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 Nos. EL16-49-002 EL18-178-002 (Consolidated)
v.	
PJM Interconnection, L.L.C.	
PJM Interconnection, L.L.C.	

REQUEST FOR CLARIFICATION AND REHEARING OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AND EAST KENTUCKY POWER COOPERATIVE, INC.

The National Rural Electric Cooperative Association ("NRECA") and East Kentucky Power Cooperative, Inc. ("EKPC") seek clarification and rehearing of the "Order on Rehearing and Clarification" issued in the above-referenced proceeding on April 16, 2020.[1] This Rehearing Request is submitted pursuant to section 313 (a) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l* (a), and Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2019).

[1] *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035 (2020) ("April 16 Order").

I. RELEVANT BACKGROUND

The history of the Minimum Offer Price Rule ("MOPR") prior to the instant proceeding with regard to self-supply is detailed in NRECA's Initial Submission.[2] In summary, the Commission has recognized that in PJM Interconnection, L.L.C.'s ("PJM") capacity construct, self-supply entities acting under long-standing business models and within certain thresholds do not have an incentive to artificially suppress clearing prices and, perhaps more importantly, should be protected against the risks attendant with application of the MOPR. Therefore, the Commission has stated its intent that the MOPR not unreasonably impede such efforts of self-supply entities, and approved provisions to exempt them from the MOPR. NRECA and EKPC provided an abbreviated recount of relevant proceedings and precedent on this issue in their January 21, 2020 Request for Rehearing and Clarification.[3]

The purported scope of this proceeding is to address concerns that "the integrity and effectiveness of the capacity market administered by [PJM] have become untenably threatened by out-of-market payments provided or required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market."[4] In the June 2018 Order, the Commission determined that the PJM Tariff is unjust and unreasonable because the MOPR allows resources receiving such state out-of-market support to affect capacity prices in PJM.[5]

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[2] Initial Submission of the National Rural Electric Cooperative Association, Docket Nos. EL16-49-000, ER18-1314-000, ER18-1341-001, EL18-178-000, at 5-11 (filed Oct. 2, 2018) ("NRECA Initial Submission").

[3] *See* Request for Clarification and Rehearing of the National Rural Electric Cooperative Association and East Kentucky Power Cooperative, Inc., Docket Nos. EL16-49-000 and EL18-178-000 (filed Jan. 21, 2020) ("NRECA/EKPC Clarification and Rehearing Request").

[4] *PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) ("June 2018 Order").

[5] *Id.* at P 156.

In the December 19 Order, the Commission adopted a "replacement rate" MOPR, which was presumably based on the Commission's determination that "out-of-market payments provided, or required to be provided, by states to support the entry or continued operation of preferred generation resources threaten the competitiveness of the capacity market administered by [PJM]."[6] The replacement rate is an overhaul of the MOPR which was initially created to address limited concerns over entities with intent and ability to artificially suppress clearing prices in the PJM capacity auctions, through uneconomic sell offers for new natural gas-fired resources. The December 19 Order directed PJM to adopt a MOPR that will apply to both new and existing resources of all types, with limited exemptions for reliance on prior MOPR decisions.

On January 21, 2020, NRECA and EKPC requested rehearing and clarification of the Commission's December 19 Order. In their Clarification and Rehearing Request, NRECA and EKPC requested that the Commission: (1) clarify that the MOPR does not apply to existing or new voluntary agreements entered into by electric cooperatives for which no state has provided or required financial benefit for the purpose of new entry or continued operation of generating capacity in PJM's capacity market; (2) clarify that sell offers by resources owned by electric cooperatives subject to a bilateral transaction are not subject to review and mitigation under the MOPR; (3) clarify that sell offers from resources financed by Rural Utilities Service Loans are not subject to review and mitigation under the MOPR; and (4) grant rehearing of the December 19 Order and direct PJM to include in its Tariff its proposed categorical Self-Supply Exemption from

[6] December 19 Order at P 1 (citation omitted).

the MOPR for new and existing capacity resources of Public Power Entities, subject to reasonable net-short and net-long thresholds.[7] On March 27, 2020, NRECA also filed a petition for review of the December 19 Order with the United States Court of Appeals for the D.C. Circuit ("D.C. Circuit"), which was docketed as Case No. 20-1095. Similarly, on April 13, 2020, EKPC filed a separate petition for review of the December 19 Order with the D.C. Circuit, which was docketed as Case No. 20-1120. Both petitions have now been consolidated with Case No. 20-1059.

The April 16 Order granted in part and rejected in part requests for rehearing and clarification of the December 19 Order, and directed PJM to submit a further compliance filing.[8] In the April 16 Order, the Commission specifically addressed certain of NRECA's requested clarifications, but provided only summary determinations with regard to others. The Commission initially addressed NRECA/EKPC's requests for clarification on self-supply issues in summary fashion.[9] Next, the Commission rejected rehearing of its directive to subject self-supply by electric cooperatives to the MOPR.[10] However, the Commission did not specifically address NRECA/EKPC's request for the Commission to clarify that the MOPR does not apply to existing or new voluntary agreements entered into by electric cooperatives for which no state has provided or required financial benefit for the purpose of new entry or continued operation of generating capacity in PJM's capacity market. Finally, the Commission also clarified, contrary to

[7] NRECA/EKPC Clarification and Rehearing Request at 14-24.

[8] *See* April 16 Order at P 1.

[9] *See id.* at P 72, n. 193 (referencing the entirety of the NRECA/EKPC clarification request), PP 80-81.

[10] *Id.* at PP 81, 220-235.

NRECA/EKPC's request, that sell offers by resources owned by electric cooperatives subject to a bilateral transaction are subject to the MOPR,[11] and electric cooperatives do not qualify for the Competitive Exemption.[12]

On May 15, 2020, NRECA filed a petition for review of the December 19 Order and the April 16 Order with the D.C. Circuit, which was docketed as Case No. 20-1155. The April 16 Order also addressed requests for clarification. Therefore, rehearing on the Commission's rulings on those requests for clarification has not yet been sought. In order to ensure that the statutory obligation to seek rehearing on these issues prior to seeking judicial review has been satisfied,[13] NRECA/EKPC submit this request for rehearing of the April 16 Order.

II. STATEMENT OF ISSUES

In compliance with Rules 203 and 713(c)(1) and (2) of the Rules of Practice and Procedure of the Commission,[14] NRECA/EKPC provide the following statement of issues and specification of errors:

1. The Commission failed to engage in reasoned decision-making by finding that the MOPR applies to sell offers for resources owned or bilaterally contracted for by electric cooperatives. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983); *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053 (D.C. Cir. 2003).

2. The Commission erred in its unexplained departure from its prior decision in finding that sell offers by resources owned by electric cooperatives subject to a bilateral transaction are subject to review and mitigation under the MOPR. *See, e.g., ABM Onsite Servs.-W., Inc. v. Nat'l Labor Relations Bd.*, 849 F.3d 1137, 1142 (D.C. Cir. 2017); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995).

[11] April 16 Order at P 243.

[12] *Id.* at P 306.

[13] 16 U.S.C. § 825*l* (a).

[14] 18 C.F.R. § 385.203, 713(c)(1), 713(c)(2) (2019).

3. The Commission erred by categorically excluding electric cooperatives from using the Competitive Exemption. *Motor Vehicle Manufacturer's Ass'n. v State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1989); *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053 (D.C. Cir. 2003).

4. The Commission erred by determining that resources that clear a PJM capacity auction and are subsequently acquired by an electric cooperative are considered new resources for purposes of the MOPR floor offer price. *See, e.g., ABM Onsite Servs.-W., Inc. v. Nat'l Labor Relations Bd.*, 849 F.3d 1137, 1142 (D.C. Cir. 2017); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995).

III. REQUEST FOR CLARIFICATION

NRECA/EKPC request clarification of a determination made for the first time in the April 16 Order. In the December 19 Order, the Commission: (1) included electric cooperatives in its new definition of State Subsidy;[15] (2) expanded the MOPR to generally apply to all resources, new or existing, that receive or are entitled to receive a State Subsidy;[16] (3) created limited exemptions for existing resources, plus a Competitive Exemption and Unit-Specific Exemption;[17] and (4) directed PJM to establish different default offer price floors for new and existing resources.[18] NRECA/EKPC continue to oppose the Commission's expansion of the MOPR to apply to resources owned or bilaterally contracted for by electric cooperatives by treating such electric cooperatives as a State Subsidy and have sought judicial review of the Commission's orders. However, if the MOPR will be applied to resources owned or bilaterally contracted for by self-supply electric cooperatives, the Commission should clarify that resources owned or bilaterally

[15] December 19 Order at P 9.

[16] *Id.*

[17] *See id.* at PP 12-16.

[18] *Id.* at PP 138-158.

contracted for by electric cooperatives will be treated as existing resources for purposes of the default offer price floor if they have previously cleared a capacity auction.

In the April 16 Order, the Commission granted a request for clarification by the Independent Market Monitor for PJM ("Market Monitor"). As the Commission explained, the Market Monitor requested clarification that only resources owned or bilaterally contracted for by a self-supply entity qualify as "existing" for purposes of the Self-Supply Exemption.[19] For example, if a self-supply entity purchases an existing resource from a non-self-supply entity, the resource would not be considered "existing" for purposes of the Self-Supply Exemption.[20] With respect to qualifying for the Self-Supply Exemption, the Commission "grant[ed] the Market Monitor's requested clarification that only resources currently owned or bilaterally contracted for by the self-supply entity qualify as 'existing' *for purposes of the Self-Supply Exemption*."[21] NRECA/EKPC interpret the Commission's clarification as limited to whether a resource qualifies for the Self-Supply Exemption. However, the Commission has not altered the definition of "existing" resource for any other purpose, including for purposes of the default offer floor. Specifically, in the December 19 Order, the Commission stated that "except as otherwise specified in this order, 'existing' refers to resources that have previously cleared a PJM capacity auction."[22] This means that if a self-supply entity purchases a physical asset or bilaterally contracts for a resource that has cleared a capacity auction, the resource is "new" for purposes of the Self-Supply

[19] April 16 Order at P 241.

[20] *Id.*

[21] *Id.* at P 246 (emphasis added).

[22] December 19 Order at n. 5.

Exemption, but is an "existing" resource for purposes of the default offer price, so that the default offer price floor is the resource-specific Net Avoidable Cost Rate ("ACR").

The difference in default offer price floors for new resources (Net Cost of New Entry) versus existing resources (Net ACR) can be the difference between a resource clearing or not clearing a capacity auction. Given the Commission's determination that it is reasonable to establish different default offer price floors for new and existing resources "because new resources are not similarly situated to existing resources with regard to the decisions and avoidable costs they face" and "the decision to enter the market is different than the decision to remain in the market",[23] it would be unreasonable and unsupported for the Commission to now treat a cleared resource as "new" for purposes of the default offer floor price. Therefore, NRECA/EKPC request clarification that for purposes of which MOPR offer floor prices will apply to a resource, an existing resource is one that has previously cleared a PJM capacity auction.[24]

IV. REQUEST FOR REHEARING

As discussed above, NRECA has sought judicial review of the December 19 and April 16 Orders, based on the Commission's rulings on rehearing. Each of the issues below were raised in requests for clarification of the December 19 Order and were not previously raised in NRECA/EKPC's requests for rehearing. Sections IV.A through IV.C below address rulings on requests for clarification by NRECA/EKPC.[25] Section IV.D below addresses the Commission's

[23] April 16 Order at P 158, citing December 19 Order at P 151.

[24] *See* December 19 Order at n. 5.

[25] *See* NRECA/EKPC Clarification and Rehearing Request at 14-24.

ruling on a request for clarification by the Market Monitor. In its April 16 Order, the Commission appeared to treat issues raised in NRECA/EKPC's request for clarification discussed in Section IV.A below as if they were raised on rehearing, and rejected them as such.[26] In that case, the Commission's rulings in the April 16 Order might be deemed to satisfy the requirement for NRECA/EKPC to seek rehearing before seeking judicial review.[27] With respect to issues IV.B and IV.D below, the Commission addressed the requests for clarification by denying and granting clarification, respectively.[28] On the request for clarification discussed in Section IV.C, the Commission did not specify the nature of its ruling in the April 16 Order.[29] In order to preserve their right to seek judicial review of the Commission's rulings, NRECA/EKPC seek rehearing of the Commission's rulings. As discussed below, NRECA/EKPC seek rehearing of these determinations in the April 16 Order because they are arbitrary and capricious, not supported by substantial evidence, and contrary to law.

A. The Commission Failed to Engage in Reasoned Decision-Making by Finding that the MOPR Applies to Sell Offers for Resources Owned or Bilaterally Contracted For by Electric Cooperatives.

In the December 19 Order, the Commission explained its intent behind the State Subsidy definition as focusing on "out-of-market payments provided or required by certain states" that

[26] *See* Section IV.A. below; April 16 Order at P 72 n.193 (explaining that parties "argue[d] that the December 2019 Order erred in defining State Subsidy to include the public power business model" but citing to only those sections of the NRECA/EKPC Clarification and Rehearing Request raising issues for clarification) and PP 79-81 (denying rehearing requests raising issues related to the definition of State Subsidy).

[27] FPA Section 313, 16 U.S.C. § 825*l* (a).

[28] April 16 Order at PP 243, 246.

[29] *Id.* at P 306.

"support[] the entry or continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market."[30] Based on the Commission's stated intent, NRECA/EKPC requested clarification that electric cooperative agreements that are free from financial benefits provided or required by a state or states, for the purpose of new entry or continued operation of generating capacity in the PJM capacity market are not within the definition of State Subsidy and, therefore, do not trigger the MOPR.[31]

Rather than directly providing clarification as to this issue, the Commission lumped these issues in with issues raised on rehearing by NRECA/EKPC and other parties and then summarily rejected them, finding that the MOPR applies to all resources receiving State Subsidies, which includes sell offers for resources owned by electric cooperatives, which includes both physical assets as well as resources owned by electric cooperatives by virtue of bilateral contracts. The Commission rejected rehearing requests arguing that self-supply does not impact participation in the PJM capacity market, finding that:

> State Subsidies provided to these resources impact the production of electricity or supply-side participation in the capacity market by permitting subsidized resources to offer below their costs. The resource need not be built for the purpose of participating in the capacity market in order to be able to distort capacity market prices. It is the resource's participation as a supplier in the capacity market that triggers the need to mitigate the effect State Subsidies may have on the resource's capacity supply offer and, consequently, on the price paid to other suppliers.[32]

[30] *Id.* at P 68.

[31] *See* NRECA/EKPC Clarification and Rehearing Request at 16-20.

[32] April 16 Order at P 79.

The Commission claims that "parties misunderstand the December 2019 Order's findings with regard to the 'directed or tethered to' standard," explaining that "[t]he December 2019 Order did not find that it would mitigate only State Subsidies that 'aim at,' 'target,' or are 'tethered' to the capacity market."[33] According to the Commission, "State Subsidies may materially impact a resource's decision to enter or remain in the market regardless of whether those payments are aimed at or tethered to the capacity market," and it therefore "affirm[ed] that State Subsidies provided to any resource offering supply into the PJM capacity market can materially impact a resource's decision to enter or remain in the market."[34] The Commission asserts that its prior orders "found that State Subsidies have the ability to influence capacity market prices, regardless of intent."[35]

The Commission also denied requests for rehearing that argued that "payments received by public power from load are not tethered to particular resources or provided to support the entry or continued operation of preferred generation resources," finding that "public power is directly supporting capacity generation resources by carrying out their business to supply load through supply contracts."[36] The Commission explained further that

> . . . self-supply, including public power, should not be exempt from the expanded MOPR. . . . Electric cooperatives and municipal utilities fit within the State Subsidy definition because they are created by state law, or, in the case of municipal utilities, are a subdivision or agency of the state, and thus are appropriately treated as units of state or local government. Generation and transmission cooperatives receive guaranteed cost recovery through long-term supply agreements and other bilateral contracts with their members. Distribution cooperatives

[33] *Id*. at P 80.

[34] *Id*.

[35] *Id*.

[36] *Id*. at P 81.

> receive guaranteed cost recovery through member rates. Receipt of these benefits allows resources owned by electric cooperatives to offer into the capacity market below their costs. Moreover, we reiterate that we can no longer assume that there is any substantive difference among types of resources participating in the PJM capacity market with the benefit of out-of-market support with respect to the resources' ability to distort capacity market prices, and therefore disagree that the payments received by municipal utilities and electric cooperatives are materially different from the payments received by, for example, RPS and ZEC resources for purposes of the expanded MOPR[37]

First, while the Commission attempts to differentiate electric cooperatives by stating "they are created by state law," this claim ignores the fact that all businesses are formed pursuant to state law, including independent power producers, which are formed under state corporation law. Therefore, it does not make sense to single out electric cooperatives on the basis that they are created by state law.

Second, by finding that electric cooperatives fit within the State Subsidy definition and that State Subsidies, regardless of whether they are "directed or tethered to" the capacity market, have the ability to impact the capacity markets, the Commission would have the MOPR be applied in a manner that violates its own intent and inexplicably and unreasonably subjects electric cooperative resource sell offers to the MOPR. The Commission has previously declared its intent that the MOPR "not unreasonably impede the efforts of resources choosing to procure of build capacity under long-standing business models."[38] Where an electric cooperative engages in transactions as part of its long-standing business model of meeting its load obligations in a cost-effective and reliable manner, the agreements entered into by the electric cooperative outside of the PJM capacity construct are free from payments provided or required by the state. Under even the

[37] April 16 Order at P 220.

[38] *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 208 (2011).

Commission's dangerously expansive view of actions which should trigger the MOPR, these sorts of arrangements by electric cooperatives are not "directed at or tethered to" or provided to support new entry or continued operation of preferred resources in the PJM capacity auction. Yet, with the Commission's finding in the April 16 Order, these actions would nevertheless be subject to the MOPR, threatening the electric cooperative business model.

Indeed, the Commission's determination here is misplaced and reflects a lack of understanding of the electric cooperative business model and a failure to engage in reasoned decision-making by disregarding the differences between resources participating in the PJM capacity market. The Commission's determination that guaranteed cost recovery under electric cooperatives' long-term contracts, including those with their own cooperative members, allow electric cooperatives to offer resources below their cost reflects this misunderstanding of the electric cooperative business model. Electric cooperatives strive to provide reliable and cost-effective power supply to their members. To the extent a resource is offered and clears an auction below cost, the electric cooperative members bear the remaining cost of the resource. Therefore, it would be contrary to the cooperative business model to undertake a strategy of offering resources below cost.

Further, the April 16 Order ignores the critical reality that resources owned by electric cooperatives receive financial benefits that are free from financial benefit provided or required by the states. For example, generation and transmission ("G&T") electric cooperatives typically enter into long-term supply arrangements whereby the G&T electric cooperative is obligated to meet the power supply obligations of its member cooperatives. These agreements are the backbone of the electric cooperative business model. As NRECA and some of its members have consistently

explained throughout proceedings regarding the MOPR, electric cooperatives invest in resources to meet their long-term power supply obligations.[39] They do not do so by direction of the states, nor do they do so with any entitlement to state-sponsored payments or other external subsidies.[40] These long-term power supply agreements between a G&T electric cooperative and its members provide the G&T electric cooperative with a source of revenues for its resources, but they are not based on or entitled to any state financial benefits. Further, the long-term power supply agreements between a G&T electric cooperative and its members also do not typically mandate use or support for particular resources, so cannot be deemed to be "directed at or tethered to" or "provided to support the entry or continued operation of preferred generation resources"[41] in the PJM capacity construct. The April 16 Order failed to adequately explain how these electric cooperative agreements, outside of the PJM market and completely divorced from any state direction, are in any way related to state action which is "directed at or tethered to" the PJM wholesale capacity construct.

[39] *See, e.g.*, NRECA Initial Submission at 17; Protest of the National Rural Electric Cooperative Association, at 3 (filed Apr. 11, 2016); Initial Submission of Old Dominion Electric Cooperative, at 21 (filed Oct. 2, 2018) ("ODEC Initial Submission"); Reply Submission of Old Dominion Electric Cooperative, at 9-10 (filed Nov. 6, 2018) ("ODEC Reply Submission"); Comments of Northern Virginia Electric Cooperative, Inc., at 7 (filed Oct. 2, 2018); Comments of Allegheny Electric Cooperative, Inc., at 6 (filed Oct. 2, 2018).

[40] *See* NRECA's Initial Submission, Declaration of Marc D. Montalvo, at P 24 ("Under the [Public Power] business model described above, Public Power utilities make resource decisions to self-supply their loads in the context of a resource planning process that considers and is driven by market prices and consumer preferences, not by state-sponsored payments or other external subsidies."). Mr. Montalvo noted, as did NRECA, that if public power utilities are required to procure resources to meet state Renewable Portfolio Standards, that subset of resource investments may fall under the Commission's definition of state-sponsored resources, and therefore covered by the definition of State Subsidy. NRECA Initial Submission at 17, n.58.

[41] April 16 Order at P 81.

NRECA/EKPC included in their request for clarification an example based on NRECA member Old Dominion Electric Cooperative ("ODEC"), which is a G&T electric cooperative located in PJM and subject to the Commission's ratemaking jurisdiction. ODEC's Wholesale Power Contracts ("WPCs") with each of its 11 member distribution cooperatives are on file with the Commission.[42] The WPCs obligate ODEC to sell to the member and each member to purchase from ODEC. However, the WPCs are not required by the states, not supported by any financial benefit made or directed by the states, and indifferent with respect to which resources ODEC selects in order to meet its obligations. The same is true of other NRECA members, including Wolverine Power Supply Cooperative, Inc. ("Wolverine"). Wolverine's WPCs with its five distribution cooperative members, which are on file with the Commission, obligate Wolverine to provide all-requirements service to its member cooperatives, are free from any state-based requirement or financial benefit, and are indifferent with respect to resources used by Wolverine in order to meet its obligations.[43] Thus, as is the case for NRECA's electric cooperative members, while ODEC and Wolverine are an electric cooperatives "formed pursuant to state law," there simply is no basis for determining that such arrangements between G&T electric cooperatives, which are typical and consistent with electric cooperatives' long-standing business model, "materially impact a resource's decision to enter or remain" in the PJM capacity market.[44]

[42] The current Second Amended and Restated Wholesale Power Contracts between ODEC and each of its member distribution cooperatives were most recently accepted in Docket No. ER08-1498 by Order issued November 4, 2008. *Old Dominion Electric Cooperative*, Letter Order Accepting Old Dominion Electric Cooperative's FERC Electric Tariff, Second Revised Volume No. 1 and Second Amended and Restated Wholesale Power Contracts, Docket No. ER08-1498-000 (Nov. 4, 2008).

[43] *See* Wolverine's filing of revised WPCs with its five distribution cooperative members submitted on March 20, 2020 in Docket No. ER20-1206-000.

[44] April 16 Order at P 80.

Moreover, these FERC-jurisdictional contracts illustrate the fact that electric cooperative rates are based on their cost-of-service. They are neither designed nor intended to create an electric cooperative "subsidy." The Commission failed to engage in reasoned decision-making by not considering this important distinction and choosing to subject electric cooperative sell offers to the expanded MOPR.

B. The Commission Erred by Finding that Sell Offers by Resources Owned by Electric Cooperatives Subject to a Bilateral Transaction are Subject to Review and Mitigation under the MOPR.

NRECA/EKPC sought clarification of the December 2019 Order regarding whether sell offers by resources owned by electric cooperatives subject to a bilateral transaction are not subject to review and mitigation under the MOPR.[45] The December 19 Order explained that "[s]ome intervenors argue that out-of-market subsidies should exclude purely private and voluntary transactions, including voluntary bilateral capacity contracts outside the market."[46] In response, the Commission determined that "the record in this proceeding does not demonstrate a need to subject voluntary, arm's length bilateral transactions to the MOPR at this time."[47] However, in the April 16 Order, the Commission changed course, "clarify[ing] that public power self-supply entities cannot engage in voluntary, arms-length bilateral contracts with unaffiliated third parties without triggering the MOPR," finding that "these voluntary bilateral agreements guarantee cost

[45] NRECA/EKPC Clarification and Rehearing Request at 20-21; April 16 Order at P 237.

[46] December 19 Order at P 70.

[47] *Id*.

recovery for public power."[48] This finding is completely inapposite to the explanation in the December 2019 Order, and the Commission's "clarification" is a change that departs from its previous determination without adequate explanation.[49]

As has been explained in this proceeding, electric cooperatives acting in their capacity as load-serving entities ("LSEs") invest in capacity resources for a variety of reasons and certainly not with a focus on PJM's capacity construct.[50] In order to meet their load-serving obligations in a cost-effective manner, LSEs obtain capacity not only through PJM's Reliability Pricing Model ("RPM"), but also through generation ownership and through bilateral purchases from third parties, outside of the RPM auctions. The LSE electric cooperative's long-standing business model involves long-term power supply obligations, as well as bilateral contracts to purchase necessary capacity. The bilateral agreements entered into by electric cooperatives to purchase capacity from third parties under voluntary, arm's length bilateral transactions should be exempt from the definition of State Subsidy because the Commission determined that such contracts need not be subject to the MOPR at this time.[51] Similarly, the agreements between electric cooperative utilities and their members are voluntary, arm's length bilateral transactions. Therefore, sell offers by resources owned by electric cooperatives, for which the electric cooperatives receive payment

[48] April 16 Order at P 243.

[49] *See, e.g., ABM Onsite Servs.-W.,* 849 F.3d at 1142 ("[A]n agency's unexplained departure from precedent is arbitrary and capricious."); *ANR Pipeline Co.,* 71 F.3d at 901 ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.")

[50] NRECA Initial Submission at 17; ODEC Initial Submission at 21; ODEC Reply Submission at 9-10 & n.14.

[51] *See* December 19 Order at P 70.

under voluntary, bilateral power supply agreements which were negotiated at arm's length, should be exempt from the definition of State Subsidy and, therefore, exempt from the MOPR. The Commission made no effort to reconcile its determination in the December 19 Order that "the record in this proceeding does not demonstrate a need to subject voluntary, arm's length bilateral transactions to the MOPR at this time"[52], with its about-face in the April 16 Order. The April 16 Order erred in changing course without explanation and finding that these transactions would trigger the MOPR.[53]

C. The Commission Erred in Categorically Excluding Electric Cooperatives From Using the Competitive Exemption.

In the December 19 Order, the Commission directed PJM to apply the expanded MOPR "to any new self-supply resource that receives or is entitled to receive a State Subsidy, unless they qualify for one of the exemptions described in this order."[54] From the December 19 Order's terse description of the State Subsidy definition and the limited Self-Supply Exemption, it was unclear whether an electric cooperative can avail itself of the Competitive Exemption and, if so, what showing the cooperative would have to make to PJM to certify that it is forgoing any State Subsidies. Therefore, NRECA/EKPC requested clarification as to when and how an electric cooperative may use the Competitive Exemption.[55] Addressing this request, the Commission determined in the April 2016 Order that "electric cooperatives receive State Subsidies by definition and therefore do not qualify for the Competitive Exemption."[56]

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[52] *Id*.

[53] *See* April 16 Order at P 243.

[54] December 19 Order at P 202.

[55] *See* NRECA/EKPC Clarification and Rehearing Request at 22-23.

[56] April 16 Order at P 306.

The Commission's decision is arbitrary and capricious in that it fails to fully consider the impact on electric cooperatives. The Commission provides no explanation as to why or how electric cooperatives could seek to avail themselves of this exemption without completely undermining the electric cooperative business model. The State Subsidy definition applies to all electric cooperative self-supply resources simply because they are owned or bilaterally contracted by an electric cooperative and regardless whether they are receiving any out-of-market payments made or directed by a state related to new entry or continued operation of generating capacity in PJM. Therefore, there would be no way for an electric cooperative to forgo State Subsidies. Thus, as the Commission has confirmed, there is no way for an electric cooperative to use the Competitive Exemption, unless it abandons the electric cooperative business model and ceases to be an electric cooperative. The Commission's determination is an unworkable, unjustified, and unreasonable imposition on the electric cooperative business model. The Commission has failed to engage in reasoned decision-making by choosing not to fully consider the negative impacts on electric cooperatives and what its decision means for the electric cooperative business model.[57] Electric cooperatives should be provided with the opportunity to use all exemptions available to other self-supply entities, if applicable, including the Competitive Exemption, rather than categorically barred.

[57] *Motor Vehicle Manufacturer's Ass'n.,* 463 U.S. at 43 (stating that an agency acts arbitrarily and capriciously when it fails to "consider an important aspect of the problem"); *see also KeySpan-Ravenswood,* 348 F.3d at 1056 (explaining that "unless an agency answers objections that on their face appear legitimate, its decisions can hardly be said to be reasoned")(internal modifications, quotes and citation omitted).

D. The Commission Erred by Determining that Resources that Clear a PJM Capacity Auction and Are Subsequently Acquired by an Electric Cooperative are Considered New Resources for Purposes of the MOPR Floor Offer Price.

As discussed above, NRECA/EKPC request clarification of the Commission's determination in the April 16 Order that "only resources currently owned or bilaterally contracted for by the self-supply entity qualify as 'existing' *for purposes of the Self-Supply Exemption*."[58] If the Commission does not grant this request, then NRECA/EKPC seek rehearing of the April 16 Order, where the Commission has made this clarification regarding treatment of resources that clear a capacity auction and are then acquired by a self-supply entity. For all of the reasons discussed above, the Commission has not explained why its definition of "existing" in the December 19 Order does not apply to resources that clear a capacity auction and are later acquired by a self-supply entity, for purposes of the MOPR floor offer prices. Such an unexplained departure from the December 19 Order is arbitrary and capricious, and should be corrected on rehearing.[59] Specifically, if NRECA/EKPC's request for clarification above is not granted, then the Commission should grant rehearing of the April 16 Order and clarify that where a resource clears an auction and is then acquired by a self-supply entity, the resource shall be treated as "new" for purposes of the Self-Supply Exemption, but shall be treated as an "existing" resource for purposes of the MOPR floor offer price.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, NRECA and EKPC request that the Commission grant rehearing of the April 16 Order and find:

[58] April 16 Order at P 246 (emphasis added).

[59] *See, e.g., ABM Onsite Servs.-W.*, 849 F.3d at 1142; *ANR Pipeline Co.*, 71 F.3d at 901.

(1) the MOPR does not apply to sell offers for resources owned or bilaterally contracted for by electric cooperatives;

(2) sell offers by resources owned by electric cooperatives subject to a bilateral transaction are not subject to review and mitigation under the MOPR;

(3) electric cooperatives should not be categorically barred from using the Competitive Exemption; and

(4) resources that previously cleared in the capacity market that are subsequently purchased by or under contract to an electric cooperative should be considered to be existing resources for purposes of the MOPR floor offer prices.

Respectfully submitted,

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Dated: May 18, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2020, I have caused a copy of the foregoing to be served upon each person on the official service list for this proceeding.

/s/ Adrienne E Clair