UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, Homer City Generation, L.P., NRG Power Marketing LLC, GenOn Energy Management, LLC, Carroll County Energy LLC, C.P. Crane LLC, Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean Energy, LLC and Panda Power Generation Infrastructure Fund, LLC,	)	**Docket No. EL16-49-000**
Complainants,	)	
v.	)	
PJM Interconnection, L.L.C.,	)	
Respondent.	)	

ANSWER OF THE ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, AND SUSTAINABLE FERC PROJECT

January 30, 2017

TABLE OF CONTENTS

I. Summary

Pursuant to Rule 213 of the Federal Energy Regulatory Commission's (FERC or the Commission)'s Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2016), Environmental Defense Fund (EDF), Natural Resources Defense Council (NRDC) and Sustainable FERC Project hereby respond to the Motion to Amend[1] filed by the Electric Power Supply Association (EPSA) and a subset of the Complainants in this proceeding (collectively Movants)[2] on January 9, 2017. Movants seek leave from the Commission to amend their complaint to address a program to support nuclear plants (the Illinois ZEC Program) contained within a broader package of clean energy legislation recently enacted by the State of Illinois.[3]

The Motion to Amend should be rejected on procedural grounds because Movants' proposed Amended Complaint fails to meet the Commission's basic requirements for such pleadings, and because it inappropriately shoehorns new and distinct concerns into an existing proceeding, forcing other parties to engage in a cumbersome review in order to determine what portions of the record remain relevant. Should the Commission accept the Motion to Amend, it should deny the requested relief on the merits. Wholesale market bids that account for revenues from sales of non-FERC-jurisdictional environmental attribute products do not artificially suppress prices; they simply reflect economically efficient bidding behavior. Moreover, the extremely broad relief requested in the Amended Complaint would compromise the stakeholder

---

[1] Calpine, et. al, *Motion to Amend, and Amendment to, Complaint and Request for Expedited Action on Amended Complaint*, Docket No. EL19-49-000 (filed January 9, 2017). EDF's comments are timely and in accordance with FERC's *Notice of Amended Complaint*, Docket No. EL19-49-000 (filed January 10, 2017) ("Motion to Amend" or "Amended Complaint").

[2] Pursuant to the Motion to Amend, Movants include all Complainants in the above-captioned proceeding except GDF SUEZ Energy Marketing, Inc. *See Motion to Amend Complaint* at 2 n.4. The group of parties filing the original complaint in this proceeding are referred to herein as "Complainants."

[3] Illinois 99th Gen. Assemb., S.B. 2814 (Dec. 7, 2016).

process already established by the PJM Interconnection, L.L.C. (PJM) to address identical issues, and is not supported by any evidence presented by Movants.

II. Background

A. The original Complaint

The original Complaint was submitted in response to proposed sales of electric energy and capacity from American Electric Power Company, Inc. (AEP) and FirstEnergy Corporation (FirstEnergy) to their affiliate utility companies, to be approved by the Public Utility Commission of Ohio (PUCO). According to Complainants, the affiliate sales worked as follows: "the utilities would purchase power from their "unregulated" affiliates pursuant to certain power purchase agreements (the Affiliate PPAs), "re-sell the purchased power in the PJM markets, and then recover the difference through non-bypassable charges assessed to all retail customers in their service territories."[4] As the Complainants put it, the "abusive affiliate contracts" were "integral to the AEP and FirstEnergy proposals."[5] Because AEP and FirstEnergy's purchases under the Affiliate PPAs would be from their related entities, the loss they took on those contracts (from the above-market prices) would be offset by the profits their affiliates made from the sales. Simultaneously, the arrangement created the financial incentive for AEP and FirstEnergy to offer into PJM capacity auctions as price takers, because doing so would push prices down in PJM's markets (benefitting them as net buyers of capacity and energy), and maximize their receipt of the non-bypassable charges (which further increased their revenue through the unique affiliate arrangements).[6]

The scheme, which kept uncompetitive coal plants running at enormous environmental

---

[4] *Id.*
[5] Original Complaint at 2.
[6] *See id.* at 25.

cost, did not entail the sale of any non-FERC-jurisdictional products. Instead, it involved buying electric energy and capacity at above-market prices, and then adjusting the revenues for the sale of those products through a non-bypassable charge justified principally on the basis that without this arrangement, the plants would face "premature retirement[]" due to "'flaws' in the RPM market that 'have led to suppressed capacity prices and significant price volatility.'"[7] As AEP described the scheme in its application to PUCO approve the non-bypassable charge, the charge would reflect the difference between costs incurred under the affiliate deal and revenues from re-selling the energy, capacity and ancillary services procured under that deal into PJM's markets.[8] Accordingly, rather than providing for the sale of any separate products, the scheme attempted to modify FERC's chosen prices for electric energy and capacity.

Complainants requested the Commission to order changes to PJM's Open Access Transmission Tariff (Tariff) to respond to the "immediate threat" of the Affiliate PPAs in PJM's Base Residual Auction for the 2019/2020 delivery year,[9] conceding that beyond that time frame their proposed solution may not be an appropriate remedy because it had not benefited from development through the PJM stakeholder process.[10] But rather than focusing on the uniquely abusive nature of the affiliate contracts referred to in the Complaint,[11] Complainants proposed a very broad relief mechanism for the 2019/2020 delivery year that would subject a wide swath of

---

[7] *Id.* at 17.

[8] *See* Ohio Power Company's Electric Security Plan at 8-9, PUCO Case Nos. 13-2385-EL-SSO, *et al.* (filed Dec. 20, 2013) ("13-2385 Application"), available at https://dis.puc.state.oh.us/TiffToPDf/A1001001A13L23B40635F07212.pdf.

[9] PJM's Base Residual Auction, or "BRA" is PJM's mechanism for procuring capacity on a three-year forward basis. *See* PJM, *Glossary*, available at: http://www.pjm.com/en/Glossary.

[10] *See id.* at 4.

[11] EDF submitted comments opposing this particular action but stating that "[t]his fact pattern is both unique and inherently abusive, where (1) an unregulated affiliate openly sells existing and admittedly uneconomic power directly to its utility affiliate at above-market prices with (2) all Ohio consumers inescapably responsible for the unjust and unreasonable costs." EDF, et. al, *Comments of the Environmental Defense Fund*, Docket No. EL19-49-000 (filed April 6, 2016) at 3.

generation resources to PJM's Minimum Offer Price Rule ("MOPR") for the first time.[12]

Under Complainants' proposal, applicable units receiving revenue from outside FERC markets would not be permitted to account for such revenue in submitting offers into PJM's capacity market unless their contracts providing for such revenues met certain conditions.[13] EDF filed comments in response arguing that "[a]ctions founded upon genuine state and public interest rationales could be compromised through [such a] sweeping change to the MOPR."[14]

B. FERC's order rescinding the waiver of affiliate sales restrictions that enabled the Affiliate PPAs

Separately, many of the Movants in this proceeding, including EPSA, Dynegy, Inc., Eastern Generation, LLC, NRG Power Marketing LLC, GenOn Energy LLC, and GenOn Energy Management LLC, filed a complaint under Section 206 of the Federal Power Act seeking rescission of the waiver of the Commission's affiliate power sales restrictions that had enabled the Affiliate PPA scheme to operate. In April 2016, the Commission granted their complaint, rescinding the waivers it had previously granted to AEP and FirstEnergy.[15] AEP and FirstEnergy each then abandoned the Affiliate PPAs, and moved to dismiss the original complaint in this matter as moot.[16] Complainants and other parties opposed dismissal.[17] The Commission has not yet issued a decision on this matter.

---

[12] *See* Original Complaint at 34-35. PJM's MOPR is the RTO's mechanism for preventing buyers in its capacity markets from exercising market power to artificially suppress prices.
[13] *Id.*
[14] EDF, et. al, *Comments of the Environmental Defense Fund*, Docket No. EL19-49-000 (filed April 6, 2016) at 4.
[15] *See Electric Power Supply Ass'n v. AEP Generation Res., Inc.*, 155 FERC ¶ 61,102 (2016); *Electric Power Supply Ass'n v. FirstEnergy Sol. Corp.*, 155 FERC ¶ 61,101 (2016).
[16] *See Motion to Dismiss of Dominion Resources Services, Inc., et. al.*, Docket No. EL16-49-000 (filed May 6, 2016).
[17] *See Answer in Opposition to Motion to Dismiss,* Docket No. EL16-49-000 (filed May 23, 2016); *Answer of PJM Interconnection, L.L.C.* at 4, Docket No. EL16-49-000 (filed June 6, 2016); Answer and Motion for Leave to Answer of the Independent Market Monitor for PJM at 3, Docket No. EL16-49-000 (filed June 6, 2016).

C. The Illinois ZEC Program

On December 7, 2016, the State of Illinois passed the Future Energy Jobs Bill (referred to herein, as enacted, as the Act).[18] As part of a multi-pronged approach to reduce harmful air pollution from the electricity sector, the Act contains the Illinois ZEC Program, designed to preserve the emissions benefits of certain existing nuclear generators. The Act also includes a comprehensive array of energy policy reforms that are not at issue in this proceeding.[19]

The Act reflects the Illinois' legislature's judgment that preserving the emissions attributes provided by nuclear resources should be one component of the State's strategy to "achieve [its] environmental objectives and reduce the adverse impacts of emitted air pollutants on the health and welfare of the State's citizens."[20] To that end, the Illinois ZEC Program provides for the creation of a new product—Zero Emissions Credits—that reflect the emissions reductions created by the production of nuclear energy, but that is distinct from the electric energy and capacity produced by eligible nuclear generators. The Act sets the value of these credits according to a formula reflecting the Illinois legislature's judgment regarding the benefits of those emissions reductions and the cost of procuring them.[21] Specifically, Illinois' General Assembly caps the value of such credits at an amount equal to the Social Cost of Carbon, as

[18] *See* Illinois 99th Gen. Assemb., S.B. 2814 (Dec. 7, 2016).
[19] The new legislation includes, for instance, a framework for expanded energy efficiency programs, as well as a significantly strengthened Renewable Portfolio Standard designed to achieve the State's goal of producing 25 percent of its electricity from renewables by 2025. *See id.* at §1(a)(2) (underscoring the need to "update" the State's "existing energy efficiency standard"); §1.75(c)(1)(B) (describing "the goals for procurement of renewable energy credits"). Neither of these aspects of the legislation are objected to by Movants and accordingly are entirely outside the scope of this proceeding.
[20] *Id.* at § 1.5(8).
[21] *Id.*

calculated by a federal interagency task force.[22] The Illinois ZEC Program sets forth a mechanism for procuring Zero Emissions Credits that entails the formulation of a procurement plan, to be proposed no later than 45 days after the effective date of the Act and then subsequently revised through a process of public comment and approval by the Illinois Commerce Commission.[23]

D. The motion to amend

Movants filed their Motion to Amend on January 9, 2017.[24] Movants argue that the Illinois ZEC Program constitutes a new example of "State-approved subsidies" that threatens to suppress prices in PJM's capacity market auctions.[25] Acknowledging that "the procurement process" set forth by the Illinois ZEC Program has "yet to occur," Movants nevertheless contend that the program "threatens to artificially suppress prices" in PJM's capacity market auctions "because the out-of-market subsidies under that legislation will create incentives for below-cost offers for certain existing resources."[26] Movants contend that because the MOPR does not include a mechanism to address this alleged threat posed by "subsidized existing resources," PJM's Tariff is "unjust and unreasonable."[27] The Motion to Amend does not cite any market data

---

[22] *Id.* at § 1.5(8) (finding that the Social Cost of Carbon "is an appropriate valuation of the environmental benefits provided by zero emission facilities."). The Social Cost of Carbon used for purposes of the ZEC Program was "based on the U.S. Interagency Working Group on Social Cost of Carbon's price in the August 2016 Technical Update using a 3% discount rate, adjusted for inflation for each year of the program." *Id.* § 5(providing for changes to be inserted to the Illinois Power Agency Act at Section 1.75(d-5)(1)(B)(i)).

[23] *See id.* (providing for changes to the Illinois Power Agency Act to be inserted at Section 1.75(d-5)(1)(C)).

[24] *See* Motion to Amend.

[25] *Id.* at 12-13. While Movants append the entire Illinois Clean Jobs Bill to their Motion to Amend, they focus entirely on price suppression allegedly caused by the Illinois ZEC Program and do not raise any claims with regard to the broader substance of or the other programs created by the Act.

[26] *Id.* at 10.

[27] *Id.* at 18.

regarding the alleged anticipated price suppression, nor do Movants provide any estimates of the impact of that alleged suppression on their own business operations.

Movants request that the Commission order the Tariff changes previously suggested by Complainants to be adopted, but for the 2020/2021 delivery year rather than for the 2019/2020 delivery year, as was requested in the Original Complaint.[28] They further request that the Commission "direct PJM to conduct a stakeholder process and to propose a longer-term remedy that can be put in place beginning with the" Base Residual Auction for the 2021/2022 delivery year.[29]

III. Comments

A. The Commission should deny the Motion to Amend on procedural grounds

The Motion to Amend is an attempt to inappropriately repurpose Movants' prior claims against the Affiliate PPAs to address their new concerns with regard to Illinois' ZEC Program, despite the significant material differences in design and motive between the two state programs. Movants provide no new data, testimony, or other documentation to address the distinct issues presented in the first instance by the Illinois ZEC Program. Accordingly, the Motion to Amend should be denied on procedural grounds.

1. Motion to Amend fails to meet the Commission's basic procedural requirements

Rule 215 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"), requires an amendment to a complaint to "conform to the

[28] *Id.* at 3.
[29] *Id.*

requirements applicable to the pleading to be amended."[30] Those requirements dictate, among other things, that a complaint must:

> (4) Make a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction;
>
> (6) State whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party, and if so, provide an explanation why timely resolution cannot be achieved in that forum;[31] [and]
>
> (8) Include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits.

The Motion to Amend meets none of the above requirements. Movants do not make a good faith effort to quantify the financial burden that the alleged deficiencies in the MOPR cause for them in light of the legislative actions referred to in the Motion to Amend. In contrast to the Original Complaint, which at least provided a basic estimate of the effect of the Affiliate PPAs on capacity market prices,[32] the Movants make no attempt whatsoever to quantify the price impacts of the Illinois ZEC Program. Nor have Movants offered any documents beyond the Act itself as evidence in support of their Amended Complaint. Surely, *some* additional documentation, such as "contracts or affidavits" was "attainable" given Movants' considerable resources.[33] Movants also fail to state whether the issues presented in their Motion to Amend are pending in any existing Commission proceedings or in a proceeding in any other forum in which the Movants are a party. Despite the passage of more than nine months since the Original Complaint was filed, and despite the fact that the Motion to Amend addresses a significantly different type of state-approved program with analytically distinct consequences (as discussed

[30] 18 C.F.R. § 385.215.
[31] 18 C.F.R. § 385.206(b).
[32] *See* Original Complaint at 27-28.
[33] 18 C.F.R. § 385.216(b)(8).

further in Section III.B below), Movants make no effort to update the Original Complaint in this regard. Had they done so, *at minimum* they would have identified the ongoing stakeholder discussions of the precise issues discussed in the Motion to Amend.[34]

The requirements of Rule 206 of the Commission's Rules of Practice and Procedure are necessary in order to ensure that complaints properly present issues before the Commission. Without discussion of parallel proceedings, the Commission cannot assess the appropriateness of granting the requested relief. "[R]ather than bald allegations, the party seeking a hearing must make an adequate proffer of evidence including pertinent information and analysis to support its claims."[35] Where complainants do not offer documentation to support their claims, the Commission cannot adequately determine whether the allegations are true or are instead "based on erroneous assumptions."[36] Accordingly, where, as here, a complainant has submitted no "affidavits, documents, or testimony that would attest to the accuracy of its allegations," despite its clear capacity to do so, the motion for leave to file should be denied.[37]

2.A new complaint would enhance rather than detract from the ability of the Commission to examine the issues raised by Movants

Movants argue that "[g]ranting leave to amend will . . . avoid the burden on the Commission and the other parties that would result if Movants were required to file an entirely

[34] PJM plans to investigate the interaction between state public policies and its markets through a Senior Task Force reporting to the Markets & Reliability Committee. *See* http://www.pjm.com/~/media/committees-groups/committees/mrc/20170126/20170126-item-03-state-actions-issue-charge-updated-main-motion.ashx.
[35] *Illinois Municipal Electric Agency v. Central Illinois Public Service Co.*, 76 FERC 61,084, 61,482 (1996). Mere "speculation" in support of an argument is insufficient. *See Municipal Resale Service Customers Ohio Power Co.*, 63 FERC 61,336 (1993).
[36] *NRG Energy, Inc.*, 126 FERC ¶ 61053, P. 15 (Jan. 16, 2009).
[37] *See id.* at PP 32, 36(dismissing a complaint without prejudice for failure to properly present evidence).

new complaint."[38] But this logic neglects the burden *imposed* upon other parties through such an approach. As discussed at length below, the Illinois ZEC Program presents an entirely different issue with regard to PJM's MOPR than the Affiliate PPAs because, unlike the Affiliate PPAs, it provides for payments to be made in exchange for an environmental attribute product that is separate and distinct from electricity or capacity. Due to this extremely important difference, Movants' Motion to Amend speciously implicates state policies with significantly different program design elements than the Original Complaint filed by Complainants.

As such, the interest of various parties in the outcome is significantly different. Should Movants be permitted to amend their complaint in this manner, then parties who have not to date been fully engaged in this proceeding due to its previous subject matter will have been hamstrung in responding to the complaint because they will have been compelled to assess the voluminous record in this proceeding on an accelerated timeline. Motions to amend must be denied where, as here, the new claims alleged therein do not "arise[] out of the same transaction or occurrence as the" original complaint.[39] More generally, the Commission has denied motions to amend where it would prejudice other parties.[40] Where a proceeding has already had substantial time to develop and parties have submitted filings targeting a particular set of facts, a party should not be permitted to file "what amounts to a new complaint against new parties."[41]

The Commission should deny Movants' Motion to Amend and direct them to file a new complaint should they so choose. This would appropriately place the burden of sorting through the record on Movants, who are responsible for presenting any evidence in support of their

---

[38] Motion to Amend at 10.
[39] *Grynberg Production Co. v. Mountain Fuel Resources*, 42 FERC 61,061 (1988).
[40] *See Missouri Basin Municipal Power Agency v. Midwest Energy Co.*, 55 FERC 61,464, 62,533 (1991).
[41] *Id.*

claims in a coherent manner. Such an approach would allow for the Answers of other respondents to not be prejudiced through failure to account for materials buried in prior filings.

B. State programs compensating units for environmental attributes do not provide cause to expand the MOPR

As discussed above, the Motion to Amend should be denied on procedural grounds. But should the Commission choose to reach the merits, it should deny the new allegations in the Amended Complaint because they are based on the false premise that bidding behavior incorporating revenues for environmental attribute products causes artificial price suppression. It does not. Rather, such bids are economically efficient, and provide no justification for revising the MOPR. To the contrary, any MOPR revisions that would mitigate such bids should expressly be avoided, because this would require customers to procure redundant capacity and artificially raise capacity prices. Movants' requested relief should also be rejected because it would compromise PJM's existing stakeholder process, which is already investigating these precise issues.

1. Complainants request a massive unwarranted expansion of the MOPR

PJM's MOPR is "intended to prevent the exercise of buyer-side market power."[42] It applies only to specific types of generation facilities, including combustion turbines and combined-cycle plants;[43] and does not apply to other types of units, including "nuclear, coal, wind, hydro, solar or landfill gas facilities."[44] It applies only to new units, not existing resources,

[42] PJM Manual 18: PJM Capacity Market § 5.4.5 (Nov. 17, 2016) ("PJM Capacity Market Manual"), available at http://www.pjm.com/~/media/documents/manuals/archive/m18/m18v35-pjm-capacity-market-11-17-2016.ashx.
[43] PJM Open Access Transmission Tariff ("Tariff"), Attachment DD, § 5.14(h)(2).
[44] PJM Capacity Market Manual at § 5.4.5.

and its operation is confined to the capacity market.[45]

The Commission has never held that the receipt of payments for environmental attribute products distinct from energy or capacity in PJM triggers special buyer-side mitigation scrutiny. Indeed, the Commission's decisions with regard to buyer-side mitigation reveal solicitude for state public policies that weighs against mitigation of resources supported by such products created pursuant to state law, even if mitigation might otherwise be warranted.[46]

While PJM's MOPR no longer has an *exemption* for state-mandated resources, a close examination of the Commission's decision approving PJM's elimination of that exemption militates *against*, rather than for, the conclusion that bids accounting for payments for state-created environmental products cause artificial price suppression. Indeed, even as PJM proposed eliminating its state mandated resource exemption, it also proposed "to *add* wind and solar facilities to the MOPR provision that currently allows for zero-price offers."[47] As PJM explained, one reason for adding such an exemption was that calculating "the net cost of wind and solar resources . . . may be complicated by credits and incentives."[48] PJM thereby expressed its view that revenues from renewable energy credits were properly incorporated into the assessment of a generator's true costs. It follows that bids reflecting such payments do *not* reflect "uneconomic" behavior but rather efficient conduct accounting for a unit's true costs. The Commission agreed with PJM's rationale, stating: "[w]e find persuasive PJM's justification for applying the MOPR to CTs and CCs and not the exempted resources."[49]

By contrast, the state-mandated resource exemption removed from PJM's Tariff in that

---

[45] *See id.*
[46] *See infra* Section III.B.3.
[47] 135 FERC 61,022 at P 145 (emphasis added).
[48] *Id.*
[49] *Id.*

same filing encompassed a much wider range of state policies. Prior to its revision, "[t]he MOPR exempt[ed] from its operation any planned resource being developed in response to a state regulatory or legislative mandate."[50] This effectively enabled states to provide subsidies to generators for the sole reason that they disagreed with the Commission's determinations regarding efficient *energy* and *capacity* prices. Indeed, it was only in response to states' abuse of that mechanism in precisely this manner that PJM decided to eliminate the exemption, which it had previously adopted in deference to state public policies. While the exemption was still in place, two states, Maryland and New Jersey, designed schemes to incent the construction of new natural gas-fired facilities by adjusting FERC's approved prices for sales of electric-capacity from those plants to PJM. As the United States Supreme Court later held, the Maryland scheme "set[] an interstate wholesale rate" for electric capacity.[51] It did so through the combination of program design features, which called for "contracts for differences" to adjust the price for the relevant generator's sales of electric capacity *to PJM*, conditioned upon the generator bidding that capacity into PJM's markets.[52] The New Jersey scheme was functionally the same.

Thus, while PJM eventually reversed its state-mandated resource exemption and excluded revenues that the relevant generators' received from these particular state programs in applying the MOPR to them, that exclusion says nothing about whether bids reflecting revenues from the bona-fide sales of distinct environmental attribute products raise concerns regarding

[50] 135 FERC 61,022 (2011).
[51] *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1297 (2016)
[52] For a more complete discussion of the Maryland program and the critical differences between that program and programs providing for environmental attribute payments, *see* Brief of Amicus Curiae Natural Resources Defense Council, Inc. In Support of Defendants' Motion to Dismiss, Case No. 16-cv-8164 (S.D.N.Y. Dec. 20, 2016), at 12-14 (discussing the Maryland program at issue in Hughes) and 15-16 (distinguishing the ZEC Program), available at https://www.nrdc.org/sites/default/files/suport-nys-promote-clean-energy-amicus-brief-20161209.pdf.

artificial price suppression. Likewise, FERC's approval of PJM's elimination of the state-mandated resource exemption also reflects no judgment as to the appropriateness of bids reflecting sales of such attributes. Indeed, as explained above, that same decision strongly suggests that the Commission appropriately views such bids as economically efficient behavior. The Commission has subsequently issued decisions consistent with this principle. For example, in *California Independent System Operator Corp.*,[53] the Commission approved the California Independent System Operator's (CAISO)'s request to lower its energy-market "bid floor from negative $30/MWh to negative $150/MWh."[54] CAISO requested this reduction because "in addition to market revenues," wind and solar resources "generally receive . . . production tax credits, renewable energy credits, and contractual energy payments."[55] The Commission agreed that the bid floor reduction, which would facilitate bids accounting for such revenues from selling environmental attributes associated with energy production, would was needed to facilitate "economic bidding" by those resources.[56]

2.Bidding behavior that accounts for payments for providing environmental benefits does not artificially suppress prices

Importantly, PJM's MOPR is "intended to prevent the exercise of buyer-side market power . . . to *artificially* depress auction clearing prices."[57] As the Commission's decision in *California Independent System Operator Corp.* holds, where units selling products into FERC's markets earn revenues from sales of non-FERC-jurisdictional products and are able to offer lower market bids on account of those revenues, the lower market prices that result are

[53] 145 FERC 61,254 (2013).
[54] *Id.* at P 34.
[55] *Id.* at P 5.
[56] *Id.* at P 34.
[57] *See* PJM Manual 18: PJM Capacity Market 110 (Nov. 17, 2016) (emphasis added), available at http://www.pjm.com/~/media/documents/manuals/archive/m18/m18v35-pjm-capacity-market-11-17-2016.ashx.

"economic," not artificial.[58] Such bids reflect the true economic reality that units participating in FERC's markets face, just as lower operating costs enable lower bids. Consistent with this principle, the Commission held in *ISO New England Inc.* that neither "Renewable Energy Credits" nor "Production Tax Credit[s] . . . should be considered" out-of-market revenues.[59]

Zero Emissions Credits sold pursuant to the Illinois ZEC Program are like other non-FERC-jurisdictional products that other types of generators produce. Under the Program, Zero Emissions Credits are separate and distinct from electric energy or capacity, and instead constitute a property interest under Illinois state law representing the avoided emissions created through the operation of the associated units.[60] In this respect, they are just like revenues from other products distinct from electric energy or capacity, such as fertilizer produced by waste-to-energy facilities, hydrogen produced by fuel cells, or steam produced by co-generation facilities. Incorporating such revenues into wholesale market bids reflects efficient behavior; just as fossil generator bids incorporating costs incurred to meet state environmental requirements is economically efficient. In this regard, revenues from selling such credits differ significantly from the revenues generated by the Maryland scheme at issue in *Hughes*, which as explained above did not entail the sale of any non-FERC-jurisdictional products.

Further, even where an agreement does call for the sale of energy or capacity (as opposed to a non-FERC jurisdictional product), bidding behavior accounting for revenues from such an agreement does not raise buyer-side mitigation concerns where it accurately reflects the value of

---

[58] 145 FERC 61,254 at P 34.
[59] 146 FERC 61,084 at P 32 (2014).
[60] *See Wheelabrator Lisbon, Inc. v. Connecticut Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) ("Generally speaking, [Renewable Energy Creidts] are inventions of state property law whereby the renewable energy attributes are 'unbundled' from the energy itself and sold separately.").

services rendered or products provided under such an agreement.[61] The Commission highlighted this important principle in a recent order denying a complaint alleging artificial price suppression in the New York Independent System Operator's markets.[62] In that proceeding, the Commission addressed revenues received under Reliability Support Services Agreements (RSSAs), contracts that were approved by the New York Public Service Commission to address purported short-term reliability needs. The RSSAs provided compensation for the continued operation of facilities that would otherwise have been mothballed but were needed to address short-term reliability concerns.[63] In rejecting a complaint that *de minimus* bids submitted by the facility owners suppressed prices in the NYISO capacity market, the Commission held that it was "reasonable" for bidders "to deduct their RSSA revenues" because "the revenues do not overstate the value provided by the resources to customers."[64] It was "therefore reasonable, and fully consistent with NYISO's tariff rules, for the units to bid at *de minimus* levels."[65]

Here, the reasonableness of bids reflecting Zero Emissions Credit revenues is even clearer because FERC has no role in determining the value of such credits. While FERC has

[61] State programs may permissibly require such sales, as the Commission acknowledged in its amicus brief filed in the Supreme Court's recent case *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1299 (2016). Brief for the United States as Amicus Curiae, *Hughes v. Talen Energy Mktg., LLC*, case nos. 14-614 and 14-623 at 34 (Jan. 19, 2016), available at https://perma.cc/4ELB-QKCU. States may, for instance, "require[] that utilities enter into . . . bilateral contracts for the purchase of capacity . . . with particular types of generators." *Id.* Where such contracts provide true value to a state's customers by facilitating a cleaner energy mix or incorporate sales of co-products such as Renewable Energy Credits, accounting for those revenues in bidding behavior is economic and does not artificially suppress prices.

[62] *Independent Power Producers of New York, Inc. v. New York Independent System Operator, Inc.*, 150 FERC ¶ 61,214 (2015), *reh'g pending*.

[63] One of the RSSAs, the "Cayuga RSSA," is available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B92703DF1-DDBF-42B9-A859-EEE5309CE029%7D; the other, the "Dunkirk RSSA," is attached to National Grid's December 6, 2013 filing with the Commission in Docket No. ER14-543-000 at Exhibit 10.

[64] *Id.* at P 66.

[65] *Id.*

jurisdiction to assess and value reliability benefits according to the needs of the bulk power system (pursuant to which it could assess the value of the services rendered pursuant to the RSSAs at issue in the NYISO proceeding), it has expressly disclaimed jurisdiction over unbundled Renewable Energy Credits, which, like the Zero Emissions Credits provided for in Illinois' ZEC Program, reflect the value of environmental attributes sold separate and apart from electric energy and capacity.[66]

While one may disagree with Illinois' policy decision to create Zero Emissions Credits, it is clear that they reflect the state's determinations and valid interests regarding the benefits of avoided emissions, and are not merely an attempt to suppress the overall prices in the market. The Illinois General Assembly enacted the ZEC Program in order to "reduce the adverse impact of emitted air pollutants on the health and welfare of the State's citizens."[67] It recognized that "[s]ulfur oxides, nitrogen oxides, and particulate emissions have significant adverse health effects on persons exposed to them, and carbon dioxide emissions result in climate change trends that could significantly adversely impact Illinois."[68] By capping payments at the Social Cost of Carbon, Illinois prevented generators of avoided emissions from receiving payments in excess of their greenhouse gas emissions avoidance value.[69] It was the State of Illinois' sovereign judgment that the preservation of the emissions attributes associated with nuclear generation should constitute a component of its strategy to avoid emissions from burning fossil fuels, and its

---

[66] *WSPP, Inc.*, 139 FERC 61,061 at PP 18-24 (2012).
[67] Illinois 99th Gen. Assemb., S.B. 2814, at § 1.5.
[68] *Id.*
[69] *See* Illinois 99th Gen. Assemb., S.B. 2814, at § 1.5(8) (Dec. 7, 2016) (stating that the Social Cost of Carbon associated with the emissions avoided is a reasonable maximum value for the "environmental benefits provided by zero emissions facilities"). The Social Cost of Carbon used for purposes of the ZEC Program was "based on the U.S. Interagency Working Group on Social Cost of Carbon's price in the August 2016 Technical Update using a 3% discount rate, adjusted for inflation for each year of the program." *Id.* at d-5(1)(B)(i).

decision to value emissions reductions caused by nuclear generation using a formula ensuring that payments would be not exceed an amount deemed by outside experts to be economically efficient.

3. Movants' requested relief must be denied to avoid unjustly forcing customers to pay for redundant capacity and frustrating legitimate state policy

Were the Commission to order PJM to mitigate resources receiving revenues from the Illinois ZEC Program, customers would be unjustly forced to procure redundant capacity. Not only would this require them to pay for unnecessary resources, it would also artificially increase capacity prices because the new marginal unit under such a scenario would likely have submitted a bid in excess of the bid provided by the last unit *truly* necessary to reliably serve the system. The Commission has recognized as much in addressing the treatment of bids by units receiving revenues from reliability must run (RMR) contracts in the NYCA capacity zone of the NYISO market.[70] The Commission concluded that, "[w]here RMR agreements are necessary, those resources also satisfy the reliability needs of the broader NYCA footprint, and it would be inefficient to procure other capacity elsewhere in the NYCA footprint to satisfy the NYCA capacity needs met by the RMR capacity."[71] The same logic holds with regard to units receiving payments for Illinois' Zero Emissions Credits, as those units would continue to meet PJM's capacity needs so long as they did not retire or sell their capacity into other regions.

The burden for the Commission to require customers to acquire redundant capacity in this manner is high, because in "assuring just and reasonable rates" under the Federal Power Act, the

---

[70] *Independent Power Producers of New York*, 150 FERC ¶ 61,214 (2015).
[71] *Id.* at P 68.

Commission has an obligation to "protect[] consumers from overpaying for . . . capacity."[72] FERC has an affirmative duty to articulate how any increased capacity costs it may impose translate into benefits for customers.[73] Here, where payments for environmental attributes under the Illinois ZEC program reflect the real value that a non-FERC-jurisdictional product provides pursuant to legitimate state policy, there are no countervailing benefits that would warrant excluding the capacity that those resources provide from the wholesale markets. Accordingly, it would violate the Federal Power Act for the Commission to impose any such measures.

Rather than applying special scrutiny to resources supported by state policies, the MOPR should instead be designed with special care to avoid mitigating such resources where possible. FERC has "sought to accommodate the ability of states to pursue their policy goals,"[74] recognizing that it is appropriate for buyer-side mitigation rules to "complement[] state programs promoting renewable resources."[75] The need to "accommodat[e] the ability of states to pursue . . . legitimate state policy objectives" is sufficiently important that it must be balanced against the Commission's "responsibility to promote" policies that in a vacuum would render "economically efficient markets and efficient prices."[76] This makes sense because, just as FERC recognized the need for bulk transmission planning rules to efficiently account for state public policies in Order

[72] *ISO New England Inc., and New England Power Pool Participants Committee*, 155 FERC 61,023, at P 34 (2016).
[73] *See Transcanada Power Marketing v. FERC*, 811 F.3d 1, 13 (2015) (finding that, in approving a tariff imposing higher costs on customers, FERC failed to meet its obligation to articulate a reasoned justification for imposing those higher costs).
[74] *ISO New England Inc. and New England Power Pool Participants Committee*, 155 FERC 61,023 at P 23 (2016).
[75] *ISO New England Inc. and New England Power Pool Participants Committee*, 147 FERC 61,173 at P 82 (2014), *reh'g denied*, 150 FERC ¶ 61,065 (2015).
[76] *New England States Committee on Electricity v. ISO New England Inc.*, 142 FERC 61,108 (2013), *reh'g denied*, 151 FERC ¶ 61,056 (2015).

No. 1000,[77] so must RTOs set wholesale market rules in a manner that renders prices just and reasonable in light of state policy choices. Where resources supported by *legitimate* state policies are mitigated, the procurement of redundant capacity increases customer costs, even if absent those state policies a different approach would be more efficient. It is not FERC's role to dictate to states what their public policies should be with regard to valuing environmental benefits that are distinct from energy or capacity, but rather to ensure just and reasonable wholesale prices for FERC-jurisdictional products given the existing policy framework.

Conversely, while it is reasonable for FERC to override bids reflecting revenues from sham policies designed with the sole purpose of circumventing FERC's determinations regarding the justness and reasonableness of wholesale market prices for energy or capacity, states should not be forced to choose between repealing their legitimate and sovereign public policies and permitting FERC to saddle customers with unnecessary costs to procure redundant capacity. The Commission has recognized that preventing such potential over procurement supplies a powerful rationale warranting *exemption* from buyer-side mitigation rules to accommodate legitimate state policies, even where underlying unit offers might otherwise trigger mitigation.[78]

4.Movants have failed to meet their burden under the Federal Power Act to establish that their proposed MOPR revisions or a Commission-ordered stakeholder process is necessary

Under the Federal Power Act, complainants objecting to an RTO's Tariff provisions must demonstrate not only that the existing provisions are "unjust and unreasonable," but also that the

[77] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC 61,051, at PP 2, 82 (2011) ("Order No. 1000") (mandating transmission owners to "explicitly provide for consideration of transmission needs driven by Public Policy Requirements," defined as encompassing "state or federal laws or regulations").
[78] *See ISO New England Inc. and New England Power Pool Participants Committee*, 155 FERC 61,023 at P 25 (2016) (holding that a renewables exemption to buyer-side mitigation rules was justified, in part, because it prevented a scenario where consumers would have "to pay for additional capacity that exceeds the requirements of the demand curve").

"specific replacement" offered as a remedy is "just and reasonable."[79] Movants have failed to meet either burden.

As discussed above, programs providing payments for delivering environmental attributes do not give rise to artificial price suppression concerns. This alone dictates that Movants have failed to meet their burden to demonstrate that the current MOPR is unjust and unreasonable. Despite the analytically distinct nature of such environmental attribute programs from the Affiliate PPAs that were the subject of the Original Complaint, Movants have offered no explanation of how, despite these differences, the Illinois ZEC Program creates the same threat of artificial price suppression. As discussed in Section III.A.1 above, Movants have offered no data, affidavits, or other documentation to support their claims that artificial price suppression is occurring due to the Illinois ZEC Program.

Nor have Movants demonstrated that their own proposed relief is just and reasonable. As discussed above, mitigating bids accounting for environmental attributes would force customers to procure redundant capacity and artificially increase prices. Further, as the Commission's prior decisions approving PJM's MOPR revisions reveal, the MOPR is a complex framework that should not be adjusted without careful consideration of the unintended consequences that may result from such adjustments. Perhaps recognizing the potential negative consequences of their proposed solution, Movants recognize that it may not be appropriate as a "longer-term remedy."[80] While Movants argue that their proposed MOPR revisions for the Base Residual Auction for the 2020/2021 delivery year are necessary to address the "immediate threat" of the Illinois ZEC Program, they provide no testimony in support of their claim that it will suppress

---

[79] *Michigan Elec. Transmission Co., LLC & Midwest Indep. Transmission Sys. Operator, Inc.*, 116 FERC ¶ 61164, P.12 (Aug. 22, 2006); *see also* 16 U.S.C. § 824e.
[80] Motion to Amend at 3.

prices in that auction, whose operation will pre-date the receipt of any Zero Emissions Credit revenues by market actors.

Furthermore, the Tariff changes requested by Movants are extremely broad, subjecting a wide variety of resources to the MOPR for the first time. As EDF stated in previously-filed comments, adopting such a proposal through administrative order holds the potential to "undermine" PJM's existing stakeholder "process and create potential unintended consequences."[81] Given Movants' admission that no payments have yet been made pursuant to the Illinois ZEC Program,[82] such an emergency remedy is unwarranted.

Furthermore, PJM and its stakeholders have already initiated a process to address these very issues.[83] Movants' alarmist rhetoric that "[s]tate-approved subsidies . . . represent an existential threat to the organized wholesale marketplace"[84] is incorrect. But if it *were* true, this would make it even less prudent for the Commission to resolve such an important issue without the benefit of a reasoned process to develop a robust factual record, present the full range of issues implicated by potential solutions, and allow for stakeholders to discuss their concerns and share feedback with one another. The stakeholder process already initiated at PJM would allow for examination of the potential collateral consequences that might be caused by the imposition of any changes to the MOPR *prior* to determining that changes should be adopted.[85] It would

[81] *Id.* The wisdom of a narrow approach was highlighted by the ultimate resolution of the Affiliate PPAs objected to in the Original Complaint.
[82] *Id.* at 17.
[83] PJM plans to investigate the interaction between state public policies and its markets through a Senior Task Force reporting to the Markets & Reliability Committee. *See* http://www.pjm.com/~/media/committees-groups/committees/mrc/20170126/20170126-item-03-state-actions-issue-charge-updated-main-motion.ashx.
[84] Motion to Amend at 2.
[85] For example, in approving PJM's continued exemption of nuclear and other resources from the MOPR, the Commission noted that it may be quite difficult to administratively develop a Cost of New Entry for such units. *See PJM Interconnection, L.L.C. PJM Power Providers' Group v.*

also allow for examination of related issues, such as whether prices are in fact too low to incent enough new entry to reliably serve the system, and if so, what alternative causes for such prices might be responsible.

Nor should the Commission accept Movants' suggestion to *order* a stakeholder process given their failure to demonstrate that PJM's existing Tariff provisions are unjust and unreasonable.[86] An order from the Commission directing a stakeholder process would prejudice its result by presuming, prior to full investigation, that there is in fact a problem in need of remedy. PJM's self-initiated proceeding, unlike Movants' proposal, does not require accepting at face value the false proposition that state programs providing for payments for environmental benefits create a risk of artificial price suppression.

IV. Conclusion

For the reasons stated above, the undersigned organizations urge the Commission to deny the Motion to Amend, or in the alternative, to reject the new claims raised in the Amended Complaint and the relief requested therein.

Respectfully submitted,

PJM Interconnection, L.L.C., 135 FERC 61,022 at P 154 (2011) (contrasting the relative ease of estimating expected investment costs for non-exempted units with the difficulty of estimating such costs for exempted units).

[86] *See infra* Section III.C.

NATURAL RESOURCES DEFENSE COUNCIL
By: *<u>/s/ Miles Farmer</u>*
Miles Farmer
NRDC
40 W. 20th St.
New York, NY 10011
(212) 727-4634

On behalf of **Natural Resources Defense Council**

ENVIRONMENTAL DEFENSE FUND
By: *<u>/s/ Michael Panfil</u>*
Michael Panfil
John Finnigan
Environmental Defense Fund
1875 Connecticut Ave., NW
Washington, DC 20009
(202) 572-3280

On behalf of **Environmental Defense Fund**

SUSTAINABLE FERC PROJECT
By *<u>/s/ John Moore</u>*
John Moore
Sustainable FERC Project
20 N. Wacker Dr., Suite 1600
Chicago, IL 60606
(202) 727-4600

On behalf of **Sustainable FERC Project**

Dated: January 30, 2017

CERTIFICATE OF SERVICE

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

Dated at Washington DC, this 30th day of January, 2017.

/s/ Michael Panfil
Michael Panfil