

**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. EL16-49-000  
EL18-178-000  
(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.**

**January 21, 2020**

## TABLE OF CONTENTS

I. INTRODUCTION.....	5
II. RELEVANT BACKGROUND.....	8
III. STATEMENT OF ISSUES .....	13
IV. REQUEST FOR CLARIFICATION .....	14
A. The Definition of “State Subsidy” is Unclear and Inconsistent as Applied to Electric Cooperative Utilities. ....	14
1. The Commission Should 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.....	16
2. The Commission Should 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.....	20
3. The Commission Should Clarify that Sell Offers from Resources financed by Rural Utilities Service Loans Are Not Subject to Review and Mitigation under the MOPR. ....	21
4. The Commission Should Clarify Whether and How an Electric Cooperative May Use the Competitive Exemption.....	22
5. The Commission Should Clarify the Application of the State Subsidy Definition to Jointly Owned Resources. ....	23
V. REQUEST FOR REHEARING .....	24
A. Payments Associated with Self-Supply Resources Owned by Electric Cooperatives Acting Under Long-Standing Business Models Should be Excluded from State Subsidies Subjecting Such Resources to the Expanded MOPR.....	25
B. The Commission Erred in Departing From Its Precedent Regarding the Purpose of RPM and the MOPR With Respect to Self-Supply by Load-serving Entities Operating Under Long-standing Business Models.....	31
C. The December 19 Order Is an Unexplained Departure from Commission Precedent Encouraging and Facilitating Long-Term Power-Supply Arrangements in RTO Regions. ....	37
D. The December 19 Order Is an Unexplained Departure from Commission Precedent Holding that Electric Cooperatives Cannot Subsidize Their Wholesale Market Operations Through Charges on Their Members.....	40
E. The December 19 Order is Arbitrary and Capricious for Expanding the Scope of this Proceeding to Include Electric Cooperative Self-Supply as a State Subsidy Subject to the MOPR.....	42
F. The Commission Erred by Subjecting Self-Supply by Electric Cooperatives Operating under Long-standing Business Models to the MOPR.....	47

1. The December 19 Order’s Rejection of a Self-Supply Exemption from the MOPR is an Unexplained Departure from Precedent. ....	47
2. The December 19 Order’s Rejection of PJM’s Self-Supply Exemption was not Based on Substantial Evidence.....	54
3. The December 19 Order’s rejection of PJM’s self-supply exemption failed to consider arguments and evidence by NRECA and others. ....	56
G. The Commission Erred in Subjecting Electric Cooperative Demand Response to the Expanded MOPR.....	60
VI. CONCLUSION.....	61

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The National Rural Electric Cooperative Association (“NRECA”) and East Kentucky Power Cooperative (“EKPC”) seek clarification and rehearing of the Order Establishing Just and

Reasonable Rate issued in the above-referenced proceeding on December 19, 2019.<sup>1</sup> This Rehearing Request is submitted pursuant to section 313(a) of the Federal Power Act (“FPA”), 16 U.S.C. § 8251 (a), and Rule 713 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2019).

## **I. INTRODUCTION**

The December 19 Order is the most drastic and likely most destructive measure taken by the Commission to date in its transformation of PJM Interconnection L.L.C.’s (“PJM”) resource adequacy construct, away from a residual capacity auction used by PJM as a last resort, after load-serving entities (“LSEs”) self-supply their capacity needs, to a mandatory sole source for PJM and its LSEs to meet regional capacity obligations. PJM’s Reliability Pricing Model (“RPM”) is a construct, not a market, where the economics and competitiveness of sell offers are based on a single-year, administratively-determined clearing price for a three-year forward capacity commitment. As a component of this myopic and unrealistic view of “competition”, the Commission has forced an upward price “mitigation” tool, the Minimum Offer Price Rule (“MOPR”), to be applied in an increasingly adverse and expansive manner, in order to meet the

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<sup>1</sup> *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) (“December 19 Order”). In the version of the December 19 Order issued on December 19, 2019, and posted on the Commission’s eLibrary system (Accession No. 20191219-3124), the numbering in the Table of Contents does not match the numbering in the text of the Order. Citations and other references in this pleading to paragraphs in the December 19 Order are based on the version issued on December 19, 2019, and posted on the eLibrary system.

revenue expectations and demands of some merchant generation owners at the cost of load and true competitive outcomes. Now, under the thin veil of protecting PJM's capacity construct from state actions which the Commission has determined "threaten the competitiveness"<sup>2</sup> of RPM, the Commission has expanded the MOPR in a manner which is certain to kill legitimate new entry, including investments by LSEs in the very types of long-term resources which are necessary for reliability and competition, in order to prop up a resource adequacy construct that has strayed far from its original purposes.

Against the unsupported and unsubstantiated demands by a few merchant interests, NRECA, EKPC and others – including PJM – have consistently encouraged the Commission to encourage and facilitate the self-supply of capacity by LSEs like electric cooperatives operating under long-standing business models. In the past, the Commission has been willing to accept measures that would protect self-supply by LSEs operating under long-standing business models from becoming collateral damage in the battle over the MOPR, such as the 2013 Self-Supply Exemption with net-short and net-long thresholds. However, the December 19 Order moved from collateral damage to a frontal attack on the business model of electric cooperatives (as well as municipal utilities and vertically-integrated utilities) in an unprecedented, unreasonable, and unsupported manner. As discussed in this request for clarification and rehearing, the December 19 Order is unworkably unclear and legally unsound. Additionally, the Commission's mandate to

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<sup>2</sup> December 19 Order at P 1.

apply the MOPR to sell offers from resources owned by electric cooperatives “formed under state law”<sup>3</sup> is completely devoid of any consideration of the impact on competition, costs to consumers, or the Commission’s apparently abandoned goals to promote diversity of resources and ensure a level playing field for advanced technologies.

It is ironic that the Commission issued the December 19 Order just one day short of the twentieth anniversary of Order No. 2000.<sup>4</sup> There, the Commission encouraged the voluntary formation of Regional Transmission Organizations (“RTOs”) because they would foster wholesale competition and support innovative state energy policy. Order No. 2000 predicted that the benefits of RTOs would include “more efficient planning for transmission and generation investment, increased coordination among state regulatory agencies . . .” and “facilitation of the development of environmentally preferred generation in states with retail access programs. . . .”<sup>5</sup> Short of ending PJM as an RTO altogether, the December 19 Order could not be further from the goals of Order No. 2000. The December 19 Order hamstringing wholesale competition, wreaks havoc with planning for generation investment, and broadly attacks state generation resource policy, all purportedly to preserve a bland simulacrum of competition in RPM. NRECA and EKPC submit

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<sup>3</sup> December 19 Order at P 67.

<sup>4</sup> *Regional Transmission Orgs.*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *appeals dismissed sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) (per curiam).

<sup>5</sup> *Id.*

this request for clarification and rehearing to yet again implore the Commission to uphold its precedent to treat RPM as a residual capacity procurement mechanism and retain the critical role of LSEs who invest in self-supply resources outside of the RPM auctions, as part of their long-standing and FERC-acknowledged business models.

## **II. RELEVANT BACKGROUND**

The history of the MOPR prior to the instant proceeding with regard to self-supply is detailed in NRECA's Initial Submission.<sup>6</sup> In summary, the Commission has recognized that in PJM's 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. The following is an abbreviated recount of relevant proceedings and precedent on this issue, aside from the instant proceeding:

- The Commission initially approved PJM's RPM in 2006 as residual in nature, as a "last resort" to be used only "after LSES have had an opportunity to procure capacity on their own . . ."<sup>7</sup>

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<sup>6</sup> 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").

<sup>7</sup> *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at PP 55, 71 (2006).



- The Commission approved a settlement<sup>8</sup> which included a two-step MOPR, where even if a self-supply Sell Offer triggered application of the MOPR based on specific screens and an impact test, PJM was required to guarantee clearing for self-supply by clearing “first, all Sell Offers in their entirety designated as self-supply . . .”,<sup>9</sup> then applied the replacement clearing price mechanism;
- In April 2011, based at least in part on actions taken in New Jersey and Maryland, the Commission approved changes to the MOPR to eliminate a state mandate exemption and the guaranteed clearing for self-supply, and provide for a unit-specific review mechanism.<sup>10</sup> This change introduced the risk that LSE-owned capacity, procured outside of the RPM construct, would not clear in the Base Residual Auction, leaving its load to pay twice for a single capacity obligation; once for the resource procured outside of RPM and second time for capacity through the BRA;<sup>11</sup>
- On rehearing of the April 2011 Order, the Commission clarified its intent that the MOPR not “unreasonably impede the efforts of resources choosing to procure or build capacity under long-standing business models”<sup>12</sup> and acknowledged that the unit-specific review “will not guarantee that all resources designated as self-supply will clear in the auction.”<sup>13</sup>
- In 2012, PJM submitted Tariff provisions to include the MOPR Self-Supply Exemption and Competitive Entry Exemption with an express identification of the long-standing business models contemplated, in order “[t]o promote transparency and certainty, and ease administrative burdens on market sellers and PJM . . .”<sup>14</sup> PJM’s filing also eliminated the unit-specific exemption because it was difficult to

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<sup>8</sup> *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006).

<sup>9</sup> *See PJM Interconnection, L.L.C.*, Settlement Agreement and Explanatory Statement of the Settling Parties Resolving all Issues, at Attachment DD, Section 5.14(h)(5), Docket Nos. ER05-1410, -001 and EL05-148-000, -001 (filed Sept. 29, 2006).

<sup>10</sup> *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (2011), *order on reh’g*, 137 FERC ¶ 61,145 (2011).

<sup>11</sup> *See Commission Staff Report on Centralized Capacity Market Design Elements*, Docket No. AD13-7-000, August 23, 2013 at 27-28 (Staff explains the double payment problem and notes that “[s]imilar concerns have been raised regarding the application of MOPR-type mitigation to a resource that is self-supplied by a load-serving entity.”).

<sup>12</sup> *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 208 (2011).

<sup>13</sup> *Id.* at P 209.

<sup>14</sup> PJM’s December 7, 2012 Filing in Docket No. ER13-535-000 at 18 (citations omitted).

administer, lacked transparency, and was unnecessary with the two other exemptions in place. In an order issued May 2, 2013, the Commission accepted PJM’s proposed exemption for self-supply, subject to condition, including retention of the unit-specific exemption, and a compliance filing.<sup>15</sup> The Commission reasoned that “as a general matter, providing exemptions for resources properly designated as self-supply when they meet suitable net-short and net-long thresholds is reasonable . . .” and “[i]f the amount of non-self-supplied resources procured from RPM is sufficiently small, uneconomic new entry would reduce the cost of procuring this portion by less than the amount spent on the uneconomic new entry.”<sup>16</sup>

- On appeal of the 2011 Orders, the U.S. Court of Appeals for the Third Circuit criticized the Commission’s elimination of the guaranteed clearing for self-supply because the Commission “barely acknowledg[ed] that it was making any change at all,” and the Court said that it “strains to accept such scant treatment as ‘reasoned analysis’ sufficient to satisfy the demands of the [Administrative Procedure Act].”<sup>17</sup> The Court did not reach the merits of the issue because it concluded the dispute was moot due to the Commission’s 2013 approval of PJM’s 2012 filing creating the categorical Self-Supply Exemption.
- On July 7, 2017, the U.S. Court of Appeals for the D.C. Circuit found that the Commission exceeded its authority under FPA Section 205 by modifying PJM’s 2012 filing with the categorical Self-Supply and Competitive Entry Exemptions.<sup>18</sup> The Court did not reach the merits of the exemptions.
- On remand of the *NRG* decision, the Commission rejected the PJM proposal to eliminate a unit-specific review process in favor of a categorical Self-Supply

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<sup>15</sup> *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 (2013).

<sup>16</sup> *Id.* at P 108.

<sup>17</sup> *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 104 (3d Cir. 2014), citing *Motor Vehicle Manufacturer’s Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 57 (1989) (parenthetical omitted); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (requiring agencies to generally “‘display awareness’ of a change in position”); *Nat’l Cable & Telecomms. Ass’n v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009) (an agency departing from its prior position must “suppl[y] ‘a reasoned analysis’ . . . showing that ‘prior policies and standards are being deliberately changed, not casually ignored.’”); *Greater Bos. Television*, 444 F.2d 841, 852 (D.C. Cir. 1970) (“[I]f an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”)

<sup>18</sup> *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017) (“*NRG*”).

Exemption and Competitive Entry Exemption, and directed PJM to reinstate the prior MOPR Tariff provision, which did not include the Self-Supply Exemption or the Competitive Entry Exemption.<sup>19</sup> By order issued December 19, 2019, the Commission rejected requests for rehearing of the order on remand.<sup>20</sup>

The 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.”<sup>21</sup> 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.<sup>22</sup>

PJM had proposed remedies to address the Commission’s concern over state-subsidized resources while also limiting the MOPR to only “those resources receiving a subsidy that warrants action based on design or market impact . . .”<sup>23</sup> In the June 2018 Order, the Commission rejected PJM’s proposal as well as the complainants’ requested remedy in Docet No. EL16-49-000 for a MOPR which would apply to all resources, regardless of type. Instead, the Commission proposed a two-part Replacement Rate which consisted of (1) an expanded MOPR to apply to new and

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<sup>19</sup> *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252 at P 43 (2017).

<sup>20</sup> *PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,237 (2019).

<sup>21</sup> *PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (“June 2018 Order”).

<sup>22</sup> *Id.* at P 156.

<sup>23</sup> PJM’s filing submitted on April 9, 2018 in Docket No. ER18-1314, at 69.

existing resources, regardless of type, with few or no exceptions; and (2) a resource-specific Fixed Resource Requirement (“FRR”) Alternative which would allow “resources receiving out-of-market support to choose to be removed from the PJM capacity market, along with a commensurate amount of load, for some period of time.”<sup>24</sup> The Commission requested comments on specific areas and questions set forth in the June 2018 Order.<sup>25</sup> NRECA made initial and reply submissions, including evidentiary support.<sup>26</sup>

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].”<sup>27</sup> 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 directs PJM to adopt a MOPR which will apply to both new and existing resources of all types, with limited exemptions for reliance on prior MOPR decisions.

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<sup>24</sup> June 2018 Order at PP 158, 160.

<sup>25</sup> *Id.* at PP 165-171.

<sup>26</sup> NRECA’s Initial Submission was filed on October 2, 2018 and included the Declaration of Marc D. Montalvo.

<sup>27</sup> December 19 Order at P 1 (citation omitted).

### III. STATEMENT OF ISSUES

In compliance with Rules 203 and 713(c)(1) and (2) of the Rules of Practice and Procedure of the Commission,<sup>28</sup> NRECA and EKPC provide the following statement of issues and specification of errors:

1. The Commission erred by including payments associated with self-supply resources owned by electric cooperatives acting under long-standing business models in the definition of State Subsidies, subjecting such resources to the expanded MOPR. *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 (2006); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 (2011).
2. The Commission erred in departing from its precedent regarding the purpose of RPM and the MOPR with respect to self-supply by load-serving entities operating under long-standing business models. *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); *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at PP 55, 71 (2006); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, P 208 (2011); *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).
3. The Commission erred in its unexplained departure from its precedent encouraging and facilitating long-term power supply arrangements in RTO regions. 16 U.S.C. § 824q; *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, 71 Fed. Reg. 43,564 (Aug. 1, 2006), *order on reh'g*, Order No. 681-A, 71 Fed. Reg. 68,440 (Nov. 16, 2006), *order on reh'g*, Order No. 681-B, 74 Fed. Reg. 13,103 (Mar. 26, 2009); *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100, PP 4, 277-309 (Oct. 28, 2008), *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37,776 (July 29, 2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009); *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 in its unexplained departure from its precedent holding that electric cooperatives cannot subsidize their wholesale market operations through charges on their members. *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);

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<sup>28</sup> 18 C.F.R. § 385.203, 713(c)(1), 713(c)(2) (2019).

*Market-Based Rates for Wholesale Sales of Electric Energy, Capacity & Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 (2007); *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264 (2018).

5. The Commission erred by subjecting self-supply by electric cooperatives operating under long-standing business models to the MOPR. *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at PP 55, 71 (2006); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 (2011); *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014), *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009); *Greater Bos. Television*, 444 F.2d 841 (D.C. Cir. 1970).
6. The Commission erred in subjecting electric cooperative Demand Response to the expanded MOPR. *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at PP 55, 71 (2006); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 (2011); *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014), *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009); *Greater Bos. Television*, 444 F.2d 841 (D.C. Cir. 1970); *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252 (2017); *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 166 (2013).
7. To the extent the Commission does not grant NRECA and EKPC's requested clarifications, the December 19 Order does not reflect reasoned decision-making. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

#### **IV. REQUEST FOR CLARIFICATION**

The Commission's directive to expand PJM's MOPR to permit review and mitigation of new self-supply resources of electric cooperatives is arbitrary and capricious, not supported by substantial evidence, and contrary to law, as discussed in the request for rehearing in Section V below. However, even if the Commission denies NRECA and EKPC's request for rehearing and maintains this unreasonable and unprecedented action against electric cooperatives operating under long-standing business models, the Commission should clarify the December 19 Order's directives as set forth in this Section.

##### **A. The Definition of "State Subsidy" is Unclear and Inconsistent as Applied to Electric Cooperative Utilities.**

In determining what will qualify as a subsidy subject to the MOPR, the December 19

Order concludes as follows:

Based on the evidence presented in this paper hearing, we find that PJM's MOPR must be expanded to permit the review and mitigation of capacity offers by resources that receive or are eligible to receive State Subsidies. Specifically, the term State Subsidy will be defined as follows:

A direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is (1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that (2) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce, or (3) will support the construction, development, or operation of a new or existing capacity resource, or (4) could have the effect of allowing a resource to clear in any PJM capacity auction.

December 19 Order at P 67 (footnotes omitted). By including in the definition of State Subsidy, “an electric cooperative formed pursuant to state law” and rejecting PJM’s proposal to reinstate its previous self-supply exemption which included protection for resources owned by electric cooperatives as public power entities,<sup>29</sup> the Commission presumably intended to subject all capacity offers by resources that receive or are eligible to receive financial benefit as a result of actions or processes of “an electric cooperative formed pursuant to state law.” However, the Commission’s explanation of the intent of the State Subsidy definition, as well as other aspects of the December 19 Order, make the application of the MOPR to sell offers for resources owned by

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<sup>29</sup> See December 19 Order at PP 178-179, 202-204.

electric cooperatives unclear, at best. On this critical issue of subjecting self-supply resources owned by electric cooperatives acting under long-standing business models to the threats posed by the MOPR, there at least must be clarity in application of the Commission’s mandate.<sup>30</sup> Contrary to the December 19 Order, the State Subsidy definition is far from “sufficiently clear and specific to be understood by PJM and its stakeholders.”<sup>31</sup>

**1. The Commission Should 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.**

In the December 19 Order, immediately after stating the above-quoted definition of State Subsidy, the Commission explained its intent, as follows:

This definition focuses on those forms of “out-of-market payments provided or required by certain states” that . . . squarely impact the production of electricity or supply-side participation in PJM’s capacity market by “supporting the entry or continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market.” This definition is not intended to cover every form of state financial assistance that might indirectly affect FERC-jurisdictional rates or transactions; nor is it intended to address other commercial externalities or opportunities that might affect the economics of a particular resource. Rather, our concern is with those forms of State Subsidies that are not federally preempted, but nonetheless are most nearly “directed at” or tethered to the new entry or continued operation of generating capacity in the federally-regulated multi-state wholesale capacity market administered by PJM.

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<sup>30</sup> NRECA notes that the December 19 Order does not define “self-supply” for purposes of the MOPR.

<sup>31</sup> *Id.* at P 69.



December 19 Order at P 68. Based on the Commission’s stated intent for the State Subsidy definition to focus on “out-of-market payments provided or required by certain states” that “support[] the entry or continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market,”<sup>32</sup> it should clarify that electric cooperative agreements which 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.

Otherwise, the MOPR will be applied in a manner that violates the Commission’s own intent and inexplicably and unreasonably subjects electric cooperative resource sell offers to the MOPR. 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 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” new entry or continued operation of resources in the PJM capacity auction.

As an example of a financial benefit received by a resource owned by an electric cooperative that is free from financial benefit provided or required by the states, generation and transmission (“G&T”) electric cooperatives typically enter into long-term supply arrangements

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<sup>32</sup> *Id.* at P 68.

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.<sup>33</sup> 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.<sup>34</sup> 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” new entry or continued operation of generating capacity in the PJM capacity construct.

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<sup>33</sup> *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).

<sup>34</sup> *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.

To illustrate this point, while most G&T electric cooperatives are exempt from the Commission's rate regulation by Federal Power Act ("FPA") Section 201(f),<sup>35</sup> NRECA member Old Dominion Electric Cooperative ("ODEC") is a G&T electric cooperative located in PJM and subject to the Commission's ratemaking jurisdiction. Therefore, ODEC's Wholesale Power Contracts ("WPCs") with each of its 11 member distribution cooperatives are on file with the Commission.<sup>36</sup> 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. Thus, while ODEC is an electric cooperative "formed pursuant to state law," there simply is no basis for determining that such arrangements between a G&T electric cooperative, which are typical and consistent with electric cooperatives' long-standing business model, are or may be "directed at or tethered to" new entry or continued operation of generation capacity in the PJM capacity market. As a practical matter, most if not all of these arrangements originated well before PJM's capacity construct and MOPR. In ODEC's case, its WPCs were first on file with the Commission in 1992 and these aspects of the WPCs have

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<sup>35</sup> 16 U.S.C. § 824(f).

<sup>36</sup> 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).

not changed since then. Thus, there can be no legitimate conclusion that the WPCs are directed at or tethered to the operation of generating resources in PJM's capacity construct.

**2. The Commission Should 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.**

The Commission noted in the December 19 Order 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.”<sup>37</sup> 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.”<sup>38</sup> NRECA and EKPC agree.

As has been explained in this proceeding, electric cooperatives acting in their capacity as LSEs invest in capacity resources for a variety of reasons and certainly not with a focus on PJM’s capacity construct.<sup>39</sup> In order to meet their load-serving obligations in a cost-effective manner, LSEs obtain capacity not only through 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

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<sup>37</sup> December 19 Order at P 70.

<sup>38</sup> December 19 Order at P 70.

<sup>39</sup> NRECA Initial Submission at 17; ODEC Initial Submission at 21; ODEC Reply Submission at 9-10 & n.14.

determined that such contracts need not be subject to the MOPR at this time. 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 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.

**3. The Commission Should Clarify that Sell Offers from Resources financed by Rural Utilities Service Loans Are Not Subject to Review and Mitigation under the MOPR.**

Many, if not most, cooperative utilities receive funding and hold debt from the U.S. Department of Agriculture's Rural Utilities Service ("RUS"). The RUS funding is a form of financing used by electric cooperatives since they have no shareholders from whom they can raise capital. NRECA and others requested that the Commission "explicitly state that if resources owned by self-supply cooperative utilities or their affiliates are financed with RUS debt, the financing alone will not trigger application of the MOPR."<sup>40</sup>

In the December 19 Order, the Commission explicitly stated that it "will not require mitigation of capacity offers that are supported by federal subsidies."<sup>41</sup> However, the Commission did not confirm that RUS funding is included in the federal subsidies that will not subject a capacity offer to the MOPR. Because RUS funding is a federal source of financing for electric cooperatives,

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<sup>40</sup> NRECA Initial Submission at 26.

<sup>41</sup> December 19 Order at P 89.

the Commission's determination that it "may not, therefore, disregard or nullify" its effect of such a federal subsidy should be clarified.

#### **4. The Commission Should Clarify Whether and How an Electric Cooperative May Use the Competitive Exemption.**

The December 19 Order directs 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."<sup>42</sup> The Order notes that new self-supply resources "may avail themselves of the Unit-Specific Exemption."<sup>43</sup> The Order also notes that the existing FRR remains an option.<sup>44</sup>

The Order does not mention the Competitive Exemption, which the December 19 Order directs PJM to include "for both existing and new resources, other than gas-fired resources, that certify to PJM that they will forego any State Subsidies."<sup>45</sup> From the Order's terse description of the State Subsidy definition and the limited Self-Supply Exemption, it is 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.

One reading of paragraphs 67 to 68 and 202 to 204 of the December 19 Order is that the State Subsidy definition applies to all electric cooperative new self-supply resources simply because they are owned 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

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<sup>42</sup> December 19 Order at P 202.

<sup>43</sup> *Id.* at P 204.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at P 161.

generating capacity in PJM. In that case, there would be no way for an electric cooperative to forgo State Subsidies. If that is the Commission's intention, then there would not appear to be a 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. NRECA and EKPC urge the Commission against such an unjustified and unreasonable imposition on the electric cooperative business model. Therefore, NRECA and EKPC request that the Commission clarify that an electric cooperative may avail itself of the Competitive Exemption, and explain the necessary showing in order to do so.

**5. The Commission Should Clarify the Application of the State Subsidy Definition to Jointly Owned Resources.**

The December 19 Order is unclear how the State Subsidy definition and available MOPR exemptions apply to jointly owned resources. Thus, the December 19 Order directs 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."<sup>46</sup> An electric cooperative or other self-supply entity may jointly own a resource with another entity, which may or may not be another self-supply entity; the co-owner could be a merchant generator, for example. More generally, one co-owner may receive or eligible to receive a State Subsidy and another co-owner may not. Similarly, one co-owner may be able to avail itself of a MOPR exemption and another co-owner may not. NRECA and EKPC submit, and ask the Commission to clarify, that the determination of a State Subsidy and application of any exemption should apply to each co-

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<sup>46</sup> *Id.* at P 204.

owner share of the resource, rather than to the whole resource, because the circumstances of the co-owners may differ.

## **V. REQUEST FOR REHEARING**

The December 19 Order provides a “Self-Supply Exemption” from the expanded MOPR for certain existing self-supply resources and limited new self-supply resources with interconnection service agreements, in recognition that self-supply entities have made resource decisions in reliance on past Commission determinations, including the prior exemption from the MOPR for new self-supply resources.<sup>47</sup> NRECA and EKPC acknowledge and appreciate the Commission’s directive to PJM to include this Self-Supply Exemption and respect cooperatives’ existing resource investments made in reliance on its past determinations.

Nonetheless, the Commission’s further directive to PJM to apply the expanded MOPR to all new self-supply resources owned by cooperatives, unless one of the other exemptions applies, is arbitrary and capricious, not supported by substantial evidence, and contrary to law. Therefore, for the reasons discussed below, the Commission should grant rehearing of the December 19 Order and direct PJM to exclude self-supply resources owned by cooperatives from the scope of the “out of-market support” subject to review and mitigation under the expanded MOPR. If new self-supply resources owned by cooperatives are included in the scope of the expanded MOPR, however, the Commission should direct PJM to include PJM’s proposal in this proceeding for a categorical Self-

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<sup>47</sup> Order at PP 12, 202-203.



Supply Exemption from the MOPR for new and existing capacity resources of Public Power Entities subject to reasonable net-short and net-long thresholds.<sup>48</sup>

**A. Payments Associated with Self-Supply Resources Owned by Electric Cooperatives Acting Under Long-Standing Business Models Should be Excluded from State Subsidies Subjecting Such Resources to the Expanded MOPR.**

NRECA and EKPC’s submissions in the paper hearing in these proceedings focus on the need to protect and encourage the self-supply of capacity by electric cooperatives and other LSEs in PJM acting under their long-standing business models. NRECA and EKPC submit that instead of expanding the MOPR and transforming it into a blunt-force instrument to mitigate supposed price suppression resulting from state energy policies, the Commission would be better served to begin a transition of RPM to a voluntary, residual capacity market, used by PJM as a last resort after LSEs have had an opportunity to self-supply their capacity obligations by generation ownership and long-term contracts—as was initially envisioned and approved by the Commission.<sup>49</sup> That should remain the Commission’s long-run objective.

In the near term, however, if the Commission instead proceeds down the path of an expanded MOPR as directed in the December 19 Order, NRECA and EKPC request that the

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<sup>48</sup> PJM proposed a MOPR which would apply to new and existing resources of all fuel and technology types that are material resources receiving a Material Subsidy, but stated that “a resource owned by a vertically integrated utility subject to traditional bundled rate regulation or a resource owned by a public power entity, in both cases developed to meet the self-supply needs of the integrated utility or public power system, will not be considered material resources receiving a Material Subsidy, provided the resource owners meet a stated net long/net short test where applicable.” PJM Initial Submission submitted in these proceedings on October 2, 2018, at 12. “Public Power Entities” would include cooperatives and municipal utilities. *Id.* at 32.

<sup>49</sup> Initial Submission of NRECA at 1-2, 14.

Commission grant rehearing of the Order with the objective of avoiding serious unintended consequences that will injure wholesale competition by self-supply resources owned by electric cooperatives and other LSEs operating under long-standing business models. Contrary to the arguments made by some generator parties and seemingly adopted in the December 19 Order, an expanded MOPR should not be applied so broadly that it treats capacity self-supply by LSEs acting under long-standing business models as inherently suspect, subsidized, and the enemy of competition.

NRECA's October 2, 2018, initial paper hearing submission included the Declaration of Marc D. Montalvo, President of Daymark Energy Advisors and an expert in wholesale market design.<sup>50</sup> Mr. Montalvo explains that there is no basis in this proceeding, which was initiated by concerns over the impact of state initiatives on RPM capacity prices, to attack the electric cooperative self-supply business model and undermine its clear benefits for cooperative member-consumers. He concludes that "self-supplied resources used to meet the loads of Public Power utilities should not be subject to mitigation by the proposed expanded MOPR and should be exempted from the MOPR."<sup>51</sup> In addition, he concludes that "any policy the Commission adopts

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<sup>50</sup> Mr. Montalvo's Declaration was developed on behalf of NRECA and the American Public Power Association ("APPA") and submitted by each association with its respective initial submission. Mr. Montalvo worked for ten years at ISO New England as Director of Enterprise Risk Management, Director of Market Analysis and Investigation of the Internal Market Monitor, and Director of Market Development. Montalvo Declaration at P 2.

<sup>51</sup> Montalvo Declaration at P 4. Mr. Montalvo follows the convention of the Commission and PJM in using the term "Public Power" to refer to both municipal utilities and electric cooperatives. *Id.* at P 3.

to address the impact of state subsidies on its jurisdictional markets should not impede the ability of Public Power utilities to self-supply resources to meet their loads consistent with the Commission's broader open-access transmission and competitive wholesale market policies."<sup>52</sup>

Mr. Montalvo bases these conclusions on three basic arguments:

- First, the self-supply resource investments of Public Power utilities do not receive the state-sponsored out-of-market payments that the Commission seeks to address with the expanded MOPR.<sup>53</sup>
- Second, the self-supply resource investment decisions of Public Power utilities "are consistent with the behaviors one would expect of participants in a competitive market."<sup>54</sup>
- Third, applying the proposed expanded MOPR to the self-supplied resources of Public Power utilities "would improperly interfere with the public benefits of this long-standing business model."<sup>55</sup>

As to the first point, Mr. Montalvo states that the Commission should use "the lightest touch practicable" in applying an expanded MOPR to remedy the market problems it has identified.<sup>56</sup> In this instance, Mr. Montalvo concludes that the expanded MOPR should not be applied to public power self-supplied resources because self-supply by public power utilities is "plainly distinguishable" from the out-of-market payments made or directed by states which the Commission determined in the June 2018 Order render the MOPR unjust and unreasonable.<sup>57</sup>

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<sup>52</sup> Montalvo Declaration at P 4.

<sup>53</sup> *Id.* at PP 6-7, 20-24.

<sup>54</sup> *Id.* at PP 8-9, 25-45.

<sup>55</sup> *Id.* at PP 11-13, 46-49.

<sup>56</sup> *Id.* at P 22.

<sup>57</sup> *Id.* at P 24.

As Mr. Montalvo explains, public power LSEs employ long-term planning to make resource investment decisions based on their long-term obligation to serve load, not the short-term capacity market price.<sup>58</sup> Moreover, public power LSEs like electric cooperatives derive benefits from assembling a portfolio of generation resources well beyond those available from the RPM capacity market – such as reliability, hedges against energy costs, and other non-price values—all of which is consistent with a well-functioning market.<sup>59</sup> The decision to invest in a resource, whether through ownership of the resource or through a bilateral contract, as part of an LSE’s portfolio cannot be judged on the basis of RPM capacity prices alone.<sup>60</sup> Accordingly, payments by load to LSEs (such as cooperative end-use member-consumers payments for retail electric service from their distribution cooperative, or a distribution cooperative’s payments for wholesale electric service from a G&T cooperative) to recover the costs of resources procured outside the RPM construct should not be deemed out-of-market payments or a State Subsidy triggering review and mitigation under the expanded MOPR. These ordinary payments for retail or wholesale electric service are not made or directed by states—much less directed at or tethered to particular resources—in contrast to the state energy policies producing the subsidies that are the focus of the Commission’s December 19 Order.

Accordingly, the Commission should not deem all revenues received outside of the RPM capacity construct to be “out-of-market” revenues that threaten the integrity and effectiveness of the capacity market and, therefore, must be subject to review and mitigation. To the contrary, such

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<sup>58</sup> *Id.* at PP 14-19.

<sup>59</sup> *Id.* at PP 25-37.

<sup>60</sup> *Id.* at PP 38-44.

legitimate investments in resources and revenues outside of the RPM capacity construct should be expected to result in less procurement through the administrative capacity construct which will, in turn, result in decreased prices in the RPM auctions. For-profit generators should not be shielded from this true reflection of the relationship between supply and demand, at the expense of consumers. There is nothing magic about revenues received from the centralized capacity construct which makes them more legitimate than revenues received through bilateral contracts for resources procured outside of those constructs.<sup>61</sup>

Mr. Montalvo also explains that public power LSE resource self-supply decisions are fully consistent with a well-functioning power market:

Public Power utilities make decisions about whether to build capacity, enter into bilateral contracts, or purchase requirements through the PJM capacity market based on a set of investment objectives and expectations regarding future market conditions. The customer-owners of Public Power utilities bear any gain or loss associated with those decisions. The Public Power not-for-profit utility business model—i.e., ownership structure, tax treatment, and resource selection process—is consistent with and benefits from the competitive market framework. A Public Power utility seeks to add the lowest cost resources to its portfolio that meet its customers' needs and the utility's goals, and relies on competition (competitive solicitations, fuel markets, and the FERC-jurisdictional power markets) to achieve that objective.<sup>62</sup>

As he further explains, the implicit assumption that “the integrity of competition in the PJM capacity market requires the application of the MOPR to Public Power self-supply resources”

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<sup>61</sup> See Post-Technical Conference Comments of NRECA, Docket No. AD13-7-000, at 42 (filed Jan. 8, 2014).

<sup>62</sup> Montalvo Declaration at P 25.

rests on “the mistaken premise that all resource entry and exit must be coordinated solely by the RTO administered market to be deemed economic.”<sup>63</sup> In fact, the prices yielded by PJM’s RPM capacity market, with its single, standardized capacity product, “do not fully reflect the complete set of [market] participant preferences.”<sup>64</sup> Because market participants incorporate other criteria besides RPM prices into their resource decision-making, “it is not the case that only supply that enters and exits the marketplace subject to the standardized terms and conditions is deemed economic.”<sup>65</sup> “The RPM structure, with its reliance on a single standardized contract, does not allow participants to fully reveal their preferences,” and thus “is incapable of signaling for the types of resources that optimally satisfy **all** buyers’ preferences, particularly the desire for diversity, environmental and health benefits, flexibility, and security at an aggregate or economy-wide level.”<sup>66</sup>

Accordingly, Mr. Montalvo shows that public power utilities such as electric cooperatives should be allowed to continue making economic investments decisions on behalf of their customers and should not be subject to the expanded MOPR, which would rob customers of the benefits of the long-standing public power business model:

Public Power utilities conduct detailed planning and market analysis to select self- supply investments that best meet a broad set of performance criteria while conferring the greatest portfolio benefit (cost-risk tradeoff). That the economics of investment opportunities are properly evaluated in the context of the portfolio in which they would participate given multiple selection criteria (many of which are not directly valued in the RTO-administered market) is consistent with

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<sup>63</sup> *Id.* at P 26.

<sup>64</sup> *Id.* at P 33.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (emphasis original).

their utility business model, not anti-competitive, and should not be subject to mitigation.

In the case of Public Power, applying the MOPR to self-supply investments could have the effect of undoing the benefits (e.g., access to low-cost debt) of the not-for-profit business model that the organizational structure was intended to confer, and which are enshrined in federal and state statutes. Moreover, application of the MOPR to Public Power investment choices could undermine the portfolio benefits built into an existing and future resource mix and could expose Public Power utility customers to costs that their prudent portfolio diversification would have allowed them to avoid.<sup>67</sup>

Based on this evidence submitted by NRECA in the paper hearing, the Commission should grant rehearing of the December 19 Order and direct PJM to exclude self-supply resources owned by cooperatives from the scope of the “out of-market support” subject to review and mitigation under the expanded MOPR.

In any event, even if the Commission does not exclude new self-supply resources owned by cooperatives are from the scope of the expanded MOPR, for the same reasons articulated by Mr. Montalvo, the Commission should grant rehearing of the December 19 Order and direct PJM to include PJM’s proposal made in this proceeding for a categorical Self-Supply Exemption from the MOPR for capacity resources of Public Power Entities subject to reasonable net-short and net-long thresholds for new resource

**B. The Commission Erred in Departing From Its Precedent Regarding the Purpose of RPM and the MOPR With Respect to Self-Supply by Load-serving Entities Operating Under Long-standing Business Models.**

The Commission’s unprecedented and unreasonable decision in this proceeding to impose the expanded MOPR on all new self-supply resources owned by electric cooperatives abandons

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<sup>67</sup> *Id.* at PP 47-48.

fundamental principles which were the basis of PJM’s capacity construct (RPM) and the MOPR, as well as Commission policy. The Commission has failed to acknowledge, much less explain and justify, its departure from its own precedent.<sup>68</sup> Therefore, the Commission’s action is arbitrary and capricious.<sup>69</sup>

The first critical, foundational principle which has been inexplicably abandoned by the December 19 Order is that PJM’s administrative capacity construct would be residual in nature. The Commission’s initial approval of PJM’s RPM made clear that it would be limited in use, only “. . .after LSEs have had an opportunity to procure capacity on their own, it is reasonable for PJM to procure capacity in an open auction at a time when further delay in procurement could jeopardize reliability. *This however should be a last resort.*”<sup>70</sup> The residual nature of PJM’s reliability construct is explicit in the PJM Tariff, which states in part as follows:

. . . the Reliability Pricing Model provides: (a) *support for LSEs in satisfying Daily Unforced Capacity Obligations for future Delivery Years through Self Supply of Capacity Resources*; (b) a competitive auction mechanism to secure the forward commitment of additional Capacity Resources and Qualifying Transmission Upgrades *as necessary to satisfy the portion of LSEs’ Unforced Capacity Obligations not satisfied through Self-Supply*, in order to ensure the reliability of the PJM Region for future Delivery Years; (c) long-term pricing signals for the development of Capacity Resources, including demand resources and planned generation resources, to ensure the reliability of the PJM Region;

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<sup>68</sup> See, e.g., *ABM Onsite Servs.-W., Inc. v. Nat’l Labor Relations Bd.*, 849 F.3d 1137, 1142 (D.C. Cir. 2017) (“[A]n agency’s unexplained departure from precedent is arbitrary and capricious.”); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) (“[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.”).

<sup>69</sup> *Id.*

<sup>70</sup> NRECA Initial Submission at 6, citing *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at PP 55, 71 (2006) (emphasis added).



(d) recognition for the locational benefits of Capacity Resources; (e) deficiency charges to ensure progress toward, and fulfillment of, forward commitments by demand and generation resources to satisfy capacity requirements; (f) measures to identify and mitigate capacity market structure deficiencies; and (g) a Reliability Backstop mechanism to ensure that sufficient generation, transmission and demand response solutions will be available to preserve system reliability.<sup>71</sup>

By subjecting all new resources owned by electric cooperatives to the MOPR unless otherwise exempted, the Commission is abandoning the residual nature of RPM and thereby forcing PJM to violate the above-quoted Tariff provision. That is because as opposed to allowing self-supply to be used to meet an LSE's capacity obligation first, then turning to the PJM capacity construct to satisfy the remainder of the obligation not covered by self-supply resources, all resources offered into RPM – even those designated as self-supply to meet the LSE's capacity obligation – will be subject to the MOPR, which creates a precondition to self-supply being used to satisfy the LSE's capacity obligation and a risk of not clearing the auction. By requiring all self-supply resources to be subject to the MOPR (except for the limited exemption in the December 19 Order), the Commission has violated the foundational principle that RPM is to be used to satisfy an LSE's supply obligation *only after* the LSE has done so on its own, and even then only as a “last resort.”

Second, the Commission's determination that self-supply by electric cooperatives must be subject to the MOPR is also an unjustified departure from the Commission's precedent that “the

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<sup>71</sup> PJM Open Access Transmission Tariff, Attachment DD, Section 1, available at <https://www.pjm.com/directory/merged-tariffs/oatt.pdf>.

purpose and function of the MOPR is not to unreasonably impede the efforts of resources choosing to procure or build capacity under longstanding business models.”<sup>72</sup> The long-standing electric cooperative business model is to invest in resources to meet its load serving obligations in a cost-effective and reliable manner.<sup>73</sup> Among other things, the MOPR subjects electric cooperatives to the risk of customers having to pay twice in order to satisfy a single capacity obligation; once for the initial investment outside of the PJM capacity construct, and then a second time to procure capacity through RPM when the investment resource does not clear the auction due to application of the MOPR. For electric cooperatives, these costs are borne by the members they serve; there are no shareholders to absorb the loss. This prospect alone will have a chilling effect on investment in new resources to serve electric cooperative load. Therefore, application of the MOPR to new electric cooperative self-supply resources violates the Commission’s statement that purpose of the

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<sup>72</sup> *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 208; *see also* December 19 Order, Commissioner Glick’s dissent at P 39.

<sup>73</sup> *See, e.g.*, Initial Comments of East Kentucky Power Cooperative (“EKPC”), submitted in this proceeding on October 2, 2018, at 7 (In support of an exemption from the MOPR for self-supply by municipal and cooperative utility LSEs, EKPC explains that these utilities’ “business strategy is to procure reliable capacity at the lowest reasonable cost, not attempt to drive out competitors from the market through price-suppression bidding.” *See also* ODEC Initial Submission at 11 (“ODEC invests in resources in order to meet its obligations in a manner that is cost-effective and reliable”); Comments of Allegheny Electric Cooperative, Inc. at 8 (explaining that resource investment decisions are driven by “long-term commitment to serve . . . members’ electricity needs in a reliable and cost-effective manner”); Comments of Northern Virginia Electric Cooperative, Inc. at 7 (explaining that cooperatives “make investment decisions based on their long-term obligation to serve load at the lowest cost reasonably possible”).

MOPR is “not to unreasonably impede the efforts of resources choosing to procure or build capacity under longstanding business models.”<sup>74</sup>

These concerns and the potential for the MOPR to threaten long-term investment in resources by electric cooperatives are not merely theoretical. In its Initial Submission in this proceeding, NRECA member ODEC provided information about its recent resource addition, the Wildcat Point generating facility.<sup>75</sup> The facility is an approximately 940 MW combined-cycle natural gas generating facility located in Cecil County, Maryland. ODEC explained that “[a]s a new resource, Wildcat Point would have been subject to the MOPR when it was offered into the 2014 BRA, for Delivery Year 2017/2018. However, it obtained a Self-Supply Exemption.”<sup>76</sup> ODEC further explained that “if not for the Self-Supply Exemption, ODEC’s Wildcat Point unit would not have cleared the auction . . .” and “[t]his would mean that ODEC’s load, for whom ODEC invested in this new resource, would be subject to double payment for capacity . . .”<sup>77</sup> With all new resources subject to the MOPR unless they otherwise qualify for an exemption, electric cooperatives like ODEC will no longer be able to make their resource investment decisions as they have under their long-standing business models, on the basis of long-term load obligations as opposed to the short-term, 3-year forward capacity commitment. Instead, the short-term, 3-year forward capacity commitment, and whether an investment will be deemed “economic” on that basis, must be factored into investment decisions for electric cooperatives. Faced with the risk of

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<sup>74</sup> 137 FERC ¶ 61,145, at P 209.

<sup>75</sup> ODEC Initial Submission at 20.

<sup>76</sup> *Id.* at 19.

<sup>77</sup> *Id.* at 20.

double-payment for capacity if resources do not clear the auctions due to being subject to the MOPR, electric cooperative LSEs will be discouraged from investing in resources which would be economic to meet load serving obligations over the long-term life of the resource.

The December 19 Order refuses any accommodation for new self-supply resources owned by electric cooperatives simply because they are “formed pursuant to state law” (as such would be included in the definition of State Subsidy). The Commission’s reasoning is reduced to two paragraphs of the December 19 Order.<sup>78</sup> The Commission does not at all in the December 19 Order address arguments, presented in pleadings in this proceeding, that a MOPR applied to self-supply by electric cooperatives acting under long-standing business models would violate these foundational principles of RPM and MOPR, and the Commission’s policy and obligation to support long-term power supply investments by LSEs. The Commission must address arguments and evidence put forth, or it fails to engage in reasoned-decision making.<sup>79</sup> Further, the Commission must not depart from its precedent without adequate explanation.<sup>80</sup> Having failed to make any effort to reconcile its MOPR decision in the December 19 Order with the foundational

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<sup>78</sup> December 19 Order at PP 203-304.

<sup>79</sup> *Motor Vehicle Manufacturer’s Ass’n. v State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1989) (stating that an agency acts arbitrarily and capriciously when it fails to “consider an important aspect of the problem”); *see also KeySpan-Ravenswood, LLC v. FERC*, 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).

<sup>80</sup> *See, e.g., ABM Onsite Servs.-W., Inc. v. Nat’l Labor Relations Bd.*, 849 F.3d 1137, 1142 (D.C. Cir. 2017) (“[A]n agency’s unexplained departure from precedent is arbitrary and capricious.”); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) (“[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.”).

principles that (1) RPM is a residual construct to be used to meet LSE needs only after taking into account self-supply and as a last resort and (2) “the purpose and function of the MOPR is not to unreasonably impede the efforts of resources choosing to procure or build capacity under longstanding business models,”<sup>81</sup> as well as its precedent favoring investments in long-term resources, the Commission has failed to engage in reasoned decision making.

**C. The December 19 Order Is an Unexplained Departure from Commission Precedent Encouraging and Facilitating Long-Term Power-Supply Arrangements in RTO Regions.**

The Commission’s directive to PJM to apply the expanded MOPR to all new self-supply resources of electric cooperatives and other LSEs operating under long-standing business models represents even further unexplained departures from Commission policy. For many years, the Commission has had regulations that encourage and facilitate long-term power-supply agreements in RTO regions. In the December 19 Order, the Commission makes and about-face and subjects these long-term power-supply arrangements to review and potential mitigation as the product of anticompetitive State Subsidies.

For example, Congress amended the FPA in 2005 by adding a new Section 217, 16 U.S.C. § 824q, which requires in relevant part that “[t]he Commission shall exercise the authority of the Commission under this chapter [of the FPA] in a manner that ... enables load-serving entities to

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<sup>81</sup> *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 208; *see also* December 19 Order, Commissioner Glick’s dissent at P 39.

secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.” 16 U.S.C. § 824q(b)(4).<sup>82</sup> To implement this directive, FERC adopted regulations requiring RTOs with organized electricity markets, like PJM, to make available long-term firm (i.e., generally uninterruptible) transmission rights. 18 C.F.R. § 42.1 (2013).<sup>83</sup> These regulations require that RTOs make available firm transmission rights with terms long enough “to meet the needs of load serving entities to hedge long-term power supply arrangements made or planned to satisfy a service obligation,” and that RTOs “must be able to offer firm coverage for at least a 10 year period.” 18 C.F.R. § 42.1(d)(4) (2013). The December 19 Order, however, inexplicably deems these long-term power-supply arrangements of LSEs in PJM to be inherently suspect and anticompetitive. The order is thus contrary to Congress’ directive and undermines the Commission’s own implementing regulations.

Similarly, in 2008, FERC adopted regulations requiring RTOs to dedicate a portion of their web sites for market participants to post offers to buy or sell power on a long-term basis (one year or more), with the goal of promoting greater use of long-term contracts by improving market

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<sup>82</sup> Load-serving entities are defined as utilities, including public power systems and electric cooperatives, obligated by state law or contract to provide electric service to end-users. 16 U.S.C. § 824q(a). For background on this statute, see Jay Morrison, *EPACT '05 Implementation: Is FERC in Full Compliance?* 28 Energy L.J. 631 (2007).

<sup>83</sup> See *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, 71 Fed. Reg. 43,564 (Aug. 1, 2006), *order on reh'g*, Order No. 681-A, 71 Fed. Reg. 68,440 (Nov. 16, 2006), *order on reh'g*, Order No. 681-B, 74 Fed. Reg. 13,103 (Mar. 26, 2009).

transparency. 18 C.F.R. § 35.28(g)(2) (2013).<sup>84</sup> The Commission explained the importance of long-term contracts in these terms:

Long-term power contracts are an important element of a functioning electric power market. Forward power contracting allows buyers and sellers to hedge against the risk that prices may fluctuate in the future. Both buyers and sellers should be able to create portfolios of short-, intermediate-, and long-term power supplies to manage risk and meet customer demand. Long-term contracts can also improve price stability, mitigate the risk of market power abuse, and provide a platform for investment in new generation and transmission.<sup>[85]</sup>

It would be exceedingly incongruous action for the Commission to decide that the RPM capacity construct is now incompatible with long-term power-supply arrangements and long-term power contracts by LSEs in PJM, warranting review and mitigation of LSE self-supply resources under the expanded MOPR, in an effort to preclude generators and load-serving entities from entering into long-term capacity arrangements to hedge against the price volatility of PJM's annual capacity auctions. Yet that is the implication of applying the December 19 Order's expanded MOPR to new self-supply resources of LSEs acting under long-standing business models that the Commission heretofore has encouraged. The December 19 Order represents an unexplained departure from these Commission policies.

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<sup>84</sup> See *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100, PP 4, 277-309 (Oct. 28, 2008), *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37,776 (July 29, 2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

<sup>85</sup> *Id.*, P 278.

**D. The December 19 Order Is an Unexplained Departure from Commission Precedent Holding that Electric Cooperatives Cannot Subsidize Their Wholesale Market Operations Through Charges on Their Members.**

As noted above, the December 19 Order defines “State Subsidy” to include a “direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is (1) a result of any action, mandated process, or sponsored process of ... an electric cooperative formed pursuant to state law ...”<sup>86</sup> The December 19 Order does not explain how an action or process of an electric cooperative may result in a “direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit” to the cooperative that provides an out-of-market source of revenue to support the entry or continued operation of a cooperative’s self-supply resource that, standing alone, might not be economic in the RPM capacity auction.<sup>87</sup>

However, to the extent the December 19 Order is based on a finding that an electric cooperative can obtain such out-of-market revenue from a “direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit” *paid to the cooperative from the cooperative’s members*, the December 19 Order squarely contradicts established Commission policy—and common sense.

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<sup>86</sup> December 19 Order at P 67.

<sup>87</sup> *See id.* P 68.



As Mr. Montalvo’s declaration notes, an electric cooperative is owned by its member-consumers.<sup>88</sup> He concludes that electric cooperative self-supply resource investments do not receive state-sponsored payments warranting mitigation by an expanded MOPR.<sup>89</sup> The Commission itself has recognized the fact that a cooperative cannot obtain subsidies from its member-consumers. Thus, the Commission treats Commission-jurisdictional cooperatives, i.e., cooperatives that are public utilities not exempted by FPA Section 201(f), as “not subject to the Commission’s affiliate-abuse restrictions, based on a finding that transactions of an electric cooperative with its members do not present dangers of affiliate abuse through self-dealing.”<sup>90</sup> The Commission reached this conclusion because, “as the Commission has previously stated in many market-based rate orders over the years, the cooperative’s members are both the ratepayers and shareholders.”<sup>91</sup>

The December 19 Order appears to ignore this established Commission wholesale-rate precedent in its inexplicable conclusion that a cooperative can obtain a “direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit” from its

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<sup>88</sup> Montalvo Declaration at P 16.

<sup>89</sup> *Id.* at PP 6-7, 20-24.

<sup>90</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity & Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904, 39,966, FERC Stats. & Regs. ¶ 31,252 at P 526 (2007).

<sup>91</sup> *Id.* (citing cases). *See also Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 73 Fed. Reg. 11,013, 11,021 (Feb. 29, 2018), FERC Stats. & Regs. ¶ 31,264, at P 49 (same).

member-consumers that enables to the cooperative to subsidize wholesale market participation by a self-supply resource owned by the cooperative.

**E. The December 19 Order is Arbitrary and Capricious for Expanding the Scope of this Proceeding to Include Electric Cooperative Self-Supply as a State Subsidy Subject to the MOPR.**

The December 19 Order is arbitrary and capricious because there is no “rational connection between the facts found”—burgeoning State Subsidies—“and the choice made”—to subject the long-standing electric cooperative business model to the expanded MOPR.<sup>92</sup>

In the June 2018 Order, the Commission determined that PJM’s Tariff is unjust and unreasonable. The Commission’s determination was based on information provided in a FPA Section 205 filing by PJM and in the Docket No. EL16-49 complaint proceeding. Both of those proceedings focused on *state* subsidies, not all non-RPM revenues.<sup>93</sup> The following passages make this clear:

Acting on the records of the Calpine Complaint proceeding and the PJM section 205 filing, we find that PJM’s existing Tariff is unjust and unreasonable. The records in both cases demonstrate that *states* have provided or required meaningful out-of-market support to resources in the current PJM capacity market, and that such support is projected to increase substantially in the future. These subsidies

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<sup>92</sup> *Motor Vehicle Manufacturer’s Ass’n. v State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1989)(stating that an agency acts arbitrarily and capriciously when it fails to “consider an important aspect of the problem”); *see also KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d at 1056 (explaining that “unless an agency answers that on their face appear legitimate, its decisions can hardly be said to be reasoned”)(internal modifications, quotes and citation omitted).

<sup>93</sup> *See* PJM’s April 9, 2018 filing in Docket No. ER18-1314 at 1 (PJM explained that it submitted its filing “to address supply-side state subsidies and their impact on the determination of just and reasonable prices in the PJM capacity market.”).

allow resources to suppress capacity market clearing prices, rendering the rate unjust and unreasonable.<sup>94</sup>

Out-of-market payments include, for example, the zero-emissions credits (ZEC) programs and Renewable Portfolio Standards (RPS) programs on which we base our determination in this order that PJM’s Open Access Transmission Tariff . . . is unjust, unreasonable, and unduly discriminatory or preferential . . . [w]e emphasize that we cannot, and need not, address at this time all of the possible ways a *state* might provide out-of-market support for its preferred generation resources. *We need only address the forms of state support that we find, in this proceeding, render the current Tariff unjust and unreasonable – i.e., out-of-market revenue that a state either provides, or requires to be provided, to a supplier that participates in the PJM wholesale capacity market.*<sup>95</sup>

The Commission proposed a replacement rate in the June 2018 Order to address the determination that “*state subsidized resources – not just entities exercising buyer-side market power – can cause significant price suppression.*”<sup>96</sup>

The December 19 Order, in turn, purported to be limited in scope to *state* subsidies in support of preferred generation resources. According to the December 19 Order, the State Subsidy definition “focuses on those forms of ‘out-of-market payments *provided or required* by certain states’ that . . . support[] the entry or continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market.”<sup>97</sup> The Commission stated its intent as follows:

This [State Subsidy] definition is not intended to cover every form of state financial assistance that might indirectly affect FERC-jurisdictional rates or transactions; nor is it intended to address other commercial externalities or opportunities that might affect the economics of a particular resource. Rather, *our concern is with those forms of State Subsidies that are not federally preempted, but nonetheless are most*

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<sup>94</sup> June 2018 Order at P 149 (citations omitted, emphasis added).

<sup>95</sup> *Id.* at P 1, n.1 (emphasis added).

<sup>96</sup> *Id.* at P 158.

<sup>97</sup> December 19 Order at P 68.

*nearly 'directed at' or tethered to the new entry or continued operation of generating capacity in the federally-regulated multi-state wholesale capacity market administered by PJM.*

December 19 Order at P 68 (emphasis added, citation omitted). Despite its focus only on “those forms of ‘out-of-market payments *provided or required* by certain states’ that . . . support[] the entry or continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market”<sup>98</sup>, the Commission summarily and simply included in the definition of State Subsidy, financial benefit resulting from “any action, mandated process, or sponsored process of . . . an electric cooperative formed pursuant to state law . . .”<sup>99</sup> The December 19 Order provides no explanation at all to connect its focus on “‘out-of-market payments *provided or required by certain states*’ that . . . support[] the entry or continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market”<sup>100</sup> and “an electric cooperative formed pursuant to state law,” let alone any rational connection between the facts underlying the state-based focus of the State Subsidy definition and the choice made to include an electric cooperative formed pursuant to state law in that definition.<sup>101</sup>

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<sup>98</sup> December 19 Order at P 68.

<sup>99</sup> *Id.* at P 67.

<sup>100</sup> December 19 Order at P 68.

<sup>101</sup> Indeed, notwithstanding the significance of the Commission’s decision to subject self-supply by electric cooperatives to the MOPR, the December 19 Order only mentions “electric cooperatives” twice, both times as part of the definition of State Subsidy. December 19 Order at PP 9, 67. This cannot satisfy the requirement for the Commission to demonstrate a rational connection between the facts found and the decision made. *See, e.g., Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 499, 503 (2008);

The inclusion of an “electric cooperative formed pursuant to state law” in the definition of State Subsidy subjects payments received by electric cooperatives formed pursuant to state law to the MOPR, regardless whether the payment is “‘directed at’ or tethered to the new entry or continued operation of generating capacity”<sup>102</sup> in PJM’s capacity market. The Commission offers no explanation for this inclusion of electric cooperatives formed pursuant to state law in the definition of State Subsidy. There is no reasonable basis for the Commission to subject sell offers from resources owned by electric cooperatives formed under state law to the MOPR. For example, the definition of State Subsidy appears to include payments received by G&T electric cooperatives under long-term supply arrangements with their member distribution cooperatives. As discussed in Section IV.A.1 above, these contracts are essential for the G&T to finance the building or acquisition of new self-supply resources and are the backbone of the electric cooperative power supply structure. However, such long-term agreements are not “provided or required by certain states,” do not necessarily “support the entry or continued operation of preferred generation resources . . .” and are not ‘directed at’ or tethered to the new entry or continued operation of generating capacity” in PJM’s capacity market. The fact that an electric cooperative may be “formed pursuant to state law” is immaterial for this purpose. In any event, the state regulatory

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*Emera Maine v. FERC*, 854 F.3d 9, 27-30 (D.C. Cir. 2017); *Farmers Union Cent. Exchange v. FERC*, 734 F.2d 1486, 1518 (D.C. Cir. 1984).

<sup>102</sup> December 19 Order at PP 67-68.

treatment for electric cooperatives has not changed since the time that the Commission declared its intent that the MOPR not “unreasonably impede the efforts of resources choosing to procure or build capacity under long-standing business models”<sup>103</sup> and accepted a self-supply exemption from the MOPR because “as a general matter, providing exemptions for resources properly designated as self-supply when they meet suitable net-short and net-long thresholds is reasonable.”<sup>104</sup>

For similar reasons, treating electric cooperatives’ bilateral agreements as a State Subsidy has no rational connection to the record of this proceeding. Instead, the December 19 Order dictates that electric cooperatives’ bilateral agreements must be excluded from the definition of a State Subsidy subject to the MOPR. In the December 19 Order, the Commission observed 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.”<sup>105</sup> The Commission apparently agreed and specifically found that “the record in the instant proceeding does not demonstrate a need to subject voluntary, arm’s length bilateral transactions to the MOPR at this time.”<sup>106</sup> As discussed above in the request for clarification, Section IV.A.1 and IV.A.2, G&T electric cooperatives’ agreements with their member distribution cooperatives, most of which predate PJM’s RPM and MOPR, are private, voluntary, arms’ length transactions. As also discussed above, electric cooperatives, like other LSEs, rely on both owned and purchased resources to meet their obligations. Electric cooperatives’ voluntary, arms’ length bilateral

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<sup>103</sup> 137 FERC ¶ 61,145 at P 208.

<sup>104</sup> *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 108 (2013).

<sup>105</sup> December 19 Order at P 65 (citations omitted).

<sup>106</sup> *Id.* at P 70.

transactions, including capacity contracts outside the PJM capacity construct, should not be subject to the MOPR because there is no rational connection between such agreements, for which the Commission said the record does not support for application of the MOPR, and the Commission's goal to "address resources receiving State Subsidies to keep existing uneconomic resources in operation, or to support the uneconomic entry of new resources."<sup>107</sup>

**F. The Commission Erred by Subjecting Self-Supply by Electric Cooperatives Operating under Long-standing Business Models to the MOPR.**

**1. The December 19 Order's Rejection of a Self-Supply Exemption from the MOPR is an Unexplained Departure from Precedent.**

The history of the MOPR prior to the instant proceeding with regard to self-supply is detailed in NRECA's Initial Submission and summarized in Section I, above.<sup>108</sup> The Commission is obligated to either adhere to its precedent that the intent of the MOPR is not to unreasonably impede efforts of self-supply entities under long-standing business models and approving the Self-Supply Exemption which attempted to do so, or if not, adequately explain its departure from precedent.<sup>109</sup> The December 19 Order fails on both counts. Therefore, the Commission should grant rehearing and accept the Self-Supply Exemption as proposed by PJM in its Initial Submission filed in this proceeding on October 2, 2018.

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<sup>107</sup> December 19 Order at P 70.

<sup>108</sup> NRECA's Initial Submission at 5-11.

<sup>109</sup> See *United Mun. Distributors Group v. FERC*, 732 F.2d 202, 210 (D.C. Cir. 1984) ("It is . . . elementary that an agency must conform to its prior practice and decisions or explain the reason for its departure from such precedent").

On April 9, 2018, PJM proposed “to address supply-side state subsidies and their impact on the determination of just and reasonable prices in the PJM capacity market.”<sup>110</sup> Consistent with the precedent for a MOPR which does not unreasonably interfere with self-supplying entities acting under long-standing business models, PJM proposed a categorical Self-Supply Exemption with a net-short and net-long requirement, and a specific public entity exemption which would include electric cooperatives. In the June 2018 Order, the Commission proposed a new replacement rate and established a paper hearing to develop a record.<sup>111</sup> As discussed in Section IV.A.1 and V.B above, the findings in the June 2018 Order were limited to out-of-market support provided by *states*, not all non-RPM revenues.

In its Initial Submission in response to the December 19 Order, PJM proposed that consistent with the Commission’s precedent, it would not give a blanket self-supply exemption. Instead, PJM proposed to establish “net short and net long thresholds to ensure that the seller is not presented with an ‘unacceptable opportunity’ to suppress clearing prices.”<sup>112</sup> The net-short and net-long thresholds would be the same as those previously approved by the Commission, which had since been reaffirmed by PJM and its stakeholders.<sup>113</sup>

The PJM proposal in this proceeding for a self-supply exemption with net-short and net-long thresholds was a reasonable compromise which electric cooperatives have previously supported and which the Commission has approved in substance. It connected the MOPR to the

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<sup>110</sup> PJM’s April 9, 2018 filing in this proceeding, at 1.

<sup>111</sup> June 2018 Order at PP 8, 149, 157.

<sup>112</sup> PJM’s Initial Submission at 33.

<sup>113</sup> *Id.*



specific purpose for which it was designed – to control monopsony power, and allowed for a MOPR which addressed concerns over state action to artificially suppress clearing prices, while abiding by the Commission’s intent that the MOPR not unreasonably impede actions by self-supplying entities acting under long-standing business models.

The December 19 Order did not adopt PJM’s proposal for a Self-Supply Exemption with net-short and net-long thresholds, which is what the Commission previously approved and which has yet to be rejected on the merits by the Commission or any court. Instead, in a terse determination of less than two paragraphs in length, the Commission apparently rejected any exemption for self-supply resources.<sup>114</sup> The determination is an unreasoned – and unreasonable – departure from Commission precedent.

The Commission’s determination against an exemption for self-supply from the MOPR is based on a few findings which are all incorrect and/or an inadequate explanation of the basis for the Commission’s departure from precedent. First, the December 19 Order states that “the self-supply exemption authorized in 2013 was a temporary reversal in Commission policy that the

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<sup>114</sup> Although the Commission does not specifically reject PJM’s proposal, it found that self-supply entities should not have a “blanket exemption” for any new State-Subsidized resources they intend to own going forward.” December 19 Order at P 203. PJM did not propose a “blanket exemption,” it proposed an exemption with net-short and net-long thresholds. *See* PJM’s Initial Submission at 33 (“Consistent with Commission precedent, PJM is proposing *not* to give a blanket exemption to self-supply entities, but is establishing a net short and net long thresholds to ensure that the seller is not presented with an ‘unacceptable opportunity’ to suppress clearing prices.”) Nevertheless, NRECA believes the intent of the December 19 Order is to exclude any going-forward MOPR exemption of self-supplying entities operating under long-standing business models.

Commission rejected in acting on the remand of *NRG* . . .”<sup>115</sup> That simply is not correct. The Commission’s precedent has been that RPM and the MOPR should accommodate and prioritize self-supply by LSEs acting under long-standing business models. As discussed above in the chronology of the MOPR, RPM was initially approved by the Commission as a residual mechanism whereby “after LSEs have had an opportunity to procure capacity on their own, it is reasonable for PJM to procure capacity in an open auction . . . this however should be a last resort.”<sup>116</sup> The MOPR first included language which guaranteed clearing for self-supply, then the Commission approved the self-supply exemption. Thus, the Commission’s precedent has been to provide for a MOPR which did not unreasonably impede the efforts of long-standing business models. The December 19 Order is a departure from Commission policy.

Second, the Commission’s representation that the self-supply exemption authorized in 2013 was “rejected in acting on the remand of *NRG*”<sup>117</sup> is misleading and does not justify the Commission’s departure from precedent. As discussed above, the self-supply exemption authorized in 2013 has not yet been addressed on the merits. On remand of *NRG*, the Commission found that PJM had not shown that the categorical exemptions, *standing alone*, are just and reasonable, “because there would be no means for nonexempted resources with lower costs than the MOPR offer floor to have a competitive bid considered in the auction.”<sup>118</sup> It did not determine that the self-supply exemption was unjust and unreasonable on the merits, or paired with a unit-

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<sup>115</sup> December 19 Order at P 203.

<sup>116</sup> 115 FERC ¶ 61,079 at PP 55, 71.

<sup>117</sup> December 19 Order at P 203.

<sup>118</sup> *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252, at P 41 (2017).

specific exemption. As discussed above, the U.S. Court of Appeals for the Third Circuit observed that “FERC eliminated guaranteed clearance for self-supply offers, fundamentally changing the MOPR’s treatment of self-supply, but barely acknowledging that it was making any change at all. One strains to accept such scant treatment as ‘reasoned analysis’ sufficient to satisfy the demands of the APA.”<sup>119</sup> However, the Court did not rule on this aspect of the Orders on review because the issue was rendered moot.

In the same passage of the December 19 Order, the Commission “agree[s] with intervenors that self-supply entities may have the ability to suppress prices going forward.”<sup>120</sup> The Commission cites to paragraphs 20 and 21 of the December 19 Order, presumably for support. However, paragraphs 20 and 21 of the December 19 Order do not address any ability of self-supply entities to suppress prices going forward. Paragraph 20 simply summarized MOPR as accepted by the Commission in the 2013 Order. Paragraph 21 of the December 19 Order provides a history of the Third Circuit appeal and FERC’s remand order, and explains that the current MOPR allows zero-priced offers from non-natural gas-fired resources.<sup>121</sup> The discussion of resource types does not at all address exemption based on the type of entity, i.e., self-supply by electric cooperatives acting under long-standing business models. There is no discussion of whether self-supply entities

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<sup>119</sup> *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, at 103-106.

<sup>120</sup> December 19 Order at P 203 (citations omitted).

<sup>121</sup> *Id.* at P 21.

have the ability to suppress prices going forward, nor is there any discussion to explain the Commission's departure from its precedent that self-supply entities lack incentive to do so.

Third, the Commission also inexplicably departed from precedent in determining that there is "no reason to treat new resources owned by self-supply entities differently from resources owned by other types of electric utilities."<sup>122</sup> The Commission has determined that self-supply by entities acting under long-standing business models, such as NRECA's cooperative utility members, should not be subject to the MOPR. This determination is consistent with the Commission's acknowledgement that "the purpose and function of the MOPR is not to unreasonably impede efforts of resources choosing to procure or build capacity under long-standing business models"<sup>123</sup> and in light of its determination that ". . . if a self-supply entity meets a sufficiently large proportion of its capacity needs through its own generation investment, it has little or no incentive to suppress capacity market prices."<sup>124</sup> The Commission's reliance on its previous statement that it "can no longer assume that there is any substantive difference among the types of resources participating in PJM's capacity market with the benefit of out-of-market support" is misplaced.<sup>125</sup> The citation to the June 2018 Order was a discussion of the *types* of resources subject to the MOPR, where FERC found that limiting the MOPR to new natural-gas fired resources is no longer just and reasonable. It was *not* a determination regarding whether self-supply by cooperative utilities or any other type of entity should be subject to the MOPR.

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<sup>122</sup> December 19 Order at P 203.

<sup>123</sup> See November 2011 Order at P 208.

<sup>124</sup> *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 108 (2013).

<sup>125</sup> December 19 Order at P 203, n. 430.

Finally, the Commission’s statement in the December 19 Order regarding the premise of a “blanket self-supply exemption” is inadequate to justify departure from its precedent. Here again, PJM specifically did not propose a “blanket exemption” for self-supply. Moreover, the Commission does not identify any change in circumstances which would explain its policy shift away from its precedent accepting an exemption from the MOPR for self-supply entities who meet the net-short and net-long criteria. As discussed below, the Commission’s references to a “record suggestion” regarding the level of new self-supply capacity and its determination that such resources “may” receive State Subsidies, are far from sufficient to justify such a drastic departure from precedent.

In short, the determination in the December 19 Order, rejecting any exemption for Self-Supply on a going-forward basis, is an unexplained departure from precedent. As the U.S. Court of Appeals for the Third Circuit observed, the Courts require more than a cursory explanation. Instead, ““an agency departing from its prior position must ‘suppl[y] a reasoned analysis . . . showing that prior policies and standards are being deliberately changed, not casually ignored”<sup>126</sup> and “if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”<sup>127</sup> The December 19 Order is arbitrary and capricious for failing to explain its departure from the Commission’s precedent recognizing that the MOPR is not to unreasonably impede actions by self-supplying entities acting under long-

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<sup>126</sup> *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 104, *Nat’l Cable & Telecomms. Ass’n v. FCC*, 567 F.3d 659, at 667.

<sup>127</sup> *Id.*, quoting *Greater Bos. Television*, 444 F.2d 841, at 852.

standing business models, and that such entities including electric cooperatives within net-long and net-short thresholds, do not have incentive or ability to artificially suppress clearing prices.

**2. The December 19 Order’s Rejection of PJM’s Self-Supply Exemption was not Based on Substantial Evidence.**

In the two-paragraph determination to reject any self-supply exemption, the Commission concluded that “self-supply entities should not have a blanket exemption for any new State-Subsidized Resources they intend to own going forward.”<sup>128</sup> The support put forth by the Commission is a misapplication in some respects, and simply too thin to constitute substantial evidence in others.

As discussed above, the Commission’s support for its agreement that “self-supply entities may have the ability to suppress prices going forward”<sup>129</sup> is a citation to paragraphs 20-21 of the December 19 Order. Those paragraphs simply summarize the 2013 categorical exemption from the MOPR for self-supply, and again discuss the fact that the current PJM MOPR would permit zero-priced offers by nuclear, coal, IGCC, wind, solar and hydroelectric resources. The discussion of resource types does not at all address exemption based on the type of entity, i.e., self-supply by electric cooperatives acting under long-standing business models.

The only other record evidence relied upon by the Commission is the “record suggest[ion] that new self-supply capacity is significant, representing 30 percent of new generation added to

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<sup>128</sup> December 19 Order at P 203.

<sup>129</sup> December 19 Order at P 203, n.429.

PJM in capacity auctions from 2010 to 2017.”<sup>130</sup> The “record suggestion” is a statement from PJM’s April 2018 proposal, where PJM estimated “*conservatively* 70% of this new entry came from merchants, with the remainder brought in by vertically regulated or public power utilities.”<sup>131</sup> This conservative estimate is hardly sufficient record evidence to base the Commission’s finding. Moreover, there is no indication regarding the level of this “self-supply” that is represented by electric cooperative utilities operating under long-standing business models. Notably, the Montalvo Declaration included in NRECA’s Initial Submission stated that of the 1,031 PJM members, there are only 43 public power utilities, made up of municipal utilities and agencies, distribution cooperatives and G&T cooperatives, whose electricity sales account for about 5% of the total within PJM.<sup>132</sup> This record evidence, ignored by the Commission, is far short of the 70% “record suggestion” of new self-supply.

The possibility that self-supply *may* receive a State Subsidy, relied upon by the Commission, is not based on any record evidence and therefore is an insufficient basis to impose the MOPR on self-supply by cooperative utilities operating under long-standing business models.

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<sup>130</sup> *Id.* at P 204.

<sup>131</sup> PJM April 2018 Filing at 10.

<sup>132</sup> NRECA Initial Submission, Montalvo Declaration at P 14.

### **3. The December 19 Order’s rejection of PJM’s self-supply exemption failed to consider arguments and evidence by NRECA and others.**

The Commission is required to address the arguments and evidence put forth for its consideration.<sup>133</sup> The December 19 Order does not at all address evidence and arguments put forth by NRECA, its members, PJM and others. Therefore, the decision to subject self-supply to the MOPR, without exception, should be reversed on rehearing.

NRECA, EKPC and certain other NRECA individual members, as well as other public power entities and representatives, submitted responses to the issues and questions posed in the June 2018 Order.<sup>134</sup> For its part, NRECA’s Initial Submission “focuse[d] on the critical need to preserve and encourage the self-supply of capacity by PJM’s [LSEs] under long-standing business models.”<sup>135</sup> NRECA’s Initial Submission included the Declaration of Marc D. Montalvo which,

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<sup>133</sup> See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (listing the “normal[ ]” bases for finding an agency action arbitrary and capricious, including that the agency “entirely failed to consider an important aspect of the problem”); *SecurityPoint Holdings, Inc. v. TSA*, 867 F.3d 180, 185 (D.C. Cir. 2017) (“[T]he court must vacate a decision that ‘entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency.’”); *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (explaining that, even where a statutory “term leaves agencies with flexibility, an agency may not ‘entirely fail to consider an important aspect of the problem’” (quoting *State Farm*, 463 U.S. at 43)).

<sup>134</sup> Comments of Allegheny Electric Cooperative, Inc. (filed Oct. 2, 2018); NRECA Initial Submission (filed Oct. 2, 2018); Initial Submission of Southern Maryland Electric Cooperative, Inc. (filed Oct. 2, 2018); Initial Comments of the East Kentucky Power Cooperative, Inc. (filed Oct. 2, 2018); Initial Submission of the American Public Power Association (filed Oct. 2, 2018); ODEC Initial Submission (filed Oct. 2, 2018); Comments of Northern Virginia Electric Cooperative, Inc. (filed Oct. 2, 2018); Reply Submission of the Southern Maryland Electric Cooperative, Inc. (filed Nov. 6, 2018); Reply Submission of the American Public Power Association (filed Nov. 6, 2018); ODEC Reply Submission (filed Nov. 6, 2018); NRECA Reply Submission (filed Nov. 6, 2018).

<sup>135</sup> NRECA Initial Submission at 2.



among other things, (1) distinguished self-supply by public power utilities from out-of-market payments made or directed by states which the Commission determined in the June 2018 Order render the MOPR unjust and unreasonable; (2) explained that public power LSEs use long-term planning to make resource investment decisions based on their long-term obligation to serve load as opposed to the short-term capacity market price, and derive benefits well beyond those available from the RPM construct; and (3) concluded that the Commission should use “the lightest touch practicable” in applying an expanded MOPR to remedy the market problems it identified.<sup>136</sup>

Additionally, NRECA identified record support for excluding self-supply from the expanded MOPR, and Tariff provisions from PJM which would do so.<sup>137</sup> PJM explained that an exclusion from the MOPR for self-supply is appropriate because their business models “do not give rise to concerns related to artificial price suppression.”<sup>138</sup> PJM also demonstrated that based on past BRAs, the Self-Supply Exemption was not the vehicle used by self-supplying LSEs to clear new entry, so there is no reasonable concern that the exemption would allow resources that are receiving impermissible out-of-market subsidies to escape mitigation.<sup>139</sup>

NRECA requested that “[f]or all of the reasons discussed here and in light of the Commission’s precedent regarding self-supply in PJM’s RPM, the Commission should direct that

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<sup>136</sup> NRECA Initial Submission, Montalvo Declaration at P 22.

<sup>137</sup> *Id.* at 19-22.

<sup>138</sup> *Id.* at 19, citing PJM’s April 9 Filing in Docket No. ER18-1314 at 75-76.

<sup>139</sup> *See* NRECA Initial Submission at 20, citing PJM’s April 9 Filing, at 77-78.

self-supply by LSEs under long-standing business models as previously defined by PJM [inclusive of self-supply by electric cooperatives] shall be excluded from the MOPR.”<sup>140</sup> Alternatively, if the Commission did not provide a categorical exclusion for self-supply resources, NRECA requested that the Commission “at least include in PJM’s Tariff an exemption for self-supplied resources used to meet loads of public power entities.”<sup>141</sup> NRECA explained that as opposed to giving rise to concerns over artificial price suppression, the Self-Supply exemption “protects against over-mitigation” which in the past has been cautioned “could have adverse impacts on bilateral contracts and lead to unjust and unreasonable outcomes.”<sup>142</sup> As support, NRECA cited to a study report by the Brattle Group which stated in part as follows: [w]e are particularly concerned that the MOPR will lead to over-mitigation that will undermine bilateral markets and RPM participation by entities, such as public power companies, that meet their customers’ needs primarily through long-term contracts or other self-supply options”<sup>143</sup> and that “[o]ver-mitigation would be particularly problematic for resources developed as self-supply or through bilateral contracts.”<sup>144</sup>

The December 19 Order did not address any of the evidence and arguments put forth by NRECA. As discussed above, the two-paragraph determination regarding application of the MOPR to self-supply by entities acting under long-standing business models relies on inapplicable

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<sup>140</sup> *Id.* at 22 (citation omitted).

<sup>141</sup> *Id.* at 23.

<sup>142</sup> *Id.* at 24 (citation omitted).

<sup>143</sup> *Id.* at 24, n.81.

<sup>144</sup> *Id.*

and insufficient arguments and discussion. In addition, the Commission did not adequately address the threat of double-payment for capacity if electric cooperative self-supply is subject to the MOPR, as consistently raised in these proceedings by NRECA and others.<sup>145</sup> The Commission's reference to the *NRG* decision on this point is misplaced. The December 19 Order states as follows:

As to arguments that an expanded MOPR will unjustly and unreasonably increase costs to consumers, courts have directly addressed this point, holding that states are “free to make their own decisions regarding how to satisfy their capacity needs, but they ‘will appropriately bear the costs of [those] decision[s], . . .’ including possibly having to pay twice for capacity.”<sup>146</sup>

The discussion at P 41 of the Order is inapplicable here. In the 3<sup>rd</sup> Circuit's *NRG* opinion, the Court was addressing arguments that *state* actions would result in increased costs to consumers. The discussion was not addressed to self-supply by electric cooperatives. As discussed above in Sections IV.A.1 and IV.A.2, the contracts by which electric cooperatives are obligated to meet their members' requirements are not directed by the states, nor are the bilateral agreements entered into by electric cooperatives to purchase resources in order to meet their load-serving obligations. Moreover, in the case of electric cooperatives, the double payment for capacity that can result from the MOPR is not borne by states, as the 3<sup>rd</sup> Circuit opinion discussed. It will be borne by the cooperative members.

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<sup>145</sup> NRECA Initial Submission at 3-4, 7-8 & n.23, 13; NRECA Reply Submission at 9-10 & n.36, 12-13; ODEC Initial Submission at 8-9, 14-16, 18, 20-21; ODEC Reply Submission at 3, 10; Comments of Allegheny Electric Cooperative, Inc. at 8.

<sup>146</sup> December 19 Order at P 41 citing *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d at 96-97 (citations omitted).

**G. The Commission Erred in Subjecting Electric Cooperative Demand Response to the Expanded MOPR.**

The December 19 Order provides a limited exemption from the Expanded MOPR for demand response resources that, by December 19, 2019, have cleared an annual or incremental capacity auction, completed registration, or had a measurement and verification plan approved by PJM. The Commission rejected exempting other demand response resources from review and mitigation under to the Expanded MOPR.

The Commission acknowledges that demand response resources “traditionally ... have been exempt from application of the MOPR” and that, until the Commission instituted the instant proceeding in June 2018, market participants reasonably relied on that exemption. The December 19 Order cites no evidence that demand response resources have caused RPM price suppression, much less uneconomic price suppression. The Commission claims the December 19 Order is aimed at “ensuring that all resources make economic offers based on their expected costs and not any State Subsidies they may receive . . . .” The Order provides no evidence that demand response resources have made uneconomic offers or received State Subsidies and provides no rationale for why that might happen even in theory. The Order simply concludes with this ipse dixit: “[W]e find that it is just and reasonable to require new demand response ... resources that do not meet the above [exemption] criteria to comply with the applicable default offer price floor if they do not qualify for a Competitive Exemption or Unit-Specific Exemption.”

As for electric cooperative demand response resources, the Order provides no analysis whatsoever of the origin of the supposed State Subsidy. As in the case of other cooperative self-supply resources, the December 19 Order provides no economic rationale for finding a State Subsidy.

In addition, the December 19 Order reduces market efficiency by hampering the ability of wholesale demand response programs to expand in the PJM region. Electric cooperatives such as EKPC that use demand response resources in PJM's capacity market, will be forced to use demand response outside the PJM markets, depriving PJM of this resource tool and denying PJM and cooperatives the market benefits.

## **VI. CONCLUSION**

WHEREFORE, for the foregoing reasons, NRECA and EKPC request 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 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 the MOPR for new and existing capacity resources of Public Power Entities, subject to reasonable net-short and net-long thresholds.

Respectfully submitted,

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Dated: January 21, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of January, 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