioners raise.

I. FERC'S MOPR ORDERS WERE WITHIN ITS JURISDICTION

New Jersey argues that the MOPR reforms approved below interfere with state sovereignty and "exceed FERC's jurisdiction by substituting its power supply preferences for those of the states and LSEs." N.J. Pet. Br. at 22; *see id.* at 22-27. They err because the MOPR by its terms *only* affects the *price* of a FERC-jurisdictional product—wholesale capacity—leaving states and LSEs free to build any type of capacity to any degree they could wish. What the MOPR Orders prohibit is manipulation of capacity prices in interstate commerce through out-of-market subsidies or other preferential treatment. FERC correctly held that, "[b]ecause below-cost entry suppresses capacity prices and because the Commission has exclusive jurisdiction over wholesale rates, the deterrence of uneconomic entry falls within the Commission's jurisdiction, and [it is] statutorily mandated to protect the [PJM capacity market] against the effects of such entry." Rehearing Order at P 96, JA____ (quoting MOPR Order at P 143, JA____).

FERC has regulated the terms and conditions of wholesale capacity sales for decades. *See, e.g.*, *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1300-03 (D.C. Cir. 1978) (rejecting claims that FERC invaded state jurisdiction by instituting a capacity deficiency charge "to motivate [utilities] to develop sufficient capacity to meet their load requirements"). The Supreme Court itself has squarely held that FERC has exclusive jurisdiction to allocate capacity costs in a multi-state utility system, explaining that "States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that *agreements affecting wholesale rates* are reasonable." *Mississippi Power*, 487 U.S. at 374 (emphasis added); *see also id.* at 377-78 (Scalia, J., concurring) ("[W]hen two or more utilities form a joint venture or pool to share electrical generating capacity, including construction of a new facility, the resulting transfers of power are wholesales of electricity subject to FERC's jurisdiction under the Federal Power Act.").

The advent of organized energy markets did not alter FERC's exclusive jurisdiction to set rates for wholesale generation capacity or to regulate "any rule, regulation, practice, or contract *affecting* such rate[s]." 16 U.S.C. § 824e(a) (emphasis added). The state-sponsored contracts and related mandates issued by New Jersey and Maryland plainly affect the rates for wholesale capacity in interstate commerce. Indeed, the record in this case establishes that affecting capacity rates is precisely what New Jersey and Maryland intended to do.[16] Neither of them denies that fact; on the contrary, they claim this was their

[16] *See, e.g.*, P3 Complaint at 57-73, JA____-____ (describing the state regulatory initiatives and documenting the statements of state leaders); IMM Comments at 1-2, 7-12, JA____-____ (same); *see also* Shanker Supp. Test. at 4-5, JA____-____; Pennsylvania PUC Comments at 19-20, JA____-____; P3 Answer at 29-31, JA____-____.

prerogative. *See* N.J. Br. at 22-23 (inherent prerogative); *cf.* MDPSC Br. at 9-11 (settlement prerogative). But that is not the law.

Only three years ago, the jurisdictional arguments New Jersey presents here were considered and rejected by the D.C. Circuit with respect to the New England capacity market in *Connecticut DPUC*. In that case, Connecticut contended that FERC exceeded its jurisdiction under FPA section 201, 16 U.S.C. § 824, by effectively dictating the state's generation and reliability policies through its economic regulation of the New England capacity market. The court disagreed, finding that FERC does not engage in "direct regulation of generation facilities," 569 F.3d at 482, merely because its rate-setting policies will determine the economic consequences of choices states are freely left to make. As the court explained:

> State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the Commission. Of course, those choices affect the pool of bidders in the Forward Market, which in turn affects the market clearing price for capacity.

Id. at 481. There, as here, FERC's capacity auction rules permit states to implement whatever choices the "consumer-constituents of state commissions prefer," and likewise ensure "they will appropriately bear the costs of that decision." *Id.*

The reasoning of the D.C. Circuit in *Connecticut DPUC* accords perfectly with Justice Scalia's opinion two decades earlier in *Mississippi Power*:

> Appellees rely upon the language in [FPA section 201] § 824(b)(1) which states that FERC "shall not have jurisdiction, except as specifically provided in this subchapter [the Federal Power Act] . . . , over facilities used for the generation of electric energy." But this does not plainly contradict FERC's assertion of jurisdiction. First, it is reasonable to regard FERC's [FPA section 205] § 824e(a) authority to set wholesale rates as precisely an example of jurisdiction "specifically provided." And second, it is reasonable to say that FERC is not exercising jurisdiction over the electrical generating facility but merely over the sale of the power created by that facility.
>
> After today, the battle will no longer be over who has jurisdiction, FERC or the States, to evaluate the prudence of a particular utility's entering pooling arrangements with affiliated companies for the sharing of electrical generating capacity or the creation and wholesaling of electrical energy. FERC has asserted that jurisdiction and has been vindicated. What goes along with the jurisdiction is the responsibility, where the issue is appropriately raised, to protect against allocations that have the effect of making the ratepayers of one State subsidize those of another.

487 U.S. at 382-83 (Scalia, J. concurring).

New Jersey attempts to distinguish *Connecticut DPUC* from the present case on the ground that the utilities in New England "could select whatever resources they chose to meet their FCM obligations." N.J. Pet. Br. at 26. That claim has no merit. One of the choices available on Connecticut's menu was "to limit new construction to more expensive, environmentally-friendly units." *Connecticut DPUC*, 569 F.3d at 481. That is precisely what New Jersey says it wants to do here by building natural gas-fired plants to replace coal-fired ones. *See* N.J. Pet.

Br. at 2, 6, 12-13. The MOPR revisions FERC approved below do not forbid New Jersey from implementing that choice,[17] but the MOPR does attempt to ensure that New Jersey "will appropriately bear the costs of that decision." *Connecticut DPUC*, 569 F.3d at 481.

New Jersey also objects that the MOPR Orders impede state regulation of local reliability concerns. *See* N.J. Pet. Br. at 22, 27. Once again, *Connecticut DPUC* teaches that FERC does not usurp a state's regulatory jurisdiction when it determines the economic consequences of state decisions in interstate commerce:

> Petitioners point to nothing in the record to suggest that the Commission seeks authority to set a reliability requirement rather than to ensure that the capacity charges actually imposed by ISO-NE are fair to suppliers and consumers. That reasonable concerns about system adequacy might factor into the fairness of those charges is precisely what brings them within the heartland of the Commission's section 206 jurisdiction, see § 824e(a).

569 F.3d at 483. This Court should similarly hold that the MOPR Orders are "within the heartland of the Commission's … jurisdiction." *Id.*

Moreover, the circumstances presented here underscore why it is necessary that FERC, rather than states, regulate sales of capacity at wholesale in interstate

[17] New Jersey repeatedly attacks FERC for seeking to "prevent . . . entry" of various kinds. N.J. Br. at 23 (quoting Rehearing Order at P 62, JA____). The omitted word in each case is "uneconomic." We respectfully submit that this word cannot reasonably be elided from the text of FERC's orders as a basis for arguing that FERC exceeded its jurisdiction. As *Connecticut DPUC* teaches, there is a vast difference between preventing the construction of a plant and regulating the price at which it may sell energy and capacity in interstate commerce.

commerce. As FERC emphasized, concurring with arguments raised by the Pennsylvania Commission, "without effective mitigation of state-sponsored uneconomic entry, the actions of a single state could have the effect of preventing other states from participating in wholesale markets." Rehearing Order at P 96, JA____ (quoting MOPR Order at P 143, JA____). In this case, New Jersey and Maryland take a radically different view from other states about how to best serve their state's interests through the interstate market in wholesale capacity. Specifically, New Jersey and Maryland prefer to subsidize new entry to influence market outcomes, while other states, such as Pennsylvania, prefer to rely on market forces as the best way to establish competitive capacity prices in the long run. *See* MOPR Order at P 137, JA____ ("The Pennsylvania Commission asserts that no one state (or states) can claim the right to artificially skew wholesale outcomes by escaping market power mitigation of subsidies, particularly given that such efforts would affect all other PJM states.").

When faced with this conflict in state objectives, FERC correctly found that "the deterrence of uneconomic entry falls within the Commission's jurisdiction, and we are statutorily mandated to protect the RPM against the effects of such entry." Rehearing Order at P 96, JA____ (quoting MOPR Order at P 143, JA____). FERC likewise correctly held that "there is no valid state interest in ensuring that uneconomic offers can submit below-cost offers into the RPM auction." MOPR Order at P 142, JA____.

The need for uniform regulation by FERC is particularly crucial in situations such as this, where conflicting state regulatory initiatives would allow one state to impose or shift burdens on another. *See, e.g.*, *Mississippi Power*, 487 U.S. at 383 (Scalia, J. concurring) ("What goes along with [FERC's] jurisdiction is the responsibility, where the issue is appropriately raised, to protect against allocations that have the effect of making the ratepayers of one State subsidize those of another."); *Appalachian Power Co. v. Pub. Serv. Comm'n of West Virginia*, 812 F.2d 898, 905 (4th Cir. 1987) ("Only FERC, as a central regulatory body, can make the comprehensive public interest determination contemplated by the FPA . . . . No single state commission has the jurisdiction, and neither can it be expected to have the competence or inclination, to make this broad determination.") .

Finally, New Jersey argues that "FERC could have allowed entry of extra-RPM resources but prevented those resources from affecting RPM prices." NJ Pet. Br. at 24. This argument fails for two reasons. First, New Jersey did not raise it below. Second, this is, in fact, exactly what FERC did: uneconomic resources are free to enter, but when they are mitigated under the MOPR, and do not clear, they are precluded from affecting RPM prices, or from providing capacity credit.

II. THE REVISED MOPR PROTECTS COMPETITION CONSISTENTLY WITH ANTITRUST LAW PRINCIPLES

The Load Petitioners argue at length that FERC is under an obligation to protect competition consistently with antitrust principles. *See* Load Pet. Br. at 25-30. We agree. But the Load Petitioners conclusion—that MOPR reform is out of compliance with these principles—is fundamentally mistaken. MOPR reform is not only consistent with these principles, it is required by them.

Antitrust principles are entirely symmetrical. The Supreme Court teaches that the "kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization." *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321-22 (2007) (citing Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 Antitrust L.J. 589, 591 (2005) ("[A]symmetric treatment of monopoly and monopsony has no basis in economic analysis.")); *see also, e.g., Vogel v. American Soc'y of Appraisers*, 744 F.2d 598, 601 (7th. Cir. 1984) ("[M]onopoly and monopsony are symmetrical distortions of competition from an economic standpoint."); John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 Antitrust L.J. 625, 653 (2005) (describing monopsony as the "mirror image" of monopoly). FERC precedent, and appellate decisions reviewing FERC's orders, also recognize and apply this principle. *See, e.g., Edison Mission*, 394 F.3d at 968-70; *Midwest Indep. Transmission Sys. Operator*, 111 FERC ¶ 61,043 at P 78

(2005), *order on reh'g*, 112 FERC ¶ 61,086 (2005), *aff'd sub nom. Wisconsin Pub. Power Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007); *New York Indep. Sys. Operator*, 122 FERC ¶ 61,211 at PP 32, 100 (2008); *Devon Power*, 115 FERC ¶ 61,340 at P 114 (2006).

Contrary to the Load Petitioners' claims, FERC's decision to bolster the capacity market's protections against monopsony power in the orders below did not "fail[]to apply competitive principles" or disregard "balancing" by refusing "to consider antitrust policy." Load Pet. Br. 28. Rather, FERC emphasized the importance of *symmetry*, holding that "PJM needs to protect against both buyer market power and seller market power to ensure competitive, properly functioning markets." Rehearing Order at P 98 & n.47, JA____ (citing *Tejas Power Corp.*, 908 F.2d at 1004, and *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 at P 31). Indeed, the entire point of the orders below was to provide symmetry by fixing a manifestly broken buyer-side mitigation regime.

And the sell-side, at the behest of Load Petitioners and allied parties in the RPM proceeding, is heavily mitigated. Regardless of size or location or any indicia of market power or intent to abuse such market power, *all* capacity sellers are bound by a strict price cap known as the Avoidable Cost Rate (or ACR). *See, e.g., PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,264 at PP 52-60 (2008) (accepting PJM's compliance filing to implement seller price caps in Section 6.7(c) of Attachment DD to the tariff and, contrary to the request of PJM and the IMM, denying any discretion to exempt sellers from the price caps through an individualized review process). Here, FERC correctly found that it would be unjust and unreasonable to mitigate only one side of the market—the sell-side—while leaving the other side of the market practically unmitigated as the MOPR previously did.

The Load Petitioners broadly plea for "the protection of competition, not competitors." Load Pet. Br. at 28. (quoting *Atlantic Richfield Co.*, 495 U.S. at 338). We ardently agree with that principle. *See supra* Argument Part I at 38. But it rings hollow when what the Load Petitioners are actually advocating is that buyers should be free from meaningful mitigation while sellers should be subject to strict mitigation. Their real lament, revealed in the final paragraph of their brief, is that FERC "robbed self-suppliers of *guaranteed clearing* for their offers." Load Pet. Br. 30 (emphasis added). That is not economic principle, but rather special pleading which this Court should reject.[18]

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[18] Load Petitioners confuse things by likening sales of home-grown tomatoes to sales of capacity by self-supplied LSEs. Load Pet. Br. at 3. If the buyers of capacity were as diverse as the buyers of tomatoes, this analogy might be apt. That not being the case, it is not. In any event, the Supreme Court has rather famously held that home-grown produce actually can be regulated as practice affecting interstate commerce. *See Wickard v. Filburn*, 317 U.S. 111 (1942).

III. CIRCUMSTANCES FULLY JUSTIFIED FERC'S NARROWING OF THE STATE MANDATE LOOPHOLE

A. ELIMINATION OF MOPR LOOPHOLE WAS JUST AND REASONABLE

New Jersey asserts that the revisions to the MOPR accepted by FERC shift the weight of capacity decisionmaking—such as whether to use self-supply, long-term contracts or the auction—to the market and that this embodies an unjustified paradigm shift. *See* N.J. Pet. Br. at 9-14. Similarly, Load Petitioners assert that the Commission's "orders depart without explanation from prior rulings approving RPM's residual nature." Load Pet. Br. at 12. These claims are doubly mistaken:

First, self-supply capacity and capacity sold in long-term contracts *always* had to clear the Base Residual Auction, its "residual" qualifier notwithstanding. The only difference between the prior rule and the revised rule accepted below is the elimination of a few loopholes that allowed certain projects, such as self-supply, to automatically clear; but all capacity supply always went through the Auction.

Second, self-supply capacity and long-term contract capacity remain perfectly legal and practicable. The orders below make no changes at all with respect to any existing self-supply or long-term contract capacity. If those resources cleared the auction even once in the past, even using the loopholes, they are permanently grandfathered and can be traded or terminated without ever having to meet the MOPR again. As for new self-supply or long-term capacity, the only change in the revised MOPR is that it qualifies to fulfill capacity requirements, or affect the capacity price, *only* if it is economic.

However, nothing prevents determined load entities from building their own capacity or long-term contracting for capacity even if it is uneconomical. Such capacity would just not be credited toward capacity requirements or allowed to affect capacity prices—two forms of price control that fall within FERC's exclusive jurisdiction to regulate any practice or contract *affecting* the market-wide price. *See* 16 U.S.C. § 824e(a); *see supra* Part I at 66-68. If these previously uneconomic capacity sources ever become economic, they will be credited by FERC and PJM, under the MOPR. In short, the *only* change in the new MOPR is that permanently uneconomic supply will no longer be credited or allowed to influence price levels. The only possible motive for building permanently uneconomic capacity is to exercise buyer-side market power to artificially suppress capacity price levels. And preventing such abuse of market power is not only FERC's right, but its statutory duty, as FERC correctly held below. *See* MOPR Order at PP 142-43, JA____; Rehearing Order at PP 96-97, JA____-____.

B. THE COMMISSION HAS JUSTIFIED ITS REVISION OF THE STATE MANDATE LOOPHOLE IN COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF THE APA AND FPA

New Jersey and the MDPSC contend that FERC failed to adequately explain its decision. *See* N.J. Pet. Br. at 14-15, 18-21; MDPSC Br. at 4-8. These arguments lack merit.

MDPSC objects that FERC failed to address testimony by MDPSC Chairman Nazarian that "that Maryland's pursuit of long-term contracts for new generation was motivated by legitimate purposes" and testimony by Dr. Hausman that state policies "need to be considered as playing an important role in their actions." MDPSC Br. at 7-8. On the contrary, FERC squarely addressed those concerns on rehearing. *See* Rehearing Order at P 89, JA____-____. FERC acknowledged that "[t]he Maryland Commission and the New Jersey Board assert that the Commission disregarded their states' purported unmet reliability needs and did not properly consider their legitimate interests in assuring that the reliability needs of their citizens are met." *Id.* FERC answered that, as the MOPR Order found, "the MOPR does not interfere with states or localities that, for policy reasons, seek to provide assistance for new capacity entry if they believe such expenditures are appropriate for their state," explaining that FERC "only [sought] to ensure the reasonableness of the wholesale, interstate prices determined in the markets PJM administers." *Id.* More pointedly, FERC held in the next paragraph that "allowing selected new projects to bid into RPM as price-takers because they are state-mandated would undermine the objective of RPM to procure the least-cost, competitively-priced combination of resources necessary to meet the region's reliability objectives on a three-year forward basis." *Id.* at P 90, JA____. And still more sharply, FERC held that "there is no valid state interest in ensuring that uneconomic offers can submit below-cost offers into the RPM auction." MOPR Order at P 142, JA____.

Those answers are complete and are also entirely consistent with the rationale in *Connecticut DPUC*—that FERC does not interfere with state objectives by regulating the impact of state regulatory initiatives on interstate commerce. *See supra* Part I at 66-71.

MDPSC also objects that FERC's orders mention Chairman Nazarian by name only once and do not mention Dr. Hausman by name at all. MDPSC Br. at 8. That is not a basis for remand. FERC may fairly respond to arguments raised by "the Maryland Commission" without naming its witnesses, just as FERC may fairly respond to arguments raised by "P3" without mentioning Dr. Shanker—a name also absent from the orders below notwithstanding three separate testimonial submissions throughout the proceedings below. What matters is that FERC address particular arguments, and, at least with regard to considering states' "legitimate interests," FERC thoroughly did its job.

New Jersey separately contends that FERC improperly set aside the state mandate exemption by accepting the elimination of the state mandate exemption under FPA section 205, rather than FPA section 206. *See* N.J. Br. at 18-21. However, as New Jersey concedes, *id.* at 21, FERC explicitly rejected the state exemption under FPA section 206 on rehearing, holding that "PJM's tariff prior to the April 12 Order was unjust and unreasonable because the state exemption created a loophole permitting uneconomic entry affecting the wholesale price." Rehearing Order at P 96, JA____-____ (detailing the reasons for that finding).

Even so, New Jersey argued that the finding under FPA section 206 was infirm because "every fact that FERC identifies as rendering the existing tariff unjust and unreasonable was present when FERC approved the state exemption." *See* N.J. Br. at 21. That argument suggests that FERC may only act under FPA section 206 if factual circumstances change, but that is not the law. A change in facts may help to justify action under FPA section 206 (as many decisions hold), and the absence of changed facts may offer a reason to deny a complaint under FPA section 206 (as many other decisions hold), but changed circumstances are not a prerequisite. FERC, like any other agency, may change its policies based on the same facts provided that the agency adequately explains its decision. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 57 ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . .") (internal quotation marks omitted). In any event, New Jersey's claim that facts had not changed is impossible to square with New Jersey's other claim, in the very next paragraph, that "FERC removed the state MOPR exemption specifically to impede New Jersey and Maryland programs developed in response to findings of a capacity deficiency." *See* N.J. Br. at 21 (citing Rehearing Order at P 7, JA____). New Jersey cannot have it both ways.

IV. THE FIXED RESOURCE REQUIREMENT OPTION PROVIDES A PRACTICAL AND SAFE ALTERNATIVE WAY TO ADDRESS LOAD'S ALLEGED CONCERN

As the Pennsylvania Commission observed below, and as FERC ruled, any state "seeking full independence in resource procurement choices can opt out of the RPM markets via the Fixed Resource Requirement ("FRR") alternative." MOPR Order at P 137, JA____. Maryland complains that this alternative does not meet its needs. MDPSC Br. at 11-14.

The short answer to this argument is that it ignores another alternative FERC highlighted: states can simply "implement a form of capacity procurement that complements the RPM." MOPR Order at P 137, JA____. As long as a state chooses to sponsor capacity that is economic—meaning it does not need state subsidies to survive in the market—the MOPR will be of no consequence.

What Maryland really is arguing about here is that the FRR alternative was designed in a manner that minimizes opportunities for any entity choosing that option to artificially suppress capacity auction price outcomes. For example, if that alternative were designed to require procurement of only a subset of the buyers' capacity needs, the buyer could segment its purchasing activities, reducing the volume of its purchases through RPM in order to reduce auction clearing prices, while using the FRR process for the remainder. *See* P3 Complaint at 10, 51-52, JA____, ____-____; Shanker Test. 32:15-33:4, JA____-____. That is why the FRR alternative was designed as an "all-in" election from the beginning.

Finally, Maryland errs in contending that the FRR alternative is not workable "for states like Maryland and New Jersey that have adopted retail supply choice." MDPSC Br. at 12. A very large utility system within PJM—American Electric Power—has used the FRR alternative ever since the RPM was created. *See* Pet'rs/Cross Resp'ts Joint Statement of Facts at 10. American Electric Power is headquartered in Ohio, and its operating company subsidiary, AEP Ohio, is one of the state's largest utilities. Ohio, like Maryland and New Jersey, is a retail choice state within PJM. And, mere days before these briefs were filed, another AEP operating company's FRR plan was approved in Michigan, which is another retail choice state. *See In re: Indian Michigan Power Co.*, Case No. U-17032

(Mich. P.S.C. Sept. 25, 2012). Real-world experience thus disproves Maryland's point.

But even if the FRR alternative were not available, that would do nothing to undermine the Commission's decision below. States remain free to pursue whatever capacity procurement program they desire. The only thing the MOPR does is ensure that any such programs will not artificially suppress RPM auction price outcomes. And that action is necessary—in fact, required—for FERC to discharge its statutory obligation to ensure that capacity rates are just and reasonable and not unduly discriminatory.

V. THE LOAD PETITIONERS FAIL TO ADVANCE THEIR CASE BY COMPLAINING THAT FERC ERRED BY RULING THAT THE MOPR SHOULD APPLY ONLY TO GAS-FIRED RESOURCES, AND NOT OTHER TYPES OF RESOURCES

New Jersey complains that FERC erred by approving revisions to the MOPR that limited mitigation to gas-fired generating plants, excluding other types, such as coal-fired, nuclear, and renewables. *See* N.J. Br. at 27, 30. It is difficult to know what to make of this argument. P3 advocated below that the MOPR should apply to all types of resources, not just gas-fired resources. And the obvious remedy—were this Court to agree with New Jersey on this point—would be a remand directing FERC to broaden the MOPR to apply to all resources. But that is not what New Jersey is asking; rather, by attempting to eliminating gas-fired resources, they are seeking that the MOPR apply to nothing at all.

In no event could New Jersey's argument justify repealing the MOPR entirely. New gas-fired resources, as FERC correctly found, are the most likely vehicle to be used for downward price suppression of capacity rates. *See* MOPR Order at P 153, JA____; Rehearing Order at P 111, JA____. We know this because the New Jersey and Maryland capacity rate suppression schemes both seek to use gas-fired resources for this purpose. While FERC might be criticized for declining to more fully protect the capacity market from the full spectrum of potential downward price suppression schemes, it cannot possibly be a reversible error for FERC to limit the MOPR to the most likely vehicles for price suppression schemes.

VI. NO SELF-SUPPLYING LOADS ACTING COMPETITIVELY ARE AT RISK OF DOUBLE-PAYING FOR CAPACITY

Load Petitioners furthermore argue that the Revised MOPR places them at substantial risk of double-paying for capacity. *See* Load Pet. Br. at 24-25. However, a careful examination of the possible results of the Revised MOPR shows that this risk *only* affects loads that intentionally seek to suppress capacity prices artificially below the competitive level. All other loads acting with legitimate intent have many alternative options that allow them to fulfill their needs without risk of double-paying for capacity. As the revised MOPR affects only self-supply for illicit reasons, it is just and reasonable.

Any load seeking to self-supply has the simple expedient of offering its new generation into the auction at a price that reflects its economic cost. This is a no-lose proposition for the load entity:

First, if the auction clears at a price *above* the economic cost of the self-supply, the revised MOPR poses no obstacle to building the new self-supply and using its capacity to fulfill the load's obligation without any risk of double-payment.

Second, if the auction clears at a price *below* the economic cost of the self-supply, the load entity can shelve its building plans and *save ratepayer's money* by just accepting the auction clearing price, which by necessity would be lower than the cost of building the self-supply. As the RPM functions as a three-year forward market, shelving almost any project is readily feasible.

Third, if the auction clears *below* the economic cost of the self-supply, but the load entity firmly believes that auction prices will soon rise and therefore insists on hedging with self-supply to save in the long run, the load entity remains free to build its self-supply generation anyway. As soon as capacity prices rise above the economic costs of the self-supply, the self-supply will clear and count towards fulfilling the load entity's capacity obligation henceforth. If the load entity genuinely believes that future prices will be higher, payment of the auction clearing price while it remains briefly lower, in addition to the cost of its self-supply, would be a rational and economic choice as it reduces the entity's net costs in the long-run.

Fourth, if a load entity requires the price predictability of self-supply, but does not want to be exposed to the auction outcome at all, it retains the option of entering into long-term contracts with existing capacity suppliers. Such long-term contracts can be drafted to provide all the certainty that self-supply would offer. These existing suppliers, by definition, already will have cleared in at least one prior Base Residual Auction and are therefore not subject to the MOPR.

In short, every conceivable legitimate interest in self-supply can be fulfilled without running the risk of double-payment. The only type of self-supply that runs the risk of double-payment is new self-supply with economic costs that are permanently higher than the auction price. Such self-supply is by definition uneconomic—participating in the Auction would always save the load and ratepayer money. The only possible motive for engaging into such a predictably uneconomic, money-losing strategy is that it will also artificially suppress capacity price levels paid for by other capacity procured in the Auction. But that is exactly the type of illicit strategy that the MOPR was intended to prevent in order to protect competitive price levels.

CONCLUSION

For the foregoing reasons, P3 and PSEG respectfully request that the Court grant our petitions for review, set aside the MOPR Orders as arbitrary and capricious with respect to the five errors described herein, and remand the orders to FERC for further proceedings. Beyond those five errors, the MOPR Orders should be affirmed, and the petitions for review filed by New Jersey, Maryland, and the Load Petitioners should be denied.

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CERTIFICATE OF BAR MEMBERSHIP

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CERTIFICATE OF WORD COUNT

Pursuant to Fed. R. App P. 32(a)(7)(C), 3d Cir. L.A.R. 32.1, and the July 23, 2012 Order of this Court, we hereby certify that the foregoing document contains no more than 23,000 words (20,525 using the word-count feature in Microsoft Word 2003) not including the tables of contents and authorities, and combined certifications.

This brief complies with the typeface requirements of Fed. R. App P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point font size and Times New Roman type style.

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IDENTICAL COMPLIANCE OF BRIEFS

Pursuant to 3rd Cir. L.A.R. 113.3(c), I certify that the electronically filed copy of this brief is the only copy being submitted at this time, consistent with the June 12, 2012 Order of this Court requiring only the final brief to be submitted in paper copy.

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VIRUS CHECK

Pursuant to 3rd Cir. L.A.R. 113.3(c), I certify that a virus check of the electronic PDF version of this brief was performed using TREND MICRO™ OfficeScan, which was updated September 27, 2012, and according to that program no virus was detected.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25, 3d Cir. L.A.R. 25 and Misc. 113.4, the undersigned hereby certifies that on this 28th day of September, 2012, the foregoing brief has been served upon counsel listed on the service lists in these proceedings via email through the Court's CM/ECF system or via first-class mail, postage prepaid, as indicated below:

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Addendum Per F.R.A.P. Rule 28(f)

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 provides:

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Section 201 of the Federal Power Act, 16 U.S.C. § 824 provides:

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject

to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f), 824i, 824j, 824j-1, 824k, 824o , 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A), wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms “affiliate”, “associate company”, “electric utility company”, “holding company”, “subsidiary company”, and “exempt wholesale generator” shall have the same meaning as when used in the Public Utility Holding Company Act of 2005.

Section 205 of the Federal Power Act, 16 U.S.C. § 824d provides:

16 U.S.C. § 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

Section 206 of the Federal Power Act, 16 U.S.C. § 824e provides:

16 U.S.C. § 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Com-mission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term “short-term sale” means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term “applicable Commission rule” means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

Section 313 of the Federal Power Act, 16 U.S.C. § 825*l* provides:

16 U.S.C. § 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

Section 316 of the Federal Power Act, 16 U.S.C. § 825*o*-1 provides:

16 U.S.C. § 825*o*-1. Enforcement of certain provisions

(a) Violations

It shall be unlawful for any person to violate any provision of subchapter II of this chapter or any rule or order issued under any such provision.

(b) Civil penalties

Any person who violates any provision of subchapter II of this chapter or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than $1,000,000 for each day that such violation continues. Such penalty shall be assessed by the Commission, after notice and opportunity for public hearing, in accordance with the same provisions as are applicable under section 823b(d) of this title in the case of civil penalties assessed under section 823b of this title. In determining the amount of a proposed penalty, the Commission shall take into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner.

Judicial Code, 28 U.S.C. § 2112 provides:

§ 2112. Record on review and enforcement of agency orders

(a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:

(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

(2) For purposes of paragraph (1) of this subsection, a copy of the petition or other pleading which institutes proceedings in a court of appeals and which is stamped by the court with the date of filing shall constitute the petition for review. Each agency, board, commission, or officer, as the case may be, shall designate by rule

the office and the officer who must receive petitions for review under paragraph (1).

(3) If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals. The judicial panel on multidistrict litigation shall, after providing notice to the public and an opportunity for the submission of comments, prescribe rules with respect to the consolidation of proceedings under this paragraph. The agency, board, commission, or officer concerned shall file the record in the court of appeals designated pursuant to this paragraph.

(4) Any court of appeals in which proceedings with respect to an order of an agency, board, commission, or officer have been instituted may, to the extent authorized by law, stay the effective date of the order. Any such stay may thereafter be modified, revoked, or extended by a court of appeals designated pursuant to paragraph (3) with respect to that order or by any other court of appeals to which the proceedings are transferred.

(5) All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed. For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.

(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the rules prescribed under the authority of section 2072 of this title may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules prescribed under the authority of section 2072 of this title designate to be included therein, or (3) as the court upon motion of a party or, after a prehearing conference, upon its own motion may by order in any such proceeding designate to be included therein. Such a stipulation or order may provide in an appropriate case that no record need be filed in the court of appeals. If, however, the correctness of a finding of fact by the agency, board, commission, or officer is in question all of the evidence before the agency, board, commission, or officer shall be included in the record except such as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court agree to omit as wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer which the court subsequently determines to be proper for it to consider to enable it to review or enforce the order in question the court may direct that such additional portion of the proceedings be filed as a supplement to the record. The agency, board, commission, or officer concerned may, at its option and without regard to the foregoing provisions of this subsection, and if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation.

(c) The agency, board, commission, or officer concerned may transmit to the court of appeals the original papers comprising the whole or any part of the record or any supplemental record, otherwise true copies of such papers certified by an authorized officer or deputy of the agency, board, commission, or officer concerned shall be transmitted. Any original papers thus transmitted to the court of appeals shall be returned to the agency, board, commission, or officer concerned upon the final determination of the review or enforcement proceeding. Pending such final determination any such papers may be returned by the court temporarily to the custody of the agency, board, commission, or officer concerned if needed for the transaction of the public business. Certified copies of any papers included in the record or any supplemental record may also be returned to the agency, board, commission, or officer concerned upon the final determination of review or enforcement proceedings.

(d) The provisions of this section are not applicable to proceedings to review decisions of the Tax Court of the United States or to proceedings to review or enforce those orders of administrative agencies, boards, commissions, or officers which are by law reviewable or enforceable by the district courts.

FERC Regulation FERC Regulations, 18 C.F.R. § 1c.2, provides:

§ 1c.2 Prohibition of electric energy market manipulation.

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission,

(1) To use or employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

(b) Nothing in this section shall be construed to create a private right of action.

FERC Regulation 18 C.F.R. § 35.41, provides:

§ 35.41 Market behavior rules.

(a) Unit operation. Where a Seller participates in a Commission-approved organized market, Seller must operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable market. A Seller is not required to bid or supply electric energy or other electricity products unless such requirement is a part of a separate Commission-approved tariff or is a requirement applicable to Seller through Seller's participation in a Commission-approved organized market.

(b) Communications. A Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.

(c) Price reporting. To the extent a Seller engages in reporting of transactions to publishers of electric or natural gas price indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the Policy Statement issued by the Commission in Docket No. PL03–3–000 and any clarifications thereto. Unless Seller has previously provided the Commission with a notification of its price reporting status, Seller must notify the Commission within 15 days of the effective date of this regulation or within 15 days of the date it begins making wholesale sales, whichever is earlier, whether it engages in such reporting of its transactions. Seller must update the notification within 15 days of any subsequent change in its transaction reporting status. In addition, Seller must adhere to such other standards and requirements for price reporting as the Commission may order.

(d) Records retention. A Seller must retain, for a period of five years, all data and information upon which it billed the prices it charged for the electric energy or electric energy products it sold pursuant to Seller's market-based rate tariff, and the prices it reported for use in price indices.

PJM Tariff, Attach. DD § 5.10 provides:

PJM Interconnection, L.L.C. as of 09/28/2012
Electric TCS and MBR
Intra-PJM Tariffs

Effective Date:	07/18/2012	Status:	Effective
FERC Docket:	ER12-01784-000 464		
FERC Order:	Delegated Letter Order	Order Date:	06/13/2012

ATTACHMENT DD.5.10, OATT ATTACHMENT DD.5.10 Auction Clearing Requirements, 9.0.1 A

5.10 Auction Clearing Requirements

The Office of the Interconnection shall clear each Base Residual Auction and Incremental Auction for a Delivery Year in accordance with the following:

a) Variable Resource Requirement Curve

The Office of the Interconnection shall determine Variable Resource Requirement Curves for the PJM Region and for such Locational Deliverability Areas as determined appropriate in accordance with subsection (a)(iii) for such Delivery Year to establish the level of Capacity Resources that will provide an acceptable level of reliability consistent with the Reliability Principles and Standards. It is recognized that the variable resource requirement reflected in the Variable Resource Requirement Curve can result in an optimized auction clearing in which the level of Capacity Resources committed for a Delivery Year exceeds the PJM Region Reliability Requirement (less the Forecast RTO ILR Obligation for Delivery Years through May 31, 2012, or less the Short-Term Resource Procurement Target for Delivery Years thereafter) or Locational Deliverability Area Reliability Requirement (less the Forecast Zonal ILR Obligation for Delivery Years through May 31, 2012, or less the Short-Term Resource Procurement Target for Delivery Years thereafter for the Zones associated with such LDA) for such Delivery Year. For any auction, the Updated Forecast Peak Load, and Short-Term Resource Procurement Target applicable to such auction, shall be used, and Price Responsive Demand from any applicable approved PRD Plan, including any associated PRD Reservation Prices, shall be reflected in the derivation of the Variable Resource Requirement Curves, in accordance with the methodology specified in the PJM Manuals.

i) Methodology to Establish the Variable Resource Requirement Curve

Prior to the Base Residual Auction, in accordance with the schedule in the PJM Manuals, the Office of the Interconnection shall establish the Variable Resource Requirement Curve for the PJM Region as follows:

- Each Variable Resource Requirement Curve shall be plotted on a graph on which Unforced Capacity is on the x-axis and price is on the y-axis;

- The Variable Resource Requirement Curve for the PJM Region shall be plotted by first combining (i) a horizontal line from the y-axis to point (1), (ii) a straight line connecting points (1) and (2), (iii) a straight line connecting points (2) and (3), and (iv) a vertical line from point (3) to the x-axis, where:

  - For point (1), price equals: {the greater of [the Cost of New Entry] or [1.5 times (the Cost of New Entry minus the Net Energy and Ancillary Service Revenue Offset)]} divided by (one minus the pool-wide average EFORd) and Unforced Capacity equals: [the PJM Region Reliability Requirement multiplied by (100% plus the approved PJM Region Installed Reserve Margin ("IRM")% minus 3%) divided by (100% plus IRM%)] minus the Forecast RTO ILR Obligation for Delivery Years through May 31, 2012 or less the Short-Term Resource Procurement Target for Delivery Years thereafter;

  - For point (2), price equals: (the Cost of New Entry minus the Net Energy and Ancillary Service Revenue Offset) divided by (one minus the pool-wide average EFORd) and Unforced Capacity equals: [the PJM Region Reliability Requirement multiplied by (100% plus IRM% plus 1%) divided by (100% plus IRM%)] minus the Forecast RTO ILR Obligation for Delivery Years through May 31, 2012 or less the Short-Term Resource Procurement Target for Delivery Years thereafter; and

  - For point (3), price equals [0.2 times (the Cost of New Entry minus the Net Energy and Ancillary Service Revenue Offset)] divided by (one minus the pool-wide average EFORd) and Unforced Capacity equals: [the PJM Region Reliability Requirement multiplied by (100% plus IRM% plus 5%) divided by (100% plus IRM%)] minus the Forecast RTO ILR Obligation for Delivery Years through May 31, 2012 or less the Short-Term Resource Procurement Target for Delivery Years thereafter;

ii) For any Delivery Year, the Office of the Interconnection shall establish a separate Variable Resource Requirement Curve for each LDA for which:

A. the Capacity Emergency Transfer Limit is less than 1.15 times the Capacity Emergency Transfer Objective, as determined by the Office of the Interconnection in accordance with NERC and Applicable Regional Entity guidelines; or

B. such LDA had a Locational Price Adder in any one or more of the three immediately preceding Base Residual Auctions; or

C. such LDA is determined in a preliminary analysis by the Office of the Interconnection to be likely to have a Locational Price Adder, based on historic offer price levels; provided however that for the Base Residual Auction conducted for the Delivery Year commencing on June 1, 2012, the Eastern Mid-Atlantic Region ("EMAR"), Southwest Mid-Atlantic Region ("SWMAR"), and Mid-Atlantic Region ("MAR") LDAs shall employ separate Variable Resource Requirement Curves regardless of the outcome of the above three tests; and provided further that the Office of the Interconnection may establish a separate Variable Resource Requirement Curve for an LDA not otherwise qualifying under the above three tests if it finds that such is required to achieve an acceptable level of reliability consistent with the Reliability Principles and Standards, in which case the Office of the Interconnection shall post such finding, such LDA, and such Variable Resource Requirement Curve on its internet site no later than the March 31 last preceding the Base Residual Auction for such Delivery Year. The same process as set forth in subsection (a)(i) shall be used to establish the Variable Resource Requirement Curve for any such LDA, except that the Locational Deliverability Area Reliability Requirement for such LDA shall be substituted for the PJM Region Reliability Requirement and the LDA Short-Term Resource Procurement Target shall be substituted for the PJM Region Short-Term Resource Procurement Target. For purposes of calculating the Capacity Emergency Transfer Limit under this section, all generation resources located in the PJM Region that are, or that qualify to become, Capacity Resources, shall be modeled at their full capacity rating, regardless of the amount of capacity cleared from such resource for the immediately preceding Delivery Year.

iii) Procedure for ongoing review of Variable Resource Requirement Curve shape.

Beginning no later than for the Delivery Year that commences June 1, 2015, and continuing no later than for every third Delivery Year thereafter, the Office of the Interconnection shall perform a review of the shape of the Variable Resource Requirement Curve, as established by the requirements of the foregoing subsection. Such analysis shall be based on simulation of market conditions to quantify the ability of the market to invest in new Capacity Resources and to meet the applicable reliability requirements on a probabilistic basis. Based on the results of such review, PJM shall prepare a recommendation to either modify or retain the existing Variable Resource Requirement Curve shape. The Office of the Interconnection shall post the recommendation and shall review the recommendation through the stakeholder process to solicit stakeholder input. If a modification of the Variable Resource Requirement Curve shape is recommended, the following process shall be followed:

A) If the Office of the Interconnection determines that the Variable Resource Requirement Curve shape should be modified, Staff of the Office of the Interconnection shall propose a new Variable Resource Requirement Curve shape on or before September 1, prior to the conduct of the Base Residual Auction for the first Delivery Year in which the new values would be applied.

B) The PJM Members shall review the proposed modification to the Variable Resource Requirement Curve shape.

C) The PJM Members shall either vote to endorse the proposed modification, to propose alternate modifications or to recommend no modification by October 31, prior to the conduct of the Base Residual Auction for the first Delivery Year in which the new values would be applied.

D) The PJM Board of Managers shall consider a proposed modification to the Variable Resource Requirement Curve shape, and the Office of the Interconnection shall file any approved modified Variable Resource Requirement Curve shape with the FERC by December 1, prior to the conduct of the Base Residual Auction for the first Delivery Year in which the new values would be applied.

iv) Cost of New Entry

A) For the Delivery Year commencing on June 1, 2012, and continuing thereafter unless and until changed pursuant to subsection (B) below, the Cost of New Entry for the PJM Region shall be $112,868 per MW-year. The Cost of New Entry for each LDA shall be determined based upon the Transmission Owner zones that comprise such LDA, as provided in the table below. If an LDA combines transmission zones with differing Cost of New Entry values, the lowest such value shall be used.

Geographic Location Within the PJM Region Encompassing These Zones	**Cost of New Entry in $/MW-Year**
PS, JCP&L, AE, PECO, DPL, RECO ("CONE Area 1")	*134,000*
BGE, PEPCO ("CONE Area 2")	*123,700*
AEP, Dayton, ComEd, APS, DQL, ATSI, *DEOK* ("CONE Area 3")	*123,500*
PPL, MetEd, Penelec ("CONE Area 4")	*130,100*
Dominion ("CONE Area 5")	*111,000*

B) Beginning with the 2013-2014 Delivery Year, the CONE shall be adjusted to reflect changes in generating plant construction costs based on changes in the Applicable H-W Index, in accordance with the following:

(1) The Applicable H-W Index for any Delivery Year shall be the most recently published twelve-month change, at the time CONE values are required to be posted for the Base Residual Auction for such Delivery Year, in the Total Other Production Plant Index shown in the Handy-Whitman Index of Public Utility Construction Costs for the North Atlantic Region for purposes of CONE Areas 1, 2, and 4, for the North Central Region for purposes of CONE Area 3, and for the South Atlantic Region for purposes of CONE Area 5.

(2) The CONE in a CONE Area shall be adjusted prior to the Base Residual Auction for each Delivery Year by applying the Applicable H-W Index for such CONE Area to the Benchmark CONE for such CONE Area.

(3) The Benchmark CONE for a CONE Area shall be the CONE used for such CONE Area in the Base Residual Auction for the prior Delivery Year.

(4) Notwithstanding the foregoing, CONE values for any CONE Area for any Delivery Year shall be subject to amendment pursuant to appropriate filings with FERC under the Federal Power Act, including, without limitation, any filings resulting from the process described in section 5.10(a)(vii)(C) or any filing to establish new or revised CONE Areas.

v) Net Energy and Ancillary Services Revenue Offset

A) The Office of the Interconnection shall determine the Net Energy and Ancillary Services Revenue Offset each year for the PJM Region as (A) the annual average of the revenues that would have been received by the Reference Resource from the PJM energy markets during a period of three consecutive calendar years preceding the time of the determination, based on (1) the heat rate and other characteristics of such Reference Resource; (2) fuel prices reported during such period at an appropriate pricing point for the PJM Region with a fuel transmission adder appropriate for such region, as set forth in the PJM Manuals, assumed variable operation and maintenance expenses for such resource of $6.47 per MWh, and actual PJM hourly average Locational Marginal Prices recorded in the PJM Region during such period; and (3) an assumption that the Reference Resource would be dispatched for both the Day-Ahead and Real-Time Energy Markets on a Peak-Hour Dispatch basis; plus (B) ancillary service revenues of $2,199 per MW-year.

B) The Office of the Interconnection also shall determine a Net Energy and Ancillary Service Revenue Offset each year for each sub-region of the PJM Region for which the Cost of New Entry is determined as identified above, using the same procedures and methods as set forth in the previous subsection; provided, however, that: (1) the average hourly LMPs for the Zone in which the Reference Resource was assumed to be installed for purposes of the CONE estimate (as specified in the PJM Manuals) shall be used in place of the PJM Region average hourly LMPs; (2) if such sub-region was not integrated into the PJM Region for the entire applicable period, then the offset shall be calculated using only those whole calendar years during which the sub-region was integrated; and (3) a posted fuel pricing point in such sub-region, if available, and (if such pricing point is not available) a fuel transmission adder appropriate to each assumed Cost of New Entry location from an appropriate PJM Region pricing point shall be used for each such sub-region.

vi) Adjustment to Net Energy and Ancillary Services Revenue Offset

Beginning with the Base Residual Auction scheduled for May 2010, the Net Energy and Ancillary Services Revenue Offset for a CONE Area shall be adjusted following any Delivery Year during which Scarcity Pricing was effective in such CONE Area pursuant to the Scarcity Pricing provisions of section 6A of Schedule 1 to the PJM Operating Agreement. Following each Delivery Year, the Scarcity Pricing revenues the Reference Resource in each CONE Area would have received during such Delivery Year shall be calculated based on the assumed heat rate and other characteristics of the Reference Resource, assumed Peak-Hour Dispatch, and the actual locational marginal prices and actual fuel prices during the Delivery Year for the applicable location, which shall be the transmission zone in which such resource was assumed to be installed for purposes of the estimate of CONE applicable to such CONE Area. The Scarcity Pricing revenues so determined shall be subtracted from the Net CONE otherwise calculated for such CONE Area for use in the Base Residual Auction next occurring after the Delivery Year in which Scarcity Pricing was effective in such CONE Area.

vii) Process for Establishing Parameters of Variable Resource Requirement Curve

A) The parameters of the Variable Resource Requirement Curve will be established prior to the conduct of the Base Residual Auction for a Delivery Year and will be used for such Base Residual Auction.

B) The Office of the Interconnection shall determine the PJM Region Reliability Requirement and the Locational Deliverability Area Reliability Requirement for each Locational Deliverability Area for which a Variable Resource Requirement Curve has been established for such Base Residual Auction on or before February 1, prior to the conduct of the Base Residual Auction for the first Delivery Year in which the new values will be applied, in accordance with the Reliability Assurance Agreement.

C) Beginning no later than for the Delivery Year that commences June 1, 2015, and continuing no later than for every third Delivery Year thereafter, the Office of the Interconnection shall review the calculation of the Cost of New Entry for each CONE Area.

1) If the Office of the Interconnection determines that the Cost of New Entry values should be modified, the Staff of the Office of the Interconnection shall propose new Cost of New Entry values on or before September 1, prior to the conduct of the Base Residual Auction for the first Delivery Year in which the new values would be applied.

2) The PJM Members shall review the proposed values.

3) The PJM Members shall either vote to endorse the proposed values or propose alternate values by October 31, prior to the conduct of the Base Residual Auction for the first Delivery Year in which the new values would be applied.

4) The PJM Board of Managers shall consider Cost of New Entry values, and the Office of the Interconnection shall file any approved modified Cost of New Entry values with the FERC by December 1, prior to the conduct of the Base Residual Auction for the first Delivery Year in which the new values would be applied.

D) Beginning no later than for the Delivery Year that commences June 1, 2015, and continuing no later than for every third Delivery Year thereafter, the Office of the Interconnection shall review the methodology set forth in this Attachment for determining the Net Energy and Ancillary Services Revenue Offset for the PJM Region and for each Zone.

1) If the Office of the Interconnection determines that the Net Energy and Ancillary Services Revenue Offset methodology should be modified, Staff of the Office of the Interconnection shall propose a new Net Energy and Ancillary Services Revenue Offset methodology on or before September 1, prior to the conduct of the Base Residual Auction for the first Delivery Year in which the new methodology would be applied.

2) The PJM Members shall review the proposed methodology.

3) The PJM Members shall either vote to endorse the proposed methodology or propose an alternate methodology by October 31, prior to the conduct of the Base Residual Auction for the first Delivery Year in which the new methodology would be applied.

4) The PJM Board of Managers shall consider the Net Revenue Offset methodology, and the Office of the Interconnection shall file any approved modified Net Energy and Ancillary Services Revenue Offset values with the FERC by December 1, prior to the conduct of the Base Residual Auction for the first Delivery Year in which the new values would be applied.

b) Locational Requirements

The Office of Interconnection shall establish locational requirements prior to the Base Residual Auction to quantify the amount of Unforced Capacity that must be committed in each Locational Deliverability Area, in accordance with the PJM Reliability Assurance Agreement.

c) Minimum Annual Resource Requirements

Prior to the Base Residual Auction and each Incremental Auction for each Delivery Year, beginning with the Delivery Year that starts on June 1, 2014, the Office of the Interconnection shall establish the Minimum Annual Resource Requirement and the Minimum Extended Summer Resource Requirement for the PJM Region and for each Locational Deliverability Area for which the Office of the Interconnection is required under section 5.10(a) of this Attachment DD to establish a separate VRR Curve for such Delivery Year.

d) Preliminary PJM Region Peak Load Forecast for the Delivery Year

The Office of the Interconnection shall establish the Preliminary PJM Region Load Forecast for the Delivery Year in accordance with the PJM Manuals by February 1, prior to the conduct of the Base Residual Auction for such Delivery Year.

e) Updated PJM Region Peak Load Forecasts for Incremental Auctions

The Office of the Interconnection shall establish the updated PJM Region Peak Load Forecast for a Delivery Year in accordance with the PJM Manuals by February 1, prior to the conduct of the First, Second, and Third Incremental Auction for such Delivery Year.

PJM Tariff, Attach. DD §§ 6.4, 6.7 provide:

PJM Interconnection, L.L.C. as of 09/28/2012
Electric TCS and MBR
Intra-PJM Tariffs
Effective Date: 02/18/2012 Status: Effective
FERC Docket: ER12-00636-000 387
FERC Order: Commission Letter Order Order Date: 02/16/2012

OATT ATT DD.6, OATT ATTACHMENT DD.6. MARKET POWER MITIGATION, 5.0.0 A

6. MARKET POWER MITIGATION

* * * *

6.4 Market Seller Offer Caps

(a) The Market Seller Offer Cap, stated in dollars per MW-day of unforced capacity, applicable to price-quantity offers within the Base Offer Segment for an Existing Generation Capacity Resource shall be the Avoidable Cost Rate for such resource, less the Projected PJM Market Revenues for such resource, stated in dollars per MW of unforced capacity. During the first three Delivery Years of the Transition Period, the Market Seller Offer Cap shall be increased for Sell Offers submitted by eligible Capacity Market Sellers in any Unconstrained LDA Group by the Transition Adder set forth in section 17.5 of this Attachment. The Market Seller Offer Cap for an Existing Generation Capacity Resource shall be the Opportunity Cost for such resource, if applicable, as determined in accordance with section 6.7. Nothing herein shall preclude any Capacity Market Seller and the Market Monitoring Unit from agreeing to, nor require either such entity to agree to, an alternative market seller offer cap determined on a mutually agreeable basis. Any such alternative offer cap shall be filed with the Commission for its approval. This provision is duplicated in section II.E.3 of Attachment M- Appendix.

(b) For each Existing Generation Capacity Resource, a potential Capacity Market Seller must timely provide to the Market Monitoring Unit data and documentation required under section 6.6 to establish the level of the Market Seller Offer Cap applicable to each resource. The Capacity Market Seller must promptly address any concerns identified by the Market Monitoring Unit regarding the data and documentation provided, review the proposed Market Seller Offer Cap, and attempt to reach agreement with the Market Monitoring Unit on the level of the Market Seller Offer Cap.

(c) If the Market Monitoring Unit informs the Office of the Interconnection that a Capacity Market Seller has failed to submit costs consistent with section 6.7, it shall be required to submit any Sell Offer in the applicable auction as Self-Supply committed regardless of clearing price. If such Capacity Market Seller submits a Sell Offer that is not Self-Supply committed regardless of clearing price, the Market Monitoring Unit may seek relief from the Commission pursuant to section II.E of Attachment M - Appendix.

(d) In the event that a Capacity Market Seller and the Market Monitoring Unit cannot agree on the level of a Market Seller Offer Cap, the Office of the Interconnection shall make its own determination of the level of the Market Seller Offer Cap based on the requirements of the Tariff and the PJM Manuals. If the Capacity Market Seller submits a Sell Offer that the Office of the Interconnection determines would result in an increase of greater than five percent in any Zonal Capacity Price determined through such auction compared to the Office of the Interconnection's determination of the level of the Market Seller Offer Cap, the Office of the Interconnection shall apply to FERC for an order, on an expedited basis, directing such Capacity Market Seller to submit a Sell Offer consistent with the Office of the Interconnection's determination, or for other appropriate relief, and PJM shall postpone clearing the auction pending FERC's decision on the matter. Should the Market Monitoring Unit exercise its powers to inform Commission staff of its concerns and request a determination, on an expedited basis, directing a Capacity Market Seller to submit a Sell Offer consistent with the Market Monitoring Unit's determination, or for other appropriate relief, pursuant to section II.E of Attachment M - Appendix, PJM may postpone clearing the auction pending FERC's decision on the matter.

(e) Nothing in this section precludes the Capacity Market Seller from filing a petition with FERC seeking a determination of whether the Sell Offer complies with the requirements of the Tariff.

(f) Notwithstanding the foregoing, a Capacity Market Seller may submit a Sell Offer that it chooses, provided that (i) it has participated in good faith with the process described in this section 6.4 and in section II.E of Attachment M - Appendix, (ii) the offer is no higher than the level defined in any agreement reached by the Capacity Market Seller and the Market Monitoring Unit that resulted from the foregoing process, and (iii) the offer is accepted by the Office of the Interconnection subject to the criteria set forth in the Tariff and the PJM Manuals.

(g) For any Third Incremental Auction, the Market Seller Offer Cap for an Existing Generation Capacity Resource shall be determined pursuant to paragraph (a) of this Section 6.4, or if elected by the Capacity Market Seller, shall be equal to 1.1 times the Capacity Resource Clearing Price in the Base Residual Auction for the relevant LDA and Delivery Year.

* * * *

6.7 Data Submission

(a) Potential participants in any PJM Reliability Pricing Model Auction shall submit, together with supporting documentation for each item, to the Market Monitoring Unit no later than four months prior to the posted date for the conduct of such auction, a list of owned or controlled generation resources by PJM transmission zone for the specified Delivery Year, including the amount of gross capacity, the EFORd and the net (unforced) capacity.

(b) Except as provided in subsection (c) below, potential participants in any PJM Reliability Pricing Model Auction in any LDA or Unconstrained LDA Group that fails the Preliminary Market Structure Screen (or, if such region fails the screen, potential auction participants in the entire PJM Region) shall, in addition, submit the following data, together with supporting documentation for each item, to the Market Monitoring Unit no later than two months prior to the conduct of such auction:

i. If the Capacity Market Seller intends to submit a non-zero price in its Sell Offer in any such auction, the Capacity Market Seller shall submit a calculation of the Avoidable Cost Rate and Projected PJM Market Revenues, as defined in subsection (d) below, together with detailed supporting documentation.

ii. If the Capacity Market Seller intends to submit a Sell Offer based on opportunity cost, the Capacity Market Seller shall also submit a calculation of Opportunity Cost, as defined in subsection (d), with detailed supporting documentation.

(c) Potential auction participants identified in subsection (b) above need not submit the data specified in that subsection for any Generation Capacity Resource:

i. that is in an Unconstrained LDA Group or, if this is the relevant market, the entire PJM Region, and is in a resource class identified in the table below as not likely to include the marginal price-setting resources in such auction; or

ii. for which the potential participant commits that any Sell Offer it submits as to such resource shall not include any price above: (1) the level identified below for the relevant resource class, less (2) the Projected PJM Market Revenues for such resource, as determined in accordance with this Tariff.

Nothing herein precludes the Market Monitoring Unit from requesting additional information from any potential auction participant as deemed necessary by the Market Monitoring Unit, including, without limitation, additional cost data on resources in a class that is not otherwise expected to include the marginal price setting resource; and compliance with such request shall be a condition of participation in any auction. Any Sell Offer submitted in any auction that is inconsistent with any commitment made pursuant to this subsection shall be rejected, and the Capacity Market Seller shall be required promptly to resubmit a Sell Offer that complies with such commitments. If the Capacity Market Seller does not timely resubmit its Sell Offer, it shall be deemed to have submitted a Sell Offer that complies with the commitments made under this subsection, with a default price equal to the maximum price for the class of resource determined under section (c)(ii) above. The obligation imposed under section 6.6(a) shall not be satisfied unless and until the Capacity Market Seller submits (or is deemed to have submitted) a Sell Offer that conforms to its commitments made pursuant to this subsection or subject to the procedures set forth in section 6.4 and section II.H of Attachment M - Appendix. The default Avoidable Cost Rates referenced in section (c)(ii) above are as set forth in the tables below for any auction conducted after September 1, 2009 for any Delivery Year through the 2012-2013 Delivery Year. To determine the default ACR values for the 2013-2014 and subsequent Delivery Years, the Office of the Interconnection shall multiply the ACR values for the immediately preceding Delivery Year by a factor equal to the most recent ten-calendar-year annual average rate of change in the applicable Handy-Whitman Index of Public Utility Construction Costs or a comparable index approved by the Commission, as calculated by the Office of the Interconnection and posted to its Web site; provided, however, that after the Handy-Whitman indexing methodology has been employed to determine the default ACR values for the RPM Auctions for three consecutive Delivery Years, the Office of the Interconnection shall: i) review the default ACR values to determine whether any changes other than those produced by such methodology are warranted for subsequent Delivery Years (including seeking the analysis and advice of the Market Monitoring Unit on such matter) and report its conclusions to the Members in writing no later than four months after the Base Residual Auction for the third such Delivery Year; and ii) file with FERC resulting changes, if any, to this section no later than seven months after such Base Residual Auction, to be effective for the Base Residual Auction for the following Delivery Year; provided further, that nothing herein precludes the Office of the Interconnection from filing with FERC changes to the default ACR values or any other provision of this section prior to the deadline stated in the previous clause, or at any other time. Capacity Market Sellers shall use the one-year mothball Avoidable Cost Rate shown below, unless such Capacity Market Seller satisfies the criteria set forth in section 6.7(e), in which case the Capacity Market Seller may use the retirement Avoidable Cost Rate. PJM shall also publish on its Web site the number of Generation Capacity Resources and megawatts per LDA that use the retirement Avoidable Cost Rates.

Technology Classes Not Likely to be the Marginal Price Setting Resource						
Technology	**2010-2011 Mothball Avoidable Cost Rate ($/MW-Day)**	**2010-2011 Retirement Avoidable Cost Rate ($/MW-Day)**	**2011-2012 Mothball Avoidable Cost Rate ($/MW-Day)**	**2011-2012 Retirement Avoidable Cost Rate ($/MW-Day)**	**2012-2013 Mothball Avoidable Cost Rate ($/MW-Day)**	**2012 -2013 Retirement Avoidable Cost Rate ($/MW-Day)**
Nuclear	N/a	N/a	N/a	N/a	N/a	N/a
Pumped Storage	$20.77	$29.17	$21.72	$30.50	$22.71	$31.89
Hydro	$71.01	$92.87	$74.24	$97.10	$77.62	$101.52
Sub-Critical Coal	$170.48	$188.98	$178.24	$197.58	$186.35	$206.57
Super Critical Coal	$176.13	$192.65	$184.15	$201.42	$192.53	$210.59
Waste Coal - Small	$224.83	$272.31	$235.06	$284.70	$245.75	$297.65
Waste Coal - Large	$83.15	$100.45	$86.94	$105.02	$90.89	$109.80
Wind	N/a	N/a	N/a	N/a	N/a	N/a

Maximum Avoidable Cost Rates by Technology Class						
Technology	**2010-2011 Mothball Avoidable Cost Rate ($/MW-Day)**	**2010-2011 Retirement Avoidable Cost Rate ($/MW-Day)**	**2011-2012 Mothball Avoidable Cost Rate ($/MW-Day)**	**2011-2012 Retirement Avoidable Cost Rate ($/MW-Day)**	**2012-2013 Mothball Avoidable Cost Rate ($/MW-Day)**	**2012-2013 Retirement Avoidable Cost Rate ($/MW-Day)**
CC- 2 on 1 Frame F	$30.92	$43.86	$32.33	$45.85	$33.80	$47.94
CC- 3 on 1 Frame E/Siemens	$34.33	$46.48	$35.89	$48.60	$37.52	$50.81
CC - 3 or More on 1 or More Frame F	$26.76	$37.16	$27.98	$38.85	$29.26	$40.62
CC-NUG Cogen. Frame B or E Technology	$114.93	$154.43	$120.16	$161.45	$125.62	$168.80
CT - 1st & 2nd Gen. Aero (P&W FT 4)	$24.57	$32.68	$25.69	$34.17	$26.86	$35.73
CT - 1st & Gen. Frame B	$24.28	$32.41	$25.38	$33.87	$26.54	$35.42
CT - 2nd Gen. Frame E	$23.08	$30.89	$24.13	$32.29	$25.23	$33.76
CT - 3rd Gen. Aero (GE LM 6000)	$55.87	$82.36	$58.42	$86.10	$61.07	$90.02
CT - 3rd Gen. Aero (P&W FT - 8 TwinPak)	$29.30	$43.20	$30.64	$45.17	$32.03	$47.23
CT - 3rd Gen. Frame F	$23.69	$34.12	$24.77	$35.68	$25.90	$37.30
Diesel	$26.29	$33.39	$27.49	$34.91	$28.74	$36.49
Oil and Gas Steam	$65.21	$79.39	$68.18	$83.01	$71.28	$86.78

After the Market Monitoring Unit conducts its annual review of the table of default Avoided Cost Rates included in section 6.7(c) above in accordance with the procedure specified in section II.H of Attachment M - Appendix, it will provide updated values or notice of its determination that updated values are not needed to Office of the

Interconnection. In the event that the Office of the Interconnection disagrees with the values proposed for revising the matrix, the Office of the Interconnection shall file its values.

(d) In order for costs to qualify for inclusion in the Market Seller Offer Cap, the Capacity Market Seller must provide to the Market Monitoring Unit relevant cost data concerning each data item specified as set forth in section 6. If cost data is not available at the time of submission for the time periods specified in section 6.8, costs may be estimated for such period based on the most recent data available, with an explanation of and basis for the estimate used. Based on the data and calculations submitted by the Capacity Market Sellers for each existing generation resource and the formulas specified below, the Market Monitoring Unit shall calculate the Market Seller Offer Cap for each such resource, and notify the Capacity Market Seller one month prior to the auction of its determination.

i. Avoidable Cost Rate: The Avoidable Cost Rate for an existing generation resource shall be determined using the formula below and applied to the unit's Base Offer Segment.

ii. Opportunity Cost: Opportunity Cost shall be the documented price available to an existing generation resource in a market external to PJM. In the event that the total MW of existing generation resources submitting opportunity cost offers in any auction for a Delivery Year exceeds the firm export capability of the PJM system for such Delivery Year, or the capability of external markets to import capacity in such year, the Office of the Interconnection will accept such offers on a competitive basis. PJM will construct a supply curve of opportunity cost offers, ordered by opportunity cost, and accept such offers to export starting with the highest opportunity cost, until the maximum level of such exports is reached. The maximum level of such exports is the lesser of the Office of the Interconnection's ability to permit firm exports or the ability of the importing area(s) to accept firm imports or imports of capacity, taking account of relevant export limitations by location. If, as a result, an opportunity cost offer is not accepted from an existing generation resource, the Market Seller Offer Cap applicable to Sell Offers relying on such generation resource shall be the Avoidable Cost Rate less the Projected Market Revenues for such resource (as defined in Section 6.4). The default Avoidable Cost Rate shall be the one year mothball Avoidable Cost Rate set forth in the tables in section 6.7(c) above unless Capacity Market Seller satisfies the criteria delineated in section 6.7(e) below.

iii. Projected PJM Market Revenues, as defined by section 6.8(d), for any Generation Capacity Resource to which the Avoidable Cost Rate is applied.

(e) In order for the retirement Avoidable Cost Rate set forth in the table in section 6.7(c) to apply, a Capacity Market Seller must timely submit to the Office of the Interconnection and the Market Monitoring Unit a written sworn, notarized statement of a corporate officer representing that the Capacity Market Seller will retire the Generation Capacity Resource if it does not receive during the relevant Delivery Year at least the applicable retirement Avoidable Cost Rate because it would be uneconomic to continue to operate the Generation Capacity Resource in the Delivery Year without the retirement Avoidable Cost Rate, and specifying the date the Generation Capacity Resource would otherwise be retired.