UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Calpine Corporation, *et al.*	)	
	)	
v.	)	**Docket No. EL16-49-002**
	)	
PJM Interconnection, L.L.C.	)	
PJM Interconnection, L.L.C.	)	**Docket No. EL18-178-002**
		(Consolidated)

LIMITED REQUEST FOR REHEARING AND CLARIFICATION OF THE ELECTRIC POWER SUPPLY ASSOCIATION AND THE PJM POWER PROVIDERS GROUP

Pursuant to Section 313(a) of the Federal Power Act (the "FPA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission" or "FERC"),[2] the Electric Power Supply Association ("EPSA")[3] and the PJM Power Providers Group ("P3")[4] respectfully submit this limited request for rehearing and clarification of the Commission's December 19, 2019 order in the above-captioned

[1] 16 U.S.C. § 825/(a) (2018).

[2] 18 C.F.R. § 385.713 (2019).

[3] EPSA is the national trade association representing competitive power suppliers in the U.S. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

[4] P3 is a non-profit organization that supports the development of properly designed and well-functioning markets in the PJM region. Combined, P3 members own approximately 75,000 megawatts of generation assets, produce enough power to supply over 50 million homes in the PJM region covering 13 states and the District of Columbia. For more information on P3, visit www.p3powergroup.com. The comments contained 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.

proceedings.[5] EPSA and P3 commend the Commission for taking decisive and much-needed action in these proceedings to protect the integrity of the Reliability Pricing Model ("RPM")[6] auctions, and, as discussed below, they seek only limited rehearing and clarification to ensure that the ultimate outcome is consistent with the principles articulated in the December 19 Order, as well as the Commission's June 29, 2018 order[7] in these proceedings.

Like the Commission, EPSA and P3 are strong proponents of competitive capacity markets, and, accordingly, EPSA and P3 wholeheartedly support the Commission's efforts to address the harm that out-of-market subsidies inflict on the wholesale capacity markets. EPSA and P3 appreciate and endorse Chairman Chatterjee's statement at the Commission's December 19, 2019 open meeting that "competition works" and that the Commission should, therefore, "ensure that the markets remain competitive by establishing a level playing field and being resource neutral" in order to "promote competition that will benefit consumers."[8] Consistent with these principles, the December 19 Order correctly recognizes that all out-of-market subsidies skew market outcomes, and therefore appropriately requires PJM to apply a Minimum Offer Price Rule ("MOPR") to all subsidized resources, with only limited exemptions. In the same vein, the

---

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

[6] This and other capitalized terms used and not otherwise defined herein have the meaning set forth in the PJM Interconnection, L.L.C. ("PJM") Open Access Transmission Tariff (the "PJM Tariff").

[7] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (the "June 29 Order").

[8] Commission Meeting, Tr. at 15:5-8 (Dec. 19, 2019) (Chatterjee, Chair), https://www.ferc.gov/CalendarFiles/20200106085022-transcript.pdf.

Commission appropriately rejected proposed mechanisms that would have accommodated state subsidy programs without concomitant consideration of harmful wholesale market impacts, including the resource-specific Fixed Resource Requirement Alternative proposed in the June 2018 Order[9] and PJM's variant on that proposal, the Resource Carve-Out, on the grounds that such "accommodation of state subsidy programs would have unacceptable market distorting impacts that would inhibit incentives for competitive investment in the PJM market over the long term."[10]

EPSA and P3 seek rehearing of a single discrete and limited element of the December 19 Order: the Commission's holding that it lacks the authority to address the effects of any federal subsidies on the RPM Auctions.[11] EPSA and P3 respectfully submit that this holding is overbroad, erroneous, and at odds with the Commission's holdings as to state subsidies. EPSA and P3 also request clarification that: (1) the definition of "State Subsidy" does not encompass benefits, other than actual subsidies, from programs like the Regional Greenhouse Gas Initiative ("RGGI"); (2) PJM will have the discretion to propose, on compliance, a process to determine which voluntary, bilateral transactions for Renewable Energy Credits ("RECs") should not be subject to the MOPR; and (3) nothing in the December 19 Order should be construed as a finding that the existing Fixed Resource Requirement Alternative (the "FRR") rules are just, reasonable and not unduly discriminatory. Such clarification will help protect the integrity of the RPM market and ensure that the Commission's pro-competitive actions in the December 19 Order do not interfere with legitimate state and private environmental initiatives. In this regard,

---

9 *See* June 29 Order, 163 FERC ¶ 61,236 at PP 160-170.

10 December 19 Order, 169 FERC ¶ 61,239 at P 6.

11 *See id.* at P 89.

EPSA and P3 would emphasize that they recognize that states have, and will continue to have, legitimate societal interests in this area and that EPSA's and P3's support for the expanded MOPR should not be construed as suggesting that states must abandon these initiatives. In fact, EPSA and P3 firmly believe that there are market-compatible policy options available to states that will allow them to pursue their state policy initiatives without being impacted by the December 19 Order. Both organizations look forward to engaging with the states in these important discussions.

At the same time, EPSA and P3 urge the Commission to resist calls for unnecessary delay in running the next two Base Residual Auctions and ask that the Commission instead press PJM to conduct those auctions before the end of 2020, as the Independent Market Monitor for PJM (the "IMM") has proposed.[12] This is entirely feasible and urgently needed in order to prevent further delay in running the BRA for the 2022/2023 Delivery Year, originally scheduled for May 2019, and any more delay than absolutely necessary in running the BRA for the 2023/2024 Delivery Year, originally scheduled for May 2020.

I. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[13] EPSA and P3 hereby identify the issues on which they seek rehearing of the December 19 Order, and provide representative precedent in support of their position on such issues:

---

[12] *See* Request for Clarification of the Independent Market Monitor for PJM at 2, Docket Nos. EL16-49-001, *et al.* (filed Jan. 17, 2020) (the "IMM Clarification Request").

[13] 18 C.F.R. § 385.713(c)(2) (2019).

1. Rehearing of the December 19 Order is required because the Commission's conclusion that it lacks authority to address the effect of any and all federal subsidies on FERC-jurisdictional markets was based on "an erroneous view of law" and, "as a consequence, [the Commission] fail[ed] to exercise the discretion delegated to it by Congress" in the FPA. *Prill v. NLRB*, 755 F.2d 941, 942 (D.C. Cir. 1985) ("*Prill*"). *See also id.* at 947 ("An agency decision cannot be sustained, however, where it is based not on the agency's own judgment but on an erroneous view of the law.").

2. The Commission's refusal to extend the MOPR to offers from resources receiving federal subsidies of any kind was arbitrary and capricious as it cannot be reconciled with the Commission recognition that "subsidies created by federal law distort competitive outcomes in the PJM capacity market in the same manner as do State Subsidies," December 19 Order, 169 FERC ¶ 61,239 at P 89, and with the Commission's obligations under Sections 205 and 206 of the FPA to ensure that rates are just and reasonable and not unduly preferential or discriminatory, *see* 16 U.S.C. §§ 824d, 824e (2018); *U.S. v. City of Detroit*, 720 F.2d 443, 451 (6th Cir. 1983) ("*City of Detroit*").

3. The December 19 Order is arbitrary and capricious because the Commission failed to respond meaningfully to arguments by EPSA, P3 and others that, under long-established rules of interpretation, the Commission should not assume that Congress intended for it to abdicate its ratemaking obligations absent an express directive. *See, e.g.*, *Public Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1051 (9th Cir. 2006) ("*CPUC*"); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("*PPL Wallingford*"); *Moraine Pipeline Co. v. FERC*, 906 F.2d 5, 9 (D.C. Cir. 1990) ("*Moraine*").

4. The December 19 Order also fails to reflect reasoned decision-making because the Commission found that subjecting federally subsidized resources to the MOPR would be incompatible with federal policies, despite recognizing elsewhere in the December 19 Order that the MOPR would have no such effect with respect to state policies. *See* December 19 Order, 169 FERC ¶ 61,239 at PP 7, 41, 89. *See also, e.g., Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("*Allentown*"); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

5. The Commission further neglected its responsibility to respond meaningfully to EPSA's and P3's arguments regarding the need to apply MOPR to resources receiving federal subsidies, particularly arguments that, as the agency given exclusive jurisdiction over wholesale rates, the Commission should not defer to other federal agencies with separate responsibilities. *See, e.g.*, *CPUC*, 462 F.3d at 1051; *PPL Wallingford*, 419 F.3d at 1198.

6. Absent the three clarifications requested below, the December 19 Order would not be the product of reasoned decision-making because its holdings on these issues would be inconsistent with sound principles articulated in the December 19 Order. *See also, e.g., Allentown*, 522 U.S. 359, 374; *State Farm*, 463 U.S. 29, 43.

EPSA and P3 request clarification on the following three issues:

1. The Commission should clarify that the definition of "State Subsidy," as set forth in paragraphs 9 and 67 of the December 19 Order, is only intended to address out-of-market ***support*** that a resource may receive, and does not encompass programs that may cause different resources to incur different ***costs***. In particular, the Commission should clarify that benefits, other than actual subsidies, derived from programs like RGGI, which requires resources to procure allowances to cover their greenhouse gas emissions, will not be considered State Subsidies simply because they result in certain resources incurring higher compliance costs than others or allow some market participants to earn additional inframarginal revenues as a result of higher clearing prices.

2. In accordance with the Commission's finding that "the record in the instant proceeding does not demonstrate the need to subject voluntary, arm's length bilateral transactions to the MOPR at this time," December 19 Order, 169 FERC ¶ 61,239 at P 70 (footnote omitted), the Commission should further clarify that PJM has the discretion to propose in its compliance filing a process to determine if voluntary, bilateral transactions for RECs should be subject to the MOPR.

3. The Commission should clarify that its references to the availability of the existing FRR rules in the December 19 Order, *see id.* at PP 14, 202, 204, were merely factual statements as to the ongoing effectiveness of the FRR rules and cannot be construed as findings that the FRR rules are just, reasonable and not unduly discriminatory or preferential in light of changes required in the December 19 Order or other changes that have occurred since it went into effect.

II. REQUEST FOR REHEARING

The Commission should grant rehearing of its finding that no federal subsidies, of any kind, will be taken into consideration in determining whether a resource should be subject to the MOPR.[14] As discussed below, this finding rests on an erroneous

[14] *See* December 19 Order, 169 FERC ¶ 61,239 at PP 10, 89.

interpretation of law and an understanding of the MOPR's effects on federal subsidy programs that is inconsistent with the Commission's holdings with respect to the MOPR's effects on state subsidy programs. To be clear, as discussed below, EPSA and P3 are not arguing that the Commission must expand the MOPR to address ***all*** federal subsidies, only that the Commission erred in declining to expand it to address ***any*** federal subsidies.

In the June 29 Order, the Commission properly found PJM's existing Tariff to be unjust, unreasonable and unduly discriminatory because it

> fails to protect the integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market support to keep existing uneconomic resources in operation, or to support the uneconomic entry of new resources, regardless of the generation type or quantity of the resources supported by such out-of-market support.[15]

While the June 29 Order focused on out-of-market support provided by states,[16] the Commission conceded in the December 19 Order that "federal subsidies distort competitive markets in the same manner that State Subsidies do."[17] Nonetheless, the Commission claimed that it was powerless to address the effects of federal subsidies, because "the Commission's authority to set just and reasonable rates under the FPA comes from Congress and subsidies that are directed by Congress through federal legislation have the same legal force as the FPA."[18]

EPSA and P3 respectfully disagree and submit that the Commission's refusal to address the effects of any and all federal subsidies on RPM auctions reflects an

---

15 June 29 Order, 163 FERC ¶ 61,236 at P 150.

16 *See id.* at P 1.

17 December 19 Order, 169 FERC ¶ 61,239 at P 10.

18 *Id. See also id.* at P 89.

"erroneous view of law" and, as such, cannot be sustained.[19] As EPSA explained at length in its initial brief in the paper hearing initiated by the June 29 Order,[20] the FPA grants the Commission exclusive jurisdiction over wholesale rates and tasks the Commission with ensuring that such rates are just and reasonable.[21] Nonetheless, nowhere in the December 19 Order does the Commission even attempt to reconcile its decision to exclude all federal subsidies from the MOPR with its ratemaking responsibilities; to the contrary, the December 19 Order concedes that federal subsidies, like state subsidies, will distort competitive markets and thereby render the resulting clearing prices unjust, unreasonable, and unduly discriminatory.[22] Importantly, as P3 noted, "[t]he Commission's independent and primary jurisdictional authority is not subordinate to federal subsidies."[23]

There is simply no basis for the Commission to abdicate its statutory responsibilities in this way.[24] Nor can the Commission excuse its failure to fulfill its responsibilities by claiming that it cannot

---

19 *Prill*, 755 F.2d 941, 942.

20 *See* Initial Brief of the Electric Power Supply Association at 16-19, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (the "EPSA Initial Brief"). *See also* Reply Brief of the PJM Power Providers Group at 8-9, Docket Nos. EL16-49-000, *et al.* (filed Nov. 6, 2018) (the "P3 Reply Brief").

21 *See* 16 U.S.C. §§ 824d, 824e (2018).

22 *See, e.g.*, December 19 Order, 169 FERC ¶ 61,239 at P 89 (finding that "subsidies created by federal law distort competitive outcomes in the PJM capacity market in the same manner as do State Subsidies").

23 P3 Reply Brief at 9.

24 *See, e.g., City of Detroit*, 720 F.2d at 451 ("It is fundamental that an agency charged with implementation of a statutory framework ordinarily possesses no authority to deviate from or abdicate its statutory responsibilities."); *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 721 (D.C. Cir. 2000) ("FERC would abdicate its statutory obligations if it, for example, exempted certain utilities from the requirement that rates be just and reasonable . . . , or if it refused to review transmission rate filings altogether."), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *Northern Colorado Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1519 (D.C.

> disregard or nullify the effect of federal legislation by finding that it would be unjust, unreasonable, or unduly discriminatory to allow a PJM capacity resource to rely on a federal subsidy that provides the resource with a competitive advantage over other resources Congress has not chosen to assist in the same way.[25]

To be sure, this reasoning may justify the exclusion of subsidies explicitly awarded by Congress itself, such as the production tax credits granted to certain renewable resources. But the same cannot be said – and the Commission cannot ignore the effects on the justness and reasonableness of wholesale rates – when another federal agency is awarding subsidies on its own initiative, albeit under some general grant of congressional authority. Had Congress intended to transfer responsibility for the justness and reasonableness of wholesale rates to another federal agency in this manner, it would have done so expressly. As the EPSA Initial Brief explained, it is well established that "[r]epeal by implication is highly disfavored and will only be found where congressional 'intent to repeal . . . is clear and manifest.'"[26] In this respect, EPSA and P3 submit that, at least where a federal agency is awarding subsidies, the December 19 Order has it backwards when it declares that the Commission may not require "that Congress must expressly declare that it intends any future federal subsidy to override market rules accepted by the Commission."[27]

Cir. 1984) (reversing and remanding in light of "the Commission's current cavalier willingness to ignore the statute's terms").

[25] December 19 Order, 169 FERC ¶ 61,239 at P 89 (citations omitted).

[26] EPSA Initial Brief at 17 (quoting *Agri Processor Co. v. NLRB*, 514 F.3d 1, 4 (D.C. Cir. 2008)).

[27] December 19 Order, 169 FERC ¶ 61,239 at P 89. *Cf. Morgan Stanley Capital Group Inc. v. Public Dist. No. 1 of Snohomish County, Washington*, 554 U.S. 527, 564 (2008) ("FERC cannot abdicate its statutory responsibility to ensure just and reasonable rates through the expedient of a heavy handed presumption.").

Under the Commission's broad interpretation in the December 19 Order, the Commission would have to refrain from addressing the market impacts of any federal subsidies, even in cases where Congress, in its grant of general authority to another federal agency, has not expressed any intent to provide a subsidized resource "with a competitive advantage" over other resources participating in the RPM market.[28] As EPSA previously explained, the U.S. Supreme Court has made clear that it is wholly improper for the Commission to assume that Congress intended for the Commission to ignore its statutory responsibilities simply because of the passage of legislation that could have an impact on the wholesale markets.[29] Along the same lines, PJM pointed out that, particularly in light of recent court decisions affirming the Commission's authority to address the impact of subsidies on wholesale prices, "it is reasonable to assume, prospectively, that Congress is aware of the Commission's authority to address the impacts of federal subsidies on clearing prices in the organized markets and could expressly limit the Commission's ability to address such effects."[30] The December 19 Order failed to provide a meaningful response to the arguments of EPSA, P3, PJM and others on this point and that alone renders its holding on this issue arbitrary and capricious.[31]

---

[28] December 19 Order, 169 FERC ¶ 61,239 at P 89.

[29] *See* EPSA Initial Brief at 17-18 & n.76 (explaining that the U.S. Supreme Court has found that "Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes" (citations omitted)).

[30] December 19 Order, 169 FERC ¶ 61,239 at P 85 (footnote omitted).

[31] *See e.g.*, *CPUC*, 462 F.3d at 1051 (the Commission is obligated to provide a "reasoned response" to arguments raised before it); *PPL Wallingford*, 419 F.3d at 1198 (requiring the Commission to "respond meaningfully" to concerns raised by parties); *Moraine*, 906 F.2d at 9

The December 19 Order is also internally inconsistent in suggesting that subjecting federal subsidies to the MOPR would somehow be the equivalent of "disregard[ing] or nullify[ing]" Congressional legislation.[32] Indeed, elsewhere in the December 19 Order, the Commission correctly found that applying the MOPR to state-subsidized resources would not interfere with state decisions "to support their preferred resource types in pursuit of state policy goals," or "prevent states from making decisions about preferred generation resources . . . ."[33] In this regard, EPSA and P3 agree with dissenting Commissioner Glick that the "exclusion of ***all*** federal subsidies" is arbitrary and capricious,[34] and inconsistent with the Commission's conclusion that applying the MOPR to offers from state-subsidized resources "neither disregards nor nullifies those policies, but instead addresses only the effects that those policies have on the PJM market."[35] Where EPSA and P3 part company with Commissioner Glick is on the question of whether the Commission accurately characterized the relationship between the MOPR and state subsidies. In EPSA's and P3's view, the Commission got it right when it found that the MOPR "does not prevent states from making decisions about preferred generation resources"[36] and got it wrong when it reached a contrary conclusion with respect to federal subsidy decisions, without regard for whether those decisions were reached by

(Commission failed to engage in reasoned decision-making where it "fail[ed] to respond to [petitioner's] arguments").

32 December 19 Order, 169 FERC ¶ 61,239 at P 89.

33 *Id.* at P 7.

34 December 19 Order, Dissenting Statement of Commissioner Glick at P 27 (the "Glick Dissent") (emphasis added).

35 *Id.* at P 29.

36 *See* December 19 Order, 169 FERC ¶ 61,239 at P 7.

Congress or other federal agencies. The Commission's failure to apply the same reasoning with respect to federal subsidies fails to satisfy the requirements of reasoned decision-making.[37]

The Commission's failure to distinguish between subsidies granted directly by Congress and those provided by other federal agencies is also irreconcilable with Congress's decision to vest the Commission with exclusive jurisdiction over rates, terms and conditions for wholesale sales and with the Commission's unique expertise in this area.[38] Another federal agency may very well conclude that awarding subsidies to certain capacity resources is appropriate in light of that agency's goals and responsibilities under its governing statutes. But that does not displace the Commission's statutory duty to ensure that, regardless of what that other federal agency has done, rates for wholesale sales remain just, reasonable and not unduly discriminatory or preferential.[39] Again, the December 19 Order failed to "respond meaningfully" to the arguments of EPSA and P3 on this point.[40]

The Commission should therefore grant rehearing of its broad brush holding that the Commission is powerless to subject resources receiving federal subsidies of any kind to the MOPR. Resources subjected to the MOPR by such a holding would, of course, be

---

37 *See, e.g.*, *Allentown*, 522 U.S. at 374 (the process by which an agency arrives at a particular "result must be logical and rational"); *State Farm*, 463 U.S. at 48 (the Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner" (citations omitted)).

38 *See* EPSA Initial Brief at 16-19; P3 Reply Brief at 8-9.

39 *See* EPSA Initial Brief at 18-19.

40 *PPL Wallingford*, 419 F.3d at 1198.

eligible for the same opportunity to receive the same unit specific exemption that is available to those receiving state subsidies.

III. REQUEST FOR CLARIFICATION

A. The Commission Should Clarify that the Definition of "State Subsidies" Does Not Include State Initiatives that Cause Capacity Resources to Incur Differing Costs

As a general matter, EPSA and P3 support the broad definition of "State Subsidies" set forth in the December 19 Order, and believe that a broad definition, reasonably interpreted, will minimize the risk of inadvertently creating loopholes through which subsidized resources will seek to subvert the Commission's intent to preserve the benefits of competitive capacity markets. Nevertheless, particularly in light of the concerns raised by Commissioner Glick, EPSA and P3 respectfully request that the Commission clarify that a state program that imposes costs on certain resources, such as RGGI, would not be considered a program providing a State Subsidy simply due to the costs imposed and the potential impact on clearing prices. Such guidance should resolve Commissioner Glick's concern that "[a] literal application of the subsidy definition includes RGGI because it provides a financial benefit as a result of state action or state-mandated process."[41]

RGGI establishes an annual cap on emissions, and resources in the participating states are required to purchase emissions allowances that are sufficient to cover their emissions either through regional auctions or secondary market transactions.[42] In so

---

[41] Glick Dissent at P 23. *See also id.* at P 17 (arguing that the definition of a "State Subsidy" would "permit[] the Commission to zero out any state effort to address the externalities associated with sales of electricity," including RGGI).

[42] *See generally* RGGI, Inc., *The Regional Greenhouse Gas Initiative, an initiative of the New England and Mid-Atlantic States of the US*, https://www.rggi.org/program-overview-and-design/elements.

doing, RGGI prices an environmental externality in a way that is generally applicable to all resources, achieving emissions reductions in a manner that is fully consistent with a competitive market regime by requiring generators to internalize these costs much as they internalize other environmental and non-environmental costs, such as the costs of equipment necessary to comply with environmental requirements. Naturally, resources that have higher emissions are required to purchase more allowances than those with zero or lower emissions. Commissioner Glick suggests that lower emitting resources could, therefore, be regarded as deriving a "financial benefit" from RGGI.[43] EPSA and P3 do not believe the definition is properly read that broadly. Rather, EPSA and P3 agree with the IMM that "the inclusion of RGGI allowance values in unit offers is not, and does not create, a subsidy under the definition in the [December 19 O]rder."[44]

Programs like RGGI simply impose different ***costs*** on different resources and, except in the case of resources receiving the proceeds from allowance sales as subsidies, do not provide the sort of out-of-market payments targeted by the expanded MOPR. Indeed, in defining a "State Subsidy," the December 19 Order makes clear that the definition focuses on "out-of-market payments provided or required by certain states," and that the "definition is not intended to cover every form of state financial assistance that might indirectly affect FERC-jurisdictional rates or transactions; nor is it intended to address other commercial externalities or opportunities that might affect the economics of a particular resource."[45] The Commission further explained that its concern is focused

---

43 *See* Glick Dissent at P 23.

44 IMM Clarification Request at 2.

45 December 19 Order, 169 FERC ¶ 61,239 at P 68.

on those subsidies that are "most nearly 'directed at' or tethered to the new entry or continued operation of generating capacity in the federally-regulated multi-state wholesale capacity market administered by PJM."[46] A program like RGGI that simply imposes costs on resources would therefore not appear to be the subject of the Commission's concerns.

Similarly, where RGGI (or a similar program) imposes costs on the marginal resource, the benefits other resources may receive in the form of increased inframarginal revenues should not be regarded as State Subsidies. These benefits are quintessential in-market, not out-of-market, payments. The market clearing price would continue to be set by the marginal resource, and the fact that other resources may have lower costs than the marginal resource and would, accordingly, realize greater profits, does not mean that the competitive market has been unjustly and unreasonably distorted.[47]

It is, of course, conceivable that states seeking to evade the MOPR and/or to give certain resources an unjust and unreasonable competitive advantage could do so not through a subsidy payment, but by increasing costs for other resources. Nonetheless, EPSA and P3 are not aware of any evidence adduced to date indicating that RGGI or any similar state initiative involving a market-based mechanism to explicitly price carbon is such a program. Accordingly, while EPSA and P3 reserve the right to seek Commission action in the future if and to the extent necessary to address programs that impose additional costs on resources for the purpose of distorting competition, the Commission

---

46 *Id.* (citations omitted).

47 *See, e.g., PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,157 at P 248 (2016) (recognizing that resources with costs below the clearing price would realize a profit), *on reh'g*, 162 FERC ¶ 61,047 (2018).

should clarify that the definition of State Subsidies adopted in the December 19 Order is not intended to encompass state initiatives, such as RGGI, to the extent that they simply result in differing costs for different resources or increase inframarginal revenues for certain resources.

B. The Commission Should Clarify that, in its Compliance Filing, PJM May Propose a Process for Ensuring that Purely Voluntary RECs Transactions Are Not Subject to the MOPR

The December 19 Order finds that there is no "need to subject voluntary, arm's length bilateral transactions to the MOPR at this time," and that "the expanded MOPR, as adopted herein, will sufficiently address resources receiving State Subsidies to keep existing uneconomic resources in operation, or to support the uneconomic entry of new resources."[48] At the same time, the Commission also expressed concern that:

> [a]s to voluntary REC arrangements, meaning those which are not associated with a state-mandated or state-sponsored procurement process, based on the record in this proceeding, we agree with intervenors that it is not possible, at this time, to distinguish resources receiving privately funded voluntary RECs from state-funded or state-mandated RECs because resources typically do not know at the time of the auction qualification process how the REC will be eventually used.[49]

As is evident from their pleadings in these proceedings, EPSA and P3 take seriously the harm inflicted on the RPM market by out-of-market subsidies. At the same time, EPSA and P3 agree with the Commission that purely voluntary, bilateral transactions, including voluntary, bilateral transactions for RECs, should not be subject to potential administrative mitigation. Accordingly, to reconcile the findings in paragraphs 70 and 176 of the December 19 Order, EPSA and P3 respectfully request that the

---

48 December 19 Order, 169 FERC ¶ 61,239 at P 70 (footnote omitted).

49 *Id.* at P 176.

Commission clarify that, in its compliance filing, PJM has the discretion to propose a process that will allow resources that have entered into voluntary, bilateral REC transactions (*i.e.*, transactions that are not intended to advance or comply with state law) to be exempt from the MOPR. For example, PJM could propose a process that requires a buyer of RECs to certify that it will not use the RECs as state-funded or state-mandated RECs, and to commit not to resell such RECs. Such an approach would be one potential way of addressing the legitimate concerns raised by the Commission regarding the ultimate use of RECs purchased through bilateral transactions, while also allowing private parties to continue to support renewable resources through their own environmental initiatives.[50]

C. The Commission Should Clarify that It Did Not Make a Determination Regarding Whether the Existing FRR Rules are Just and Reasonable Based on the Record in these Proceedings

EPSA and P3 request clarification that the Commission did not make any findings as to the lawfulness of the existing FRR rules in the December 19 Order. Indeed, as EPSA and P3 read it, the December 19 Order simply noted, as a factual matter, that eligible load-serving entities preferring to "craft their own resource adequacy plans remain free to do so through the FRR Alternative option . . . ."[51] Indeed, given that the FRR rules reside in the Reliability Assurance Agreement among Load Serving Entities in the PJM Region (the "RAA"), the Commission could not lawfully have made any such findings in these proceedings, which concerns the MOPR rules set forth in the PJM Tariff. The underlying complaint in Docket No. EL16-49-000 did not challenge the lawfulness of the

[50] *See id.* at P 163 (PJM had explained that "the demand for voluntary RECs comes primarily from private corporations pursuing environmental agendas").

[51] *Id.* at 12. *See also id.* at PP 202, 204.

FRR rules or any other provisions of the RAA, and, while the June 2018 Order proposed a new resource-specific FRR Alternative, it did not expand the scope of Docket No. EL16-49-000 or define the scope of new Docket No. EL18-178-000 in any way that would even arguably encompass the existing FRR rules set forth in the RAA.

The existing FRR rules were designed as a compromise option available to certain load-serving entities that allowed such entities to be a part of the greater PJM system – thereby benefitting from the size, diversity and reliability of the PJM system – without participating in one of the most fundamental features of PJM, the capacity market. To date, very few entities have elected to use the existing FRR rules in practice and the rules have been little tested. The just and reasonable replacement rate established in the December 19 Order will likely test those rules as more load-serving entities explore this option. As a result, changes to the existing FRR rules may prove necessary to address latent defects therein that could undermine the actions taken in the December 19 Order.[52] Consequently, EPSA and P3 respectfully request that the Commission clarify that its statements regarding the availability of the current FRR option were factual in nature, and not intended as a formal determination that such existing FRR rules are just, reasonable and not unduly discriminatory or preferential in light of the changes to the PJM Tariff required to accommodate the expanded MOPR.

[52] *See, e.g.*, Initial Brief of the PJM Power Providers Group, Affidavit of Roy J. Shanker, Ph.D., ¶ 42, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (explaining that the existing FRR rules may give FRR entities "a free ability to lean on the rest of the RTO for reliability support in excess of the level they are procuring"); EPSA Initial Brief, Attachment A, Affidavit of Paul M. Sotkiewicz, Ph.D., at ¶ 53 (stating that "FRR load, during periods of extreme system stress such as during the polar vortex in January 2014, can essentially 'free ride' on the excess capacity procured by the market if its own resources fail to perform and without needing to pay for those excess reserves procured by the market").

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA and P3 requests that the Commission grant rehearing and clarification of the December 19 Order as requested herein.

Respectfully submitted,

ELECTRIC POWER SUPPLY ASSOCIATION

By: */s/ David G. Tewksbury*
David G. Tewksbury
Stephanie S. Lim
McDERMOTT WILL & EMERY LLP
500 North Capitol Street, NW
Washington, DC 20001

Nancy Bagot
Senior Vice President
Sharon Royka Theodore
Senior Director, Regulatory Affairs
Electric Power Supply Association
1401 New York Ave, NW, Suite 950
Washington, DC 20005

On behalf of the **Electric Power Supply Association**

PJM POWER PROVIDERS GROUP

By: */s/ Glen Thomas*
Glen Thomas
Laura Chappelle
GT Power Group
101 Lindenwood Drive, Suite 225
Malvern, PA 19355

On behalf of the **PJM Power Providers Group**

Dated: January 21, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on each person designated on the official service lists compiled by the Secretary of the Federal Energy Regulatory Commission in these proceedings.

Dated at Washington DC, this 21st day of January, 2020.

/s/ Stephanie S. Lim
Stephanie S. Lim