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**
Movants,	)	
v.	)	
PJM Interconnection, L.L.C.,	)	
Respondent.	)	

PROTEST OF EXELON CORPORATION

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("the Commission"), Exelon Corporation ("Exelon")[1] hereby protests the Motion to Amend, and Amendment to, Complaint and Request for Expedited Action on Amended Complaint filed on January 9, 2017,[2] by the Electric Power Supply Association ("EPSA") and the

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[1] Exelon timely filed a document-less intervention on March 23, 2016.

[2] *See Motion to Amend and Amendment to March 21, 2016 Complaint of Calpine Corporation, et. al. and Request for Expedited Action on Amended Complaint*, filed by the Electric Power Supply Association, et. al., Docket No. ER16-49-000 (filed Jan. 9, 2017) ("Motion to Amend Complaint").

Indicated Complainants[3] (collectively "Movants") in the above-captioned proceeding. As an interim remedy for the 2020/21 Base Residual Auction ("BRA"), Movants seek to impose a minimum offer price rule ("MOPR") on units "expected to be awarded" contracts under Illinois' new Zero Emission Standard ("ZES"). For the longer term, Movants ask the Commission to direct PJM to undertake a stakeholder process.

The Commission should reject the relief sought by Movants. For one, the matters raised by the original Complaint in this action are now moot, and even if they were not, the issues raised in the Motion to Amend are entirely outside the scope of this proceeding. Moreover, even if the Commission were to look beyond this procedural deficiency, the interim relief Movants seek—mitigating the bids of units based on speculation that they may receive environmental attribute credits in the future—is wholly improper. The ZES legislation does not even become effective until June 1, 2017, and it includes a detailed procurement process in which the Illinois Power Agency ("IPA") selects winning bidders based on environmental criteria, and the Illinois Commerce Commission ("ICC") then reviews and approves the resulting procurement plan. The Commission should not direct the mitigation of capacity market offers in May 2017, based on Movants' speculation regarding the likely outcome of an extended state administrative process that has yet to even begin under a not-yet-effective statute.

What is more, the application of a MOPR to existing units would be an unprecedented change with sweeping implications for the PJM markets. The logic of Movants' position would not only impact units expected to receive ZECs, but would equally affect renewable resources receiving RECs, and indeed any resource receiving a government benefit that allows the unit to clear the market more easily than it might otherwise. Such benefits include tax incentives,

[3] Pursuant to the Motion to Amend Complaint, the Indicated Movants include all Movants in the above-captioned proceeding except GDF SUEZ Energy Marketing, Inc. *See Motion to Amend Complaint* at 2 n.4.

development credits, and other benefits that affect both costs and revenues of units participating in the markets. It would also apply equally to rate-regulated resources that are guaranteed cost recovery but that participate in PJM's capacity markets. And, as Exelon pointed out in its limited protest to the original Complaint, applying a MOPR but then crafting exemptions for certain of these resources, would be impermissibly discriminatory.[4] The Commission should not embark upon rule changes with such sweeping implications for the operation of the markets (and implications for a state's ability to achieve its legitimate objectives)[5] without a determination that there is actually a problem to be solved, a clear statement of what that problem is (if any), a detailed consideration of various options for addressing it, and a consideration of the social costs and benefits of those options. For example, Movants themselves express uncertainty about whether, even under their theory, capacity market mitigation or energy market mitigation is the appropriate remedy.[6]

The Commission should also reject Movants' request to direct a stakeholder process. Movants do not even attempt to meet their burden under Section 206 to demonstrate, with evidence, that existing market rules are unjust and unreasonable. In fact, the PJM market has had no difficulty attracting new entry and incentivizing the retirement of uneconomic resources. It would be particularly inappropriate for the Commission to direct a stakeholder process, because PJM stakeholders *already* have voluntarily launched a stakeholder process to consider how its market rules could be changed to address the issues presented by Movants, without frustrating

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[4] *See* Limited Protest of Exelon Corporation, Docket No. EL16-49 (filed Apr. 11, 2016) at 6-8.

[5] Movants also recognize "the national significance of this matter" and its potential impact "not just in PJM but on other organized markets as well." Motion to Amend at 2, n.5, 11. Given the significance of the changes Movants suggest and their broad ramifications, the Commission should allow the regions time to assess the potential impact before stepping in.

[6] Motion to Amend at 12 & n.51.

states' legitimate policy goals and their interest in environmental protection. To the extent that the Commission does direct a stakeholder process, however, it should make clear that the stakeholder process should aim to develop rules intended to complement, rather than frustrate, state environmental programs.

Finally, if the Commission were to reach the merits of the Movants' Amended Complaint, it should reject the proposition that an environmental attribute program like the ZES warrants mitigation, for several reasons. *First*, it would be unprecedented for the Commission to apply a MOPR to existing resources. *Second*, doing so in response to the ZES would be inappropriate because the structure and planned operation of the ZES program make clear that it is a legitimate effort by Illinois to promote state environmental goals. The program addresses the negative environmental externality of pollution by compensating plants that do not pollute, based on the social value created by avoiding pollution. The program is cost-justified based solely on the environmental benefits it provides. As such, the ZES is not a scheme to exercise buyer-side market power and facilitate price suppression, and it should not trigger mitigation. *Third*, applying a MOPR to mitigate environmental attribute revenues would place states in the untenable position of either abandoning legitimate state environmental policies that the Commission has long respected and sought to accommodate, such as REC programs, or forcing its consumers to buy redundant, unneeded capacity. The Commission should not frustrate the ability of states to pursue legitimate policy goals in that manner.

BACKGROUND

A. Exelon

Exelon is a holding company, headquartered at 10 South Dearborn Street, Chicago, Illinois, with operations and business activities in 48 states, the District of Columbia, and Canada. Exelon

owns a number of utilities, including Atlantic City Electric Company, Baltimore Gas and Electric Company, Commonwealth Edison Company, Delmarva Power & Light Company, PECO Energy Company, and Potomac Electric Power Company. Exelon also owns Exelon Generation Company, LLC ("ExGen"), one of the largest competitive power generators in the United States, with approximately 32,000 megawatts of owned capacity comprising one of the nation's cleanest and lowest-cost power generation fleets, located in several organized markets. ExGen operates one of the largest nuclear generation fleets in the world, which includes 17,629 megawatts of nuclear generation located in the PJM region.[7]

B. The EL16-49 Proceeding

On March 21, 2016, various complainants filed a Complaint before the Commission objecting to proposals submitted to the Public Utility Commission of Ohio ("PUCO") by unregulated subsidiaries of American Electric Power ("AEP") and FirstEnergy Corporation ("FirstEnergy").[8] Under these proposals, the AEP and FirstEnergy subsidiaries would enter power purchase agreements with affiliated electric distribution companies, which would then recover the costs through a non-bypassable charge.[9] The Complaint alleged that "AEP and FirstEnergy [were] poised to dump over 6 GW of subsidized existing resources into the 2019/2020 BRA," and that because AEP and FirstEnergy secured permission to impose non-bypassable charges they "will have strong incentives to submit below-cost offers in the RPM Auctions in order to ensure that

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[7] In addition, Constellation, an ExGen business unit consisting of subsidiaries and divisions of ExGen, is one of the nation's leading marketers of electricity and natural gas and related products in wholesale and retail markets. The Constellation businesses serve approximately 2.5 million residential and business customers in various markets throughout the United States.

[8] *See Complaint Requesting Fast Track Processing*, filed by Calpine Corporation et. al., Docket No. ER16-49-000 (filed Mar. 21, 2016) ("Complaint").

[9] *See id.* at 16, 18-19.

they are able to recover the full net costs of the Affiliate PPAs pursuant to the Riders."[10] The Complaint alleged that AEP and FirstEnergy would act in this manner because their ability to "recover costs of the Affiliate PPAs will be dependent upon their ability to demonstrate to the PUCO's satisfaction that their actions when selling the output from generation units included in the [Riders] into the PJM market were not unreasonable."[11] The best way to make this demonstration, the Complaint surmised, would be for AEP and FirstEnergy "to submit 'price-taker' offers that will maximize their capacity revenues and the offset to costs incurred under the Affiliate PPAs and thereby minimize net costs recovered through the Riders."[12] The Complaint argued that these price-taker bids would lead to suppression of the RPM clearing price, deterring new entry and resulting in the untimely retirement of otherwise economic existing resources.[13]

The Complaint therefore urged the Commission to impose a MOPR in time for the 2019/2020 BRA on existing resources that receive supplemental revenue through out-of-market contracts.[14] The Complaint also urged the Commission to "direct PJM to initiate a stakeholder process to develop modifications to the MOPR that will address the threat posed by subsidized resources over the long term."[15]

In April 2016, the Commission rescinded the waivers of affiliate power sales restrictions that it had previously granted AEP and FirstEnergy, and both companies subsequently abandoned the power purchase agreements approved by the PUCO.[16] AEP and FirstEnergy then moved to

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[10] *Id.* at 23-24.

[11] *Id.* at 25.

[12] *Id.*

[13] *Id.* at 30.

[14] *Id.* at 34-35.

[15] *Id.* at 39.

[16] *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).

dismiss the Complaint as moot,[17] and the complainants and other entities objected.[18] The Commission has yet to rule on the motion to dismiss.

C. Illinois Zero Emission Standard Legislation

In early December, 2016, Illinois enacted ZES as part of a comprehensive energy legislation package.[19] The statute does not become effective until June 1, 2017.[20] The purpose of the ZES is to ensure that Illinois can "achieve the State's environmental objectives and [ ] reduce the adverse impact of emitted air pollutants on the health and welfare of the State's citizens."[21] Under the ZES, the IPA (a state agency) will procure contracts for zero emissions credits ("ZECs") from nuclear facilities capable of generating zero-emissions credits cost-effectively in an amount equal to 16% of electricity used in Illinois in 2014. Like a renewable energy credit, a ZEC values the environmental attributes of zero-emissions generation. One ZEC reflects one megawatt-hour of zero-emission production.

The ZES provides for a detailed, multi-stage procurement process, which is not expected to commence until sometime *after* its June 1, 2017 effective date. First, bidders with nuclear plants located in PJM or MISO may participate in the procurement process by submitting certain information about their plants to the IPA. The IPA will review the bids and propose winning bidders to be included in a procurement plan. Winners shall be selected based on public interest factors, including "minimizing carbon dioxide emissions that result from electricity consumed in Illinois and minimizing sulfur dioxide, nitrogen dioxide, and particulate matter emissions that

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[17] *See Motion to Dismiss of Dominion Resources Services, Inc., et. al.,* Docket No. EL16-49-000 (filed May 6, 2016).

[18] *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).

[19] Illinois SB 2814 (available at http://www.ilga.gov/legislation/99/SB/PDF/09900SB2814enr.pdf) ("SB 2814").

[20] *Id.* at section d-5.

[21] *Id.* at section 1.5.

adversely affect the citizens" of Illinois.[22] The IPA then takes public comment on its proposed procurement plan. Once finalized, the IPA submits the procurement plan to the ICC for further review. After notice and a hearing, the ICC may accept the plan or require modifications. The ICC's order regarding the plan and identifying the ultimate winners of the procurement must "identify how the winning bids satisfy the public interest criteria … of minimizing carbon dioxide emissions that result from electricity consumed in Illinois and minimizing sulfur dioxide, nitrogen dioxide, and particulate matter emissions that adversely affect the citizens" of Illinois. The ICC's order must also "specifically address how the selection of winning bids takes into account the incremental environmental benefits resulting from the procurement," and it must "quantify the environmental benefit" of the procurement using certain metrics. Only after that point will the winners enter contracts to sell ZECs.

The value of ZECs will be based on the Social Cost of Carbon as determined by the U.S. Interagency Working Group, multiplied by the emissions rate of a natural gas combined cycle plant,[23] and can never exceed that amount. The Illinois General Assembly found that this amount—which is a conservative estimate of the economic value of emissions abated by the continued operation of nuclear facilities[24]—is "an appropriate valuation of the environmental benefits provided by zero emission facilities."[25] However, "to ensure that the procurement remains affordable to retail customers in this State if electricity prices increase," the value of ZECs may be reduced below the Social Cost of Carbon. The size of the downward adjustment is determined by

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[22] *Id.* at section d-5.

[23] Affidavit of Robert D. Willig (Jan. 29, 2017) ("Willig Aff.") ¶ 8.

[24] It is a conservative estimate because the marginal emissions rate in PJM—that is, the emissions rate of the resource mix that would replace a nuclear unit—is substantially higher than the emissions rate of a natural gas combined cycle unit. *See* Willig Aff. ¶ 40 & n.40.

[25] SB 2814 at section 1.5.

the amount by which an index price, based on a simple average of MISO and PJM capacity prices and forecasted energy prices in Northern Illinois, exceeds a benchmark of $31.40/MWh.[26] Resources selected to provide ZECs thus continue to bear the market risk of falling energy and capacity prices, as well as cost increases.

The procurement is capped so that retail rates cannot rise more than 1.65% as a result of the program, and costs will be recovered from customers through a non-bypassable charge (as are RECs in Illinois).

D. The Motion to Amend

On January 9, 2017, Movants filed a Motion to Amend, purporting to ensure that the Commission had before it information regarding the ZES.[27] Citing the Commission's statements regarding the potentially price suppressive effects of subsidized new entry into the market, Movants claimed the Commission's rationale should apply with equal force to existing units.[28] Despite acknowledging that the ZES has yet to even go into effect, and that the "procurement process [has] yet to occur,"[29] Movants asked the Commission to grant their Amended Complaint and impose a MOPR on "certain existing resources."[30] Although devoid of any supporting evidence or data, the Motion to Amend alleged that the existing MOPR was "unjust and unreasonable by virtue of its failure to address subsidized existing resources."[31]

As an interim measure for the 2020/21 Base Residual Auction, to be held in May 2017, Movants urged the Commission to impose a MOPR on units which, according to Movants'

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[26] *Id.* at section d-5(B)(ii). This amount was based on then-current prices.

[27] Motion to Amend at 9.

[28] *Id.* at 12.

[29] *Id.* at 17.

[30] *Id.* at 10.

[31] *Id.* at 18.

speculation, are "expected to be awarded [contracts] under the ZECs Legislation . . . even if the contract has not yet actually been awarded or executed."[32] In particular, Movants' identified two nuclear plants owned by Exelon, only one of which is located in PJM. The Motion to Amend also requests 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 2021/2022 BRA."[33]

On January 24, 2017, various entities including FirstEnergy Service Company moved to deny the Motion to Amend and to dismiss the Amended Complaint.[34] The motion argued that the underlying proceeding was now moot, that the Motion to Amend impermissibly sought to expand the scope of the proceedings well beyond the issues identified in the original Complaint, and that the Motion to Amend failed to comply with the procedural and substantive requirements of Rules 206 and 215 of the Commission's Rules of Practice and Procedure.[35]

COMMENTS

I. The Commission Should Reject the Relief Sought By Movants as Premature and Improper.

A. The Motion to Amend Should be Rejected Because the Issues Raised in this Docket Are Now Moot, and the ZES Is Outside the Scope of This Proceeding.

As noted above, in light of the Commission's April 2016 decision to rescind the waiver of AEP and FirstEnergy's affiliate power sales restrictions, both AEP and FirstEnergy have abandoned the power purchase agreements challenged in the original Complaint. Thus, the

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[32] *Id.* at 16-17.

[33] *Id.* at 18.

[34] *See* Motion of Dayton Power and Light Company, East Kentucky Power Cooperative, Inc., and FirstEnergy Service Company to Dismiss Complaint, to Oppose Acceptance of Motion to Amend Complaint and to Dismiss Amendment to the Complaint and Request for Expedited Action, Docket No. EL16-49 (filed Jan. 24, 2017).

[35] *See id.* at 7-15.

grounds for invoking the Commission's jurisdiction in this proceeding no longer exist, and the docket should be closed.

Moreover, even if there were still a live issue in this docket arising from the AEP and FirstEnergy contracts, Movants' purported "amendment" substantially and impermissibly expands the scope of this proceeding well beyond the basis for the original Complaint. Movants concede as much: As they acknowledge, the original Complaint sought revisions "narrowly tailored to [the] threat posed by the AEP and FirstEnergy proposals."[36] The evidentiary record developed by the parties was based upon that premise. In the proposed Amended Complaint, however, Movants now ask the Commission to address an issue they claim has "national significance" and poses an "existential threat to organized wholesale markets."[37] Nothing in the Commission's rules suggests that an amendment to a complaint may so drastically change the scope of a proceeding.[38] Accordingly, the Motion to Amend should be denied.

B. The Commission Should Not Mitigate Units Based on Speculation That They Might, in the Future, Receive Environmental Attribute Payments.

Even if the Commission finds that the issues raised in this docket are not moot, and that one can permissibly amend a complaint to broaden a proceeding far beyond its original scope, the Motion to Amend should still be rejected. As Movants concede, the ZES has not gone into effect, no recipients of ZEC payments have been selected, and the program has yet to have *any* effect on the market.[39] Yet the Movants nevertheless ask the Commission to impose mitigation in the upcoming 2020/21 Base Residual Auction on units that, according to Movants, will likely be the ultimate recipients of ZEC payments. That relief is wholly improper and should be rejected out of

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[36] Motion to Amend at 11.

[37] *Id.*; *id.* at 2 n.5.

[38] *See* 18 C.F.R. § 385.215.

[39] Motion to Amend at 17.

hand by the Commission. The ZES sets forth a detailed and extensive administrative process through which the IPA will propose a procurement plan selecting resources to provide ZECs based on objective environmental criteria. The ICC will then review and approve that procurement plan. It would be inappropriate for the Commission to speculate regarding the outcome of that administrative process—which will not be complete until months after the Base Residual Auction is held—and impose mitigation preemptively on the basis of that speculation. In the past, the Commission has declined as premature invitations to rule on the effect of anticipated or future actions that have yet to occur and thus have no current market impact.[40] It should do the same here.

C. Movants Have Failed to Meet Their Burden Under Section 206 to Establish That Mitigation or a Stakeholder Process Is Required.

The Commission should also deny Movants' request that it direct a stakeholder process. Movants have utterly failed to meet their burden under Section 206 to establish that such a directive is needed, let alone that preemptive action must be taken for the 2020/21 BRA. And, in any event, PJM has already indicated that it will embark upon a stakeholder process to address the issues raised. Thus, there is no need for a directive from the Commission.

[40] *See Texas Gas Transmission Corp.*, 63 FERC ¶ 61,240, 62,656 (1993) ("Texas Gas is premature in seeking to implement a corporate tax rate that is not yet in effect."); *Next Era Resources, LLC and PSEG Companies v. ISO New England, Inc.*, 156 FERC ¶ 61,150 (2016) (Commission dismissed complaint as unripe because the state proceedings and actions that complainants asserted would produce distorted energy prices were merely pending at the time of the complaint); *CSOLAR IV South LLC v. Cal. Indep. Sys. Op. Corp.*, 142 FERC ¶ 61,250 at P 47 (2013); *Louisiana Pub. Serv. Comm'n v. Entergy Corp., et. al.*, 132 FERC ¶ 61,104 (2010); *New England Power Generators Ass'n, Inc.*, 150 FERC ¶ 61053, P 40 (2015), *on reh'g*, 153 FERC ¶ 61,222 (2105) ("If, at a future point in time, NEPGA or any other party is able to provide specific evidence that the interaction between the new Reserve Constraint Penalty Factors and the existing PER Adjustment mechanism has rendered the capacity rates for CCPs 5 through 8 unjust and unreasonable, the Commission will consider any such complaints at that time. At this point, however, the overall result of that interaction is a matter of speculation, and the Commission will not grant relief on that basis. We note that the Commission has previously encouraged ISO-NE's stakeholders to consider whether changes to the PER mechanism are necessary going forward, and that process is ongoing.").

Under Section 206, a complainant bears the burden of demonstrating that an existing rate is unjust or unreasonable.[41] In order to make this showing, a complainant cannot merely allege an existing tariff is unjust and unreasonable. Rather, under the Commission's rules, a complainant must justify a Section 206 filing with supporting evidence, whether through affidavits, data, or some other form of support.[42] The Commission has previously rejected attempts to modify an existing tariff under Section 206 precisely because the complainant had "not submitted affidavits, documents, or testimony that would attest to the accuracy of its allegations,"[43] but instead had based a complaint merely on "unsupported allegations based on erroneous assumptions."[44]

That holding aptly describes this case. The Amended Complaint is devoid of any evidence whatsoever of any market impact the ZES is having—which is not surprising, because the ZES is not even effective yet. The Motion to Amend claims "the [ZEC] Legislation threatens to artificially suppress prices in RPM Auctions,"[45] and that the "organized markets will not be sustainable unless this problem is addressed."[46] The Motion further asserts that "State-approved subsidies that, by design, interfere with economic signals for entry and exit represent an existential threat to the organized wholesale markets that are the centerpiece of the Commission's pro-

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[41] 16 U.S.C. § 824(e); *Midwest Independent Transmission System Operator, Inc.*, 153 FERC ¶ 61229, at P 37 (2015) ("[W]e cannot impose on the utility significant changes, without satisfying our burden under section 206 … to find the existing tariff provisions unjust and unreasonable."); *Michigan Elec. Transmission Co., LLC & Midwest Indep. Transmission Sys. Operator, Inc.*, 116 FERC ¶ 61164, at P 12 (2006).

[42] *See* 18 C.F.R. § 385.206 (requiring a complaint filed before the Commission to "[i]nclude 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").

[43] *NRG Energy, Inc.*, 126 FERC ¶ 61053, at P 32 (2009).

[44] *Id.* at P 15; *see also Blumenthal v. FERC,* 552 F.3d at 875, 883 (D.C. Cir. 2009) (affirming FERC finding that complainant's evidence, submitted in the form of summary charts, was insufficiently explained).

[45] Motion to Amend at 10.

[46] *Id.* at 11.

competitive regulatory approach."[47] Yet despite their alarmist rhetoric, Movants have not provided a single piece of evidence—whether in the form of market data or expert testimony—as to what the actual price suppressive effects of the ZES will be, whether reliability will be compromised, or why those effects render the PJM Tariff unjust and unreasonable. The closest the Motion comes to citing any evidentiary support at all is a brief quotation from testimony submitted by the Independent Market Monitor describing various theoretical constructs on which a capacity market could be based.[48] That testimony, which predates the ZES and does not purport to address it, is hardly an adequate basis for the Commission to take the unprecedented step of imposing a MOPR on existing units receiving payments for environmental attributes.

Moreover, even once the ZES is effective, it will apply only to 16 percent of Illinois' 2014 load—about one-third of which is located in MISO, not PJM. Even if Movants are correct that Exelon's two units in Illinois ultimately will be selected to receive ZECs, at most the program will support approximately 1,400 MW of nuclear generation in PJM, which is less than one percent of PJM's total installed capacity.[49] Movants bear a heavy burden in showing that this program will so disrupt the functioning of the market that sweeping reforms are necessary, and they cannot meet it.

Indeed, all signs point to the conclusion that RPM is performing as it should. The market is producing resource adequacy—achieving a reserve margin of 22 percent, exceeding its target of

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[47] *Id.* at 13.

[48] *See id.* at 12-13 (quoting Comments of the Independent Market Monitor for PJM, Attachment B-1, First Supplemental Testimony of Joseph E. Bowring on Behalf of the Independent Market Monitor for PJM at 5, Docket No. EL16-49-000 (filed Apr. 11, 2016)).

[49] For the 2019/2020 BRA, 172,886.4 MW of the Capacity Performance product were offered. 1,400 MW is .80% of this total. *See* 2019/2020 BRA Report at 14, available at http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2019-2020-base-residual-auction-report.ashx.

16.5 percent.[50] It is bringing about significant new entry every year for a total of more than 18.3 GW of new capacity in the past three BRAs alone. It also is incentivizing the exit of uneconomic resources, amounting to 16.2 GW of retirements or de-rates over the past three BRAs.[51] These outcomes have occurred even though the market already contains all the renewable, rate-based, and nuclear generation that would be affected by a MOPR on existing sources. In short, there is no empirical grounding for Movants' claim that the market is producing unjust and unreasonable rates—let alone the strength of evidence that would be required to meet their weighty burden under Section 206. If, once the ZES is in effect, Movants believe their allegations are borne out by experience, they may refile their complaint at that time.[52]

The Motion to Amend is deficient in yet another respect as well. Any amended complaint must conform to the requirements "applicable to the pleading to be amended."[53] Thus, the proposed Amended Complaint must comply with Rule 206 of the Commission's Rules of Practice and Procedure, including the requirement that a Complaint state whether the same issues are pending "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."[54] The Amended Complaint fails to comply with that requirement.

That deficiency is particularly problematic here, given that PJM stakeholders have just initiated a stakeholder process that will address the very issue raised by Complainants and give all interested parties the opportunity to work towards an appropriate solution. The issue charge given

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[50] *See id.* at 1.

[51] *See id.* at 22.

[52] *Next Era Resources*, 156 FERC ¶ 61,150 (2016).

[53] *See* 18 C.F.R. § 385.215(a).

[54] *See* 18 C.F.R § 385.216(6).

to stakeholders is to "brainstorm and develop modifications to RPM that could accommodate/address both capacity construct objectives and state actions."[55] There is no need for a Commission directive to begin a stakeholder process when one has already launched.

D. The Commission Should Not Impose A MOPR On Existing Units Prior to PJM Completing A Full Stakeholder Process.

Preemptive action by the Commission, prior to the completion of the PJM stakeholder process, would be particularly inappropriate because the relief sought by Movants would be unprecedented. The Commission has never before imposed a MOPR on existing resources, and the logic of the rule change sought by Movants would apply equally to other existing resources receiving other environmental attribute payments (such as RECs). It would also apply to existing resources that receive other types of support (such as tax credits or development incentives), and existing cost-of-service, vertically integrated, and public power resources ("self-supply" resources). To the extent that exemptions were provided for certain of these resources, those exemptions would be impermissibly discriminatory.

The Commission should not impose rule changes with such sweeping implications without careful and sustained consideration, aided by a robust factual record developed through a stakeholder process.[56] The Commission's long-standing policy is not to act in RTO market rule cases until after a stakeholder process is completed. Stakeholders need the opportunity to present their views on whether there is a problem, how the problem should be defined, and how it might be addressed. Then, the Commission itself must determine that there really is a problem that needs

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[55] *See* PJM Issue Charge, available at http://www.pjm.com/~/media/committeesgroups/committees/mrc /2017 0126/20 170126-item-03-state-actions-issue-charge-updated-main-motion.ashx; *see also* PJM Issue Statement, available at http://www.pjm.com/~/media/ committees-groups/committees/mrc/201 70126/20170126-item-03-state-actions-problem-statement-updated-main-motion.ashx.

[56] Movants themselves describe "the national significance of this matter" and "its potential impact "not just in PJM but on other organized markets as well." Motion to Amend at 2, n.5, 11

to be addressed—and not just accept Movants' say-so—and identify clearly what the solution is. Indeed, even as Movants urgently request capacity market mitigation, their Amended Complaint acknowledges that energy market mitigation might be a more appropriate remedy. Movants acknowledge that ZEC payments do not turn on whether a facility offers into or clears the wholesale capacity markets,[57] and primarily complain that ZEC payments "can create incentives for below-cost offers into the *energy* markets."[58] The Commission must also carefully consider the justness and reasonableness of taking action, and the effect upon various stakeholders. Accordingly, the Commission should allow the recently announced PJM stakeholder process to run its course.

II. The Commission Should Not Generally Impose a MOPR on Existing Units, And Doing So Would Be Unprecedented.

In the event that the Commission does reach the merits of Movants' requested relief—which it should not—it should reject the Amended Complaint. "The original purpose of buyer-side mitigation rules—and minimum offer price rules (MOPR) generally—was to address buyer-side market power, *i.e.*, the market power exhibited by entities seeking to lower capacity market prices for the capacity they buy."[59] Buyer-side mitigation rules are necessary because entities that purchase more capacity than they sell into the market "may have both the incentive and the ability to depress prices through uneconomic entry."[60] The Commission has rightfully targeted the "incentive and ability" to suppress wholesale prices in its buyer-side mitigation cases. As the Commission recently said, its "generally-applied minimum offer price rule policy" is "that buyer-

[57] *Id.* at 12.

[58] *Id.* (emphasis added).

[59] *Consol. Edison Co. of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139, at P 2 (2015), clarification granted, 152 FERC ¶ 61,110 (2015).

[60] *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 101 (2008), *on reh'g*, 124 FERC ¶ 61,301, *clarifying order on reh'g*, 131 FERC ¶ 61,170 (2010), *on reh'g*, 150 FERC ¶ 61,208 (2015).

side market power mitigation rules are intended to address market power exhibited by certain entities *seeking to lower capacity market prices*."[61]

The Commission has never applied buyer-side mitigation rules to existing resources,[62] and for good reason. Existing resources already are participating in the market, and their supply of capacity has contributed to prices the Commission has found to be just and reasonable. As the PJM Market Monitor has noted in the past, a significant share of existing generation resources offer into RPM as price takers, presumably because the resources' net going forward costs are low and they value the certainty of knowing that they will clear and continue to receive market revenues. Indeed, existing nuclear resources, which are the main subject of the Motion to Amend, have supplied capacity to consumers for decades and predate the advent of capacity markets. Their cost of construction is sunk, and they have been licensed by the Nuclear Regulatory Commission to operate years into the future. Their presence in the market has not impeded substantial quantities of entry and exit, as discussed above. The Commission should reject the notion that a nuclear unit's continued supply of capacity through the end of its NRC license somehow distorts the capacity market, and should maintain its longstanding and well-grounded limitation of buyer-side mitigation to new entrants only.

III. Subjecting ZEC-Eligible Nuclear Facilities To Mitigation Rules Would Frustrate Legitimate State Policy Goals and Reduce Market Efficiency.

Even if the Commission determined that buyer-side mitigation rules should be applied to certain existing units under some circumstances, mitigation should not be applied to a unit on the ground that it receives payments for its environmental attributes. Applying buyer-side mitigation

[61] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at P 10 (2015) (emphasis added), *reh'g denied*, 154 FERC ¶ 61,088 (2016); Willig Aff. ¶ 43.

[62] *See, e.g.*, *Indep. Power Producers of N.Y., Inc.*, 150 FERC ¶ 61,214, at P 65 (noting that existing rules apply only to new entry).

solely because a state has opted to address environmental externalities through an environmental credit program—rather than direct regulation of emissions, cap-and-trade program, or carbon tax—would inhibit rather than promote economic efficiency. It would also frustrate state policies the Commission has recognized as legitimate, require the over-procurement of redundant capacity, and increase harmful environmental emissions. As a program that addresses and mitigates environmental externalities, the ZES should accordingly not be subject to mitigation.

A. Buyer-Side Mitigation Is Aimed at Exercises of Market Power Seeking To Suppress Prices, Not at State Programs That Advance Legitimate Environmental Goals.

As noted above, the PJM's buyer-side mitigation rules "seek[] to prevent market buyers from offering new, otherwise uneconomic resources into PJM's capacity auctions at a very low price, or zero, in order to push down monthly spot capacity market prices."[63] In that limited context, buyer-side mitigation serves a useful function in preventing "large buyer[s]" from "intentionally increas[ing] supply" that would be "at a loss even accounting for externalities," but for its "suppression of market prices."[64]

However, the Commission has repeatedly recognized that mitigation rules should not be universally applied to state environmental programs that compensate generation for their environmental attributes. Instead, the Commission has held that it is just and reasonable to design buyer-side mitigation rules to "complement[] state programs promoting renewable resources" and other environmental aims.[65] For this reason, on several occasions, the Commission has declined

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[63] Willig Aff. ¶ 43.

[64] *Id.* ¶ 45.

[65] *ISO New England Inc.*, 147 FERC ¶ 61,173, at P 82 (2014), *reh'g denied*, 150 FERC ¶ 61,065 (2015).

to impose a broad MOPR even for *new* renewable resources.[66] In 2016, for example, the Commission approved ISO-NE's 200 MW MOPR exemption for new renewable resources in part because doing so would "accommodate the ability of states to pursue their policy goals" of increasing the penetration of renewable generation.[67] And the Commission has never, of course, applied mitigation to an *existing* resource that is paid for its environmental attributes.

The Commission's specific solicitude for state environmental programs is appropriate. Such regulation *complements* the efficiency of FERC's wholesale markets by reducing or eliminating environmental externalities that would otherwise go unaddressed.[68] As Dr. Willig explains, "all electric generation resource technologies that consume fossil fuels in the production of electricity emit pollutants into the environment."[69] These pollutants, which include carbon dioxide, are "negative externalities" because they "reduce other individuals' welfare, but the associated costs to others are not accounted for by the individual polluter when deciding whether and how much to pollute."[70] As a result, the private cost of generating electricity using fossil fuels is much lower than the social cost, which includes the negative pollution impacts of carbon dioxide and other pollutants.

Importantly, when "marginal social costs or benefits diverge from private marginal costs or benefits, the market outcome is unlikely to be efficient"—that is, the outcomes do not maximize

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[66] *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 166 (2013), *reh'g denied*, 153 FERC ¶ 61,066 (2015), *appeal pending*; *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at P 36 (2015), *reh'g denied*, 154 FERC ¶ 61,088, at P 12 (2016); *ISO New England Inc.*, 155 FERC ¶ 61,023, at PP 32-36.

[67] *ISO New England Inc.*, 155 FERC ¶ 61,023, at P 23; *see also NESCOE,* 142 FERC ¶ 61,108, at P 35 (in considering a similar exemption for renewables, stating that FERC must "balance two considerations," the first being "its responsibility to promote economically efficient markets and efficient prices," and the second being "its interest in accommodating the ability of states to pursue other legitimate state policy objectives").

[68] *See* Willig Aff. ¶¶ 20, 30-35.

[69] *Id.* ¶ 17.

[70] *Id.* ¶ 22.

social welfare.[71] To "correct for the market inefficiency," basic economics teaches that "a tax or subsidy could be used to internalize the negative or positive externality so that it would be taken into account by market participants."[72] But the "capacity and energy wholesale markets are not currently designed to induce suppliers to account in their decisions for the social externality costs of carbon emissions that result from generation."[73] Instead, the Commission has left the task of environmental regulation to other federal agencies and state regulators. So it is efficient, and consistent with Commission policy, for states and the federal government to implement their own, complementary taxes or subsidies to help producers internalize the negative externality into their decision-making.[74] These taxes or subsidies "align suppliers' market-based decision making with social efficiency"[75] and are "complementary to the ordinary workings of competitive wholesale markets,"[76] which do not attempt to address externalities.

This point is well illustrated by the Commission's reasoning in *Independent Power Producers of New York v. NYISO, Inc.*,[77] which rejected a section 206 complaint arguing that wholesale capacity prices were artificially suppressed by the low capacity bids of units receiving reliability-related revenues under a state-mandated reliability services ("RSSA") contract. The Commission reasoned that although units receiving reliability services payments might be uneconomic if viewed solely from the perspective of the capacity auction, they are "economic

[71] *Id.* ¶ 23.

[72] *Id.*

[73] *Id.* ¶ 20.

[74] *Id.* ¶¶ 20, 27-28, 30.

[75] *Id.* ¶ 20.

[76] *Id.* ¶ 30.

[77] 150 FERC ¶ 61,214, at P 66 (2015), *reh'g pending*.

from the perspective of satisfying the NYISO's reliability requirements."[78] Indeed, "[i]f the reliability needs satisfied by these units were reflected in the capacity market, the units would ... clear."[79] Because the units "are needed for reliability and would clear a capacity market that also reflected local reliability needs, RSSA revenues received by these resources reflect the value of the services provided by these resources to customers."[80] Accordingly, the Commission thought it permissible for these units to make *de minimis* capacity bids, because those bids reflected their lower going-forward costs once the RSSA revenues were taken into consideration.

The same logic applies to the bids of units receiving compensation as a result of state environmental programs. Payments pursuant to such programs represent the "value of the [environmental] services provided by these resources to customers."[81] If resources that receive payment for their environmental services submit *de minimis* bids, that is because those bids reflect their lower going-forward costs once payments for their environmental attributes are taken into consideration.[82] For this reason, the Commission has approved the deduction of revenues from REC payments in the calculation of the offer review trigger price applicable to new renewable resources in ISO-NE.[83]

Likewise, the Commission approved the California Independent System Operator's proposal to lower its "bid floor" in the energy markets "from negative $30/MWh to negative $150/MWh," even though that floor presumably resulted in reduced energy market revenues for

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[78] *Id.* at P 66 (quoting Affidavit of Dr. David Patton ("Patton Aff.") ¶ 26).

[79] *Id.* (quoting Patton Aff. ¶ 26).

[80] *Id.*

[81] *Id.* at P 66.

[82] Willig Aff. ¶ 57.

[83] *See ISO New England Inc.*, 146 FERC ¶ 61,084, P 32 (2014) (rejecting argument that REC revenues are out-of-market revenues, and approving reduction of ORTP for new renewable resources to account for REC revenues).

other participants.[84] The Commission sought to permit "variable energy resources" to offer at such extremely low prices because they "generally receive, in addition to market revenues, production tax credits, renewable energy credits, and contractual energy payments."[85] A large negative energy offer reflects the "opportunity cost" of not receiving those significant revenues tied to clean energy production.[86] In other words, the Commission recognized that renewable resources receive significant compensation for their environmental attributes. But instead of mitigating them, it approved a change in the energy market offer rules to allow these resources fully to account for that compensation in their offer prices. It is impossible to imagine that the Commission would have done so if such payments were "artificially suppressing prices" and leading to "unsustainable" market outcomes, as Movants allege is the case here.

The Commission's repeated accommodation of state environmental attribute programs also reflects the reality that states could pursue the same environmental ends in a number of different ways. States could undoubtedly accomplish their carbon-reduction or other environmental aims via emissions controls on emitting generators or an emissions tax on emitting generators.[87] Either route would result in the same market consequences as here: the retention of clean resources that do not pollute.[88] Yet in those circumstances, the Commission presumably would not mitigate (and indeed has never mitigated) the bids of clean resources that are exempt from emissions controls, carbon taxes, or other forms of environmental regulation—even though those resources could

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[84] *California Indep. Sys. Operator Corp.*, 145 FERC ¶ 61,254, at P 34 (2013).

[85] *Id.* at P 5.

[86] *Id.* at P 34.

[87] *See* Willig Aff. ¶ 24 ("Basic economics teaches that externalities can be corrected either through taxing behavior that results in harmful (negative) externalities, or subsidizing behavior that results in beneficial (positive) externalities, including behavior that prevents negative externalities.").

[88] *See id.* ¶ 33 ("Aligning private incentives with social welfare, whether through a tax or subsidy, will shift the market's generation resource mix as resources that impose environmental costs on society through their carbon emissions will face reduced production levels and reduced net revenues.").

underbid polluting resources because they are not so regulated.[89] It thus makes little sense to mitigate clean resources in the parallel situation where clean resources receive a payment for not emitting pollution and can therefore underbid polluting resources.

This is especially the case when purchasing the environmental attribute rather than taxing the environmental externality is the more effective form of state regulation. Taxes are a "classical *theoretical* approach for internalizing the cost of a negative environmental externality,"[90] but taxes imposed by isolated jurisdictions can lead to "leakage, wherein high-emitting in-state resources impacted by the tax shift their facilities out-of-state, and reshuffling, wherein high-emitting out-of-state resources not impacted by the tax in adjacent geographic regions substitute for taxed in-state generation resources."[91] That is why states have turned primarily to targeted subsidies for zero-carbon electricity generation, which have an economic effect similar to a tax on the negative externality but cannot be undermined by emitting resources restructuring their behavior to avoid the tax.[92] As one group of academics has put it: "[S]maller jurisdictions, such as US cities or states, may find subsidies more appealing than other regulatory tools that can be more easily circumvented. In fact, subsidies may be the only means to meaningfully impact emissions on a local level."[93]

In short, the Commission has signaled, time and time again, that it aims to respect, rather than disrupt, states' authority to pursue environmental attribute programs. That makes sense, given the efficiency gains those programs provide, and given that those programs are indistinguishable

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[89] *See id.* ¶ 26 (explaining that if a carbon tax were imposed, fossil fuel producers would "experience higher costs due to the tax, charge higher prices, [and] experience less demand" in the wholesale markets).

[90] *Id.*

[91] *Id.* ¶ 27.

[92] *See id.* ¶¶ 27-29.

[93] James Bushnell et al., *Local Solutions to Global Problems: Climate Change Policies and Regulatory Jurisdiction*, 23 REV. ENVTL. ECON. & POL'Y 175, 182 (2008).

in economic effect from carbon taxes or emissions regulations, which the Commission would not subject to mitigation even though one state's policy affects the prices charged in neighboring states. Therefore, the only question regarding the appropriateness of mitigation here is whether the ZES is properly characterized as an environmental program or a price-suppressive artifice. It is clearly the former.

B. The Illinois ZES Is An Environmental Program, Not a Price-Suppression Scheme, And Does Not Warrant Mitigation.

Like many other state environmental programs, the ZES aims at the legitimate state policy goal of supporting non-polluting generation by valuing environmental services that would otherwise be uncompensated. When one takes account of *what* the state buys (environmental attributes unbundled from energy or capacity), *how* it buys them (through a credit program with a price capped at the social value of the environmental attribute), and *the reason* the state buys them (to promote environmental goals), it should be clear that the ZES is a legitimate environmental program. It is not an attempt to exercise buyer-side market power to suppress wholesale prices.[94]

First, under the ZES, the state is purchasing an environmental attribute, not energy or capacity. Through the program, Illinois purchases the environmental benefit of having a set number of megawatt-hours of zero-carbon energy generated in PJM or MISO,[95] which Illinois rightly assumes will displace the generation of an equivalent amount of emitting generation.[96] The ZES does not make payment contingent on clearing the capacity market, but instead provides compensation for clean energy production. A price-suppression mechanism, by contrast, "would

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[94] *See* Willig Aff. ¶ 50.

[95] SB 2814, section 1-10 (defining a "zero emission credit" and "zero emission facility").

[96] *See* Potential Nuclear Power Plant Closings in Illinois: Impacts and Market-Based Solutions (Jan. 5, 2015) ("Illinois Nuclear Power Plant Report"), available at https://www.nirs.org/wp-content/uploads/neconomics/illhr1146report115.pdf at 115.

clearly condition payment on generation unit participation in the capacity market in order most directly to forestall increases in capacity prices."[97]

In decoupling ZECs from energy or capacity sales, the ZES mirrors the REC programs that the Commission has long recognized as within states' authority to enact.[98] It has treated attribute credits as "separate commodities from … capacity and energy" created by state law,[99] and has held that "when an unbundled REC transaction is independent of a wholesale electric energy transaction," the transaction "does not affect wholesale electricity rates."[100] Dozens of states have relied on that authority in crafting environmental policies over the last twenty years. Indeed, today, the majority of states and the District of Columbia have adopted programs recognizing RECs and requiring their procurement.[101] The ZES follows this well-trodden path.

Second, Illinois has limited the amount it will pay when it purchases a ZEC to reflect the value of the environmental externality it is paying to avoid.[102] Illinois will not pay the difference between costs and wholesale revenues. In fact, the costs of the participating zero-carbon generators are not used in determining the level of the credit payment at all. Rather, Illinois has

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[97] *See* Willig Aff. ¶ 54.

[98] *See WSPP Inc.*, 139 FERC ¶ 61,061, at PP 18-24 (2012).

[99] *Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059, P 31 & n.62 (2010).

[100] *WSPP*, 139 FERC ¶ 61,061 at P 24.

[101] *See, e.g.*, Ariz. Admin. Code § 14-2-1803; Cal. Pub. Util. Code § 399.21; Colo. Rev. Stat. § 42-2-124(1)(d); Conn. Gen. Stat. §§ 16-244r, 16-244t; Del. Code Ann. tit. 26, § 354(h); 20 Ill. Comp. Stat. 3855/1-10, 1-56; Ind. Code § 8-1-37-3; Iowa Code § 476.44A; Kan. Stat. Ann. §§ 66-1257(e), 1258; Me. Rev. Stat. tit. 35-A, §§ 3210(2)(B-2), 3210(8); Md. Code Ann. Pub. Util. Cos. §§ 7-701(n), 7-703(d); Mass. Gen. Laws ch. 25A, § 11F; 225 Mass. Code Regs. 14.09(2)(c); Mich. Comp. Laws §§ 460.1011(d), 460.1041; Minn. Stat. § 216B.1691, subdiv. 4; Mo. Rev. Stat. §§ 393.1025(4), 393.1030(2); Mont. Code Ann. §§ 69-3-2003(14), 69-3-2004; Nev. Stat. §§ 704.7803, 704.7821, 704.78215; N.H. Rev. Stat. Ann. § 362-F:6; N.J. Rev. Stat. § 48:3-49 et seq.; N.M. Stat. Ann. § 62-16-5; N.Y. Pub. Serv. Comm'n, Order Adopting a Clean Energy Standard, Docket No. 15-E-0302 (Aug. 1., 2016) at 106-109; N.C. Gen. Stat. § 62-133.8; N.D. Cent. Code §§ 49-02-24, 49-02-26, 49-02-31; Ohio Rev. Code Ann. § 4928.645; Or. Rev. Stat. § 469a.130-135; 52 Pa. Code §§ 75.1, 75.61-70; R.I. Gen. Laws §§ 39-26-2(13), 39-26-4(d); S.D. Codified Laws § 49-34A-95; Tex. Util. Code Ann. § 39.904(b); Utah Code Ann. § 54-17-603; Va. Code § 56-585.2; Wash. Rev. Code §§ 19.285.030(20), 19.285.040; Wis. Stat. 196.378; D.C. Code §§ 34-1432(d), 34-1433.

[102] *See* Willig Aff. ¶ 51.

set compensation for the credit based on the Social Cost of Carbon as determined by the U.S. Interagency Working Group, which represents the value to society of not emitting a ton of carbon dioxide.[103]

Third, because the value of a ZEC is capped at the Social Cost of Carbon, the ZES will be cost-justified based solely on the environmental benefit to consumers — unlike a price-suppression mechanism, in which the anticipated price-suppression benefits would be necessary to render the program cost-effective.[104] Moreover, the estimated cost of a ZEC—and thus the cost of securing that environmental attribute from a nuclear facility—is far less than the $230 per megawatt-hour being paid for the environmental attributes of new solar generation.[105]

Fourth, while the ZEC price can be adjusted *downward* pursuant to a consumer protection provision that takes into consideration projected future energy and capacity prices, the credit can never rise above the value of the environmental externality being abated, regardless of whether wholesale prices fall below current levels.[106] As a result, ZEC-eligible facilities still bear market risk because if market prices drop (or costs rise), ZEC payments will not increase to cover those lost revenues. A price-suppression mechanism, by contrast, would be expected to guarantee sufficient revenues for the uneconomic supplier to remain in the capacity market.[107]

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[103] SB 2814, section 1-75(d-5)(1)(B).

[104] *See id.*, section d-5(B); Willig Aff. ¶ 55.

[105] *See* Annual Report: The Costs and Benefits of Renewable Resource Procurement in Illinois Under the Illinois Power Agency and Illinois Public Utilities Act (2016), available at https://www.illinois.gov/sites/ipa/Documents/IPA-2016-Renewables-Report.pdf at 3; Renewable Electricity Production Tax Credit, available at https://energy.gov/savings/renewable-electricity-production-tax-credit-ptc.

[106] SB 2814, section 1-75(d-5)(1)(B).

[107] *See* Willig Aff. ¶ 52. For example, the program at issue in *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016), was a contract-for-differences that guaranteed generators a particular level of revenue regardless of whether wholesale prices increased or decreased. *See id.* at 1295 (describing the mechanics of the program).

Finally, the ZES's avowed purpose is to mitigate environmental harm through the promotion of zero-carbon energy. To establish the Illinois legislature's intent, the Commission need look no further than the "zero emission standard legislative findings" in the statute, which state:

- "Reducing emissions of carbon dioxide and other air pollutants, such as sulfur oxides, nitrogen oxides, and particulate matter, is critical to improving air quality in Illinois" for the health of Illinois residents.

- Carbon dioxide emissions "result in climate change trends that could significantly adversely impact Illinois."

- "Preserving existing zero emission energy generation and promoting new zero emission energy generation is vital to placing the State on a glide path to achieving its environmental goals and ensuring that air quality in Illinois continues to improve."

- "The Social Cost of Carbon is an appropriate valuation of the environmental benefits provided by zero emission facilities, provided that the valuation is subject to a price adjustment that can reduce the price for zero emission credits below the Social Cost of Carbon. This will ensure that the procurement of zero emission credits remains affordable for retail customers even if energy and capacity prices are projected to rise above 2016 levels reflected in the baseline market price index."[108]

The General Assembly reached these conclusions after reviewing a report it had previously ordered several state agencies to conduct. In that report, titled "Potential Nuclear Power Plant Closings in Illinois," the Illinois Commerce Commission, the Illinois Power Agency, the Illinois Environmental Protection Agency, and the Department of Commerce and Economic Opportunity concluded that the premature closure of existing nuclear power plants results in significant increases in greenhouse gas emissions and accompanying social costs.[109] As a result, the General Assembly found "it is necessary to establish and implement a zero emission standard, which will increase the State's reliance on zero emission energy through the procurement of zero emission

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[108] SB 2814, section 1.5.

[109] Illinois Nuclear Power Plant Report at 122 (estimating the societal cost of carbon occurring during 2020-2029 associated with nuclear plant closures at $2.5-18.6 billion).

credits from zero emission facilities, in order to achieve the State's environmental objectives and reduce the adverse impact of emitted air pollutants on the health and welfare of the State's citizens."[110] The IPA will select participating facilities in a manner consistent with these goals. Selection criteria include certain public interest factors, all of which relate to environmental impacts and none of which relates to the effect on market prices of selecting a particular unit.[111]

In sum, the ZES is aimed at redressing environmental externalities to achieve a legitimate environmental goal, and in so doing promotes efficient market outcomes. As Dr. Willig explains, mitigation would be a mistake, because it "could hamper low bids that are competitive and reflections of truly low costs, where costs include offsets or subsidies based on positive environmental externalities that are not otherwise reflected in market operations."[112] As Dr. Willig elaborates, because market prices do not automatically account for the social cost of environmental externalities, they "create[] the appearance that financially challenged nuclear units are not efficiently competitive. In fact, these units are economically efficient and their continued presence in the market, if justified under the ZES, should be viewed as pro-competitive when considering the benefit to society of their zero carbon emissions attributes."[113] The ZES therefore does not satisfy the Commission's longstanding guidelines for programs warranting buyer-side mitigation.

Indeed, mitigation would be particularly unwarranted with respect to this environmental program, because the expansion of Illinois' zero-carbon energy programs to include the ZES *improves* the efficiency of the market as compared to the status quo. Previously, Illinois and other states compensated a variety of renewable generators, including wind, solar, and clean-coal

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[110] SB 2814, section 2.

[111] *Id.*, section 1-75(d-5)(1)(C).

[112] Willig Aff. ¶ 57.

[113] *Id.*

facilities, for their zero-emitting attributes.[114] But Illinois did not compensate nuclear units for that same attribute. When combined with the wholesale market, the result was a system that selected less efficient forms of emissions abatement. The ZES reduces that inefficiency.[115]

C. An Overbroad Application of the MOPR Would Frustrate Legitimate State Policies and Force Consumers to Pay Twice for Capacity.

Programs like the ZES fall within the state's inherent police power and go to the core of a state's sovereign interests: "Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state. Environmental regulation traditionally has been a matter of state authority."[116] The power to regulate generation facilities was expressly reserved to states under the Federal Power Act.[117] But the overbroad application of buyer-side mitigation can interfere with legitimate state policies and lead to consumers paying twice for redundant capacity. Buyer-side mitigation must be applied sensitively to avoid forcing sovereign states into the untenable position of either abandoning legitimate policy goals or forcing consumers to procure redundant capacity. Properly designed market mitigation mechanisms must distinguish between: (1) impermissible state programs that exercise buyer market power by subsidizing new generation for the purpose of suppressing capacity prices; and (2) permissible state programs that pursue legitimate state policy goals.[118]

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[114] *See* 20 ILCS 3855/1-75(c), (d); 220 ILCS 5/16-115D; 20 ILCS 3855/1-10.

[115] *See* Willig Aff. ¶ 34.

[116] *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000); *Nat'l Solid Wastes Mgmt. Ass'n v. Killian*, 918 F.2d 671, 676 (7th Cir. 1990) ("Environmental regulation has long been recognized as an 'historic police power[ ] of the States.'" (citation omitted)), *aff'd sub nom. Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992); *N.Y. State Pesticide Coal., Inc. v. Jorling*, 874 F.2d 115, 117 n.2 (2d Cir. 1989) (recognizing New York's "inherent police powers to protect public health and the environment").

[117] 16 U.S.C. § 824(b)(1) (reserving states authority over "facilities used for the generation of electric energy").

[118] *See* Willig Aff. ¶¶ 43, 50.

Suppose, for example, that a MOPR was applied to facilities receiving compensation for RECs or ZECs, and as a result the facilities did not clear the capacity market. The state would then face a dilemma: either it must abandon a legitimate policy goal that goes to the core of its sovereign interests, or it must force its consumers to pay twice for capacity, once to replace the capacity payment lost by the environmentally desirable generator, and again for redundant, unnecessary capacity procured through the RTO auction. As the Commission has explained, if an ISO "determines that it will need 300 MW of new capacity in a particular year, and 60 MW of new state-subsidized resources are developed but cannot clear the [capacity market], the [capacity market] would nevertheless clear (and require customers to fund the construction of) 300 MW of new capacity, when it would only be necessary to fund the construction of 240 MW of capacity."[119] The Commission should not approve market rules that place states and consumers in that kind of bind.

The Commission has acknowledged as much in its application of mitigation rules. The Commission has recognized that its statutory mandate to "assur[e] just and reasonable rates" requires it to "protect[] consumers from overpaying for … capacity."[120] And the Commission has therefore applied buyer-side mitigation in a manner that respects state authority and "accommodat[es] the ability of states to pursue … legitimate state policy objectives."[121]

The Commission should make no mistake about the sweeping consequences that would follow from accepting Movants' arguments. The effect could not rationally be limited to the ZES;

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[119] *ISO New England Inc.*, 155 FERC ¶ 61,023, at P 25 n.61, P 33 (2016) (citing *New England Power Generators Association, Inc. v. ISO New England Inc.*, 146 FERC ¶ 61,039, at P 52 (2014); *New York Indep. System Operator, Inc.*, 122 FERC ¶ 61,064, at P 54 (2008)); *cf. also Indep. Power Producers of N.Y., Inc.*, 150 FERC ¶ 61,214, at P 68 (rejecting mitigation for RMR resources because "it would be inefficient to procure other capacity elsewhere in the NYCA footprint to satisfy the NYCA capacity needs met by the RMR capacity").

[120] *ISO New England Inc.*, 155 FERC ¶ 61,023, at P 34.

[121] *New England States Comm. on Elec. v. ISO New England Inc.*, 142 FERC ¶ 61,108, at P 35 (2013) ("NESCOE"), *reh'g denied*, 151 FERC ¶ 61,056 (2015).

such a limitation would be unfair and unduly discriminatory. As explained above, because REC payments are out-of-market revenues, existing renewable generators receiving REC payments would also be mitigated. Although the Commission has at times drawn distinctions between intermittent renewable resources with low capacity factors and larger generators for purposes of mitigating *new* entry,[122] existing renewable generation facilities receiving REC payments are indistinguishable from ZEC-eligible facilities, and thus would inevitably be mitigated if Movants' requested relief were granted. Similarly, other state subsidies or tax credits—like the Coal Refuse Energy and Reclamation Tax Credit recently passed in Pennsylvania, providing a $4 per ton tax credit to "electric generation plants that use coal refuse for fuel"[123]—would need to be mitigated under the same logic.

The logic of Movants' argument would also apply equally to self-supply resources. A state or municipality can permit these resources to be supported by captive ratepayers even when they would be uneconomic if forced to compete in the wholesale markets. Moreover, these resources typically bid in as price-takers, because they do not rely on market revenues, and therefore suppress wholesale prices.[124] A governmental entity clearly has the incentive to force captive ratepayers to subsidize older, uneconomic self-supply resources; those resources would then bid into the market

[122] *See, e.g.*, *N.Y. Pub. Serv. Comm'n*, 153 FERC ¶ 61,022, at P 47 (collecting cases and stating that "intermittent renewable with low capacity factors and high development costs, including many wind and solar resources, narrowly defined, provide their developer with limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices" (footnote omitted)).

[123] *See* Press Release, *Environmental Protection Triumphs: Coal Refuse Energy and Reclamation Tax Credit a Winner* (July 27, 2016), http://www.senatoryudichak.com/environmental-protection-triumphs-coal-refuse-energy-and-reclamation-tax-credit-a-winner/.

[124] *See, e.g.*, *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 195 (2011) ("[P]ermitting new self supply investment to compete as a price-taker in RPM impermissibly shifts the investment costs of self-supply to competitive supply by suppressing market clearing prices."), *order clarified on reh'g*, 137 FERC ¶ 61,145 (2011); *ISO New England, Inc.*, 135 FERC ¶ 61,029, at P 232 (2011) ("[W]e find that any new self-supplied capacity that clears (through a zero-price offer rather than at full net entry cost) would distort the market clearing price."), *order clarified on reh'g*, 138 FERC ¶ 61,027 (2012).

as price-takers, lowering capacity prices; and non-captive ratepayers in the state would benefit from these reduced prices. Yet Movants do not acknowledge the drastic implications of their requested relief for states' ability to implement legitimate environmental and utility regulatory policies.

Moreover, as noted above, to the extent that a MOPR is applied to some resources receiving environmental attribute revenue or other revenues pursuant to state law, it would be unduly discriminatory to exempt other similarly situated resources from the MOPR. As Exelon observed in its Limited Protest to the original Complaint, Movants have no coherent justification for why certain resources, such as those receiving ZECs, should be subject to a MOPR, while others, such as those that self-supply, should be exempted from a MOPR.

D. If The Commission Applies A MOPR To Existing Units, ZEC Payments Should Be Treated As A Revenue Stream That Offsets A Unit's Going-Forward Costs.

For all the reasons given above, the Commission should reject Movants' request that the PJM tariff be modified to apply a MOPR to existing units receiving ZEC payments. However, if the Commission disagrees, it should treat ZEC payments as a permissible revenue stream that can be deducted from going-forward costs for purposes of the mitigation test.[125]

As described above, ZECs are akin to RECs, state-created attributes that are not FERC-jurisdictional.[126] A payment for a ZEC or REC is "not compensation for capacity or energy," because ZECs and RECs are "separate commodities" that provide "[c]ompensation for …

[125] *See* Willig Aff. ¶ 59.

[126] *See WSPP, Inc.*, 139 FERC ¶ 61,061, at P 21 ("RECs are state-created and state-issued instruments ... a REC does not constitute the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce. Therefore, RECs and contracts for the sale of RECs are not themselves jurisdictional facilities subject to the Commission's jurisdiction under FPA section 201.")

environmental externalities."[127] The Commission has approved, in ISO-NE, the deduction of revenues from RECs in the calculation of the offer review trigger price applicable to new renewable resources in ISO-NE.[128] And in NYISO, the Commission has approved the deduction of "federal tax credits" and "state incentives for renewable energy" from a unit's unit-specific net Cost of New Entry, which "means that the resource is less likely to be subject to mitigation" under NYISO's buyer-side mitigation test.[129] Indeed, the Commission has gone as far as allowing the California Independent System Operator to lower its offer floor as a means of accommodating offers from resources receiving REC and Production Tax Credit support.[130] In both cases, payments for environmental attributes would have the effect of lowering units' offers. If the Commission were to apply mitigation to existing nuclear units, ZEC payments should similarly be counted along with energy and ancillary services revenues that are deductible from the calculation of those units' going forward costs, to achieve the same effect.[131]

E. If the Commission Applies a MOPR to Units Receiving ZEC Payments, It Should Make Clear That the ZES Does Not Poses a Conflict Warranting Preemption.

If the Commission determines that applying a MOPR to existing units is appropriate, it should make clear in its order that mitigation is not evidence of a conflict between the ZES and the Commission's goals, but is instead another instance of FERC harmonizing the wholesale markets with states' complementary and legitimate initiatives.

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[127] *See Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059, P 31 n.62 (2010).

[128] *See ISO New England Inc.*, 146 FERC ¶ 61,084, at P 32 (rejecting argument that REC revenues are out-of-market revenues, and approving reduction of ORTP for new renewable resources to account for REC revenues). Similarly, other revenue streams for other generation attributes such as for steam sales are typically not subjected to mitigation.

[129] *N.Y. Pub. Serv. Comm'n*, 153 FERC ¶ 61,022, at PP 43 n.103, 48.

[130] *See California Indep. Sys. Operator Corp.,* 145 FERC ¶ 61,254, at P 34 (2013).

[131] *See* Willig Aff. ¶ 59.

Movants concede in the Motion to Amend that the "Commission need not *and, indeed, should not*, address preemption questions in this proceeding."[132] Exelon agrees that preemption issues are clearly beyond the scope of this proceeding. Nonetheless, there is a risk that federal courts will misconstrue an order from the Commission applying buyer-side mitigation to ZEC-eligible units as evidence of a conflict between the ZES and FERC's wholesale-market design. Some federal courts have already made that mistake.[133] Notwithstanding that Movants now urge the Commission not to address preemption issues, they would surely raise any order from the Commission mitigating ZEC-eligible nuclear units as evidence of conflict preemption in a suit brought in federal court.

Thus, if the Commission were to decide to apply a MOPR to an existing unit receiving ZEC payments (which it should not), the Commission should explicitly clarify that its mitigation order does not reflect, and should not be read to reflect, the view of the Commission on preemption questions. Imposing a mitigation remedy in order to ensure a state program harmonizes with, and works in conjunction with, federal policies is distinct from determining that the state program poses such an irreconcilable conflict with federal priorities that the program is preempted and therefore void. "[T]he Federal Power Act, like all collaborative federalism statutes, envisions a federal-state relationship marked by interdependence."[134] Here, even if it were to subject existing units to market power mitigation, the Commission's aim would be to integrate "the ability of states to pursue … legitimate state policy objectives," including incentivizing clean energy and environmental protection, into the wholesale market design, not to override states' policy

[132] Motion to Amend at 11 n.46 (emphasis added).

[133] *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 479 (4th Cir. 2014) (stating in dicta that imposition of MOPR "tends to confirm rather than refute the existence of a conflict"), *aff'd sub nom. Hughes v. Talen Energy Mkts.*, 136 S. Ct. 1288 (2016).

[134] *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring).

choices.[135] Therefore, if the Commission directs a change in the PJM tariff, the Commission must make clear that its action does not reflect any modification to the Commission's historical view that state environmental programs complement, rather than disrupt, FERC's wholesale markets.

Finally, if the Commission chooses to act on Movants' procedurally and substantively flawed motion and applies a MOPR to existing resources receiving environmentally-related payments, any remedy it orders should be prospective only. Once held, auction results create settled expectations, and the Commission has previously recognized the danger of ordering action that undermines business transactions based on existing tariffs.[136] The long-standing rule that a MOPR does not apply to existing units is correct, but, at the very least, generators that have made business decisions in reliance on that rule should not be retroactively penalized for doing so.

CONCLUSION

Exelon respectfully requests that the Commission deny the Motion to Amend and reject Movants' call for a minimum offer price rule or other mitigation mechanism directed at existing resources receiving environmental attribute payments.

[135] *NESCOE*, 142 FERC ¶ 61,108, at P35.

[136] *See ISO New England Inc. and New England Power Pool Participants Committee*, 132 FERC ¶ 61,136, at P 22 (2010) (rejecting revisions to formula used to calculate payments in Forward Reserve Market (FRM) as unnecessary and "upset[ting] at the eleventh hour" expectations that load-serving entities have had based on current Tariff provisions "without any demonstrated benefit").

Respectfully submitted,

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Dated: January 30, 2017

Certificate of Service

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

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

/s/ *Marianne Alvarez*

Marianne Alvarez
Exelon Corporation