UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.	)))	Docket No. ER13-535-000 ER13-535-001

REQUEST FOR REHEARING OF THE NRG COMPANIES

Pursuant to Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825l(a), and Rule 713 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.713, the NRG Companies[1] hereby request rehearing of the Commission's May 2, 2013, *Order Conditionally Accepting in Part, and Rejecting in Part, Proposed Tariff Provisions, Subject to Conditions*, 143 FERC ¶ 61,090 (2013) ("*MOPR Order*") modifying the Minimum Offer Price Rule ("MOPR") applicable to new generation resources participating in PJM's Reliability Pricing Model ("RPM"). NRG and its affiliates own over 13,000 MW of generation in PJM and NRG has a compelling interest in ensuring that the RPM market provides a just and reasonable return on that investment.

[1] The NRG Companies are NRG Power Marketing LLC ("NRG PML"), GenOn Energy Management, LLC, ("GEM"), Conemaugh Power LLC, GenOn Chalk Point, LLC, GenOn Mid-Atlantic, LLC, GenOn Power Midwest, LP, GenOn REMA, LLC, GenOn Wholesale Generation, LP., Indian River Power LLC, Keystone Power LLC, NRG Energy Center Dover LLC, NRG Energy Center Paxton LLC, NRG Rockford LLC, NRG Rockford II LLC, and Vienna Power LLC.

I. Introduction

The *MOPR Order* significantly weakens PJM's MOPR by radically altering the bidding criteria applicable to new entrants. The *Order* makes the FERC-jurisdictional wholesale capacity markets in thirteen states, plus the District of Columbia, susceptible to price suppression caused by generation resources being bid into the market at far less than their actual costs. The *Order* makes the situation worse by allowing those same generators to receive guaranteed cost recovery from outside the FERC-jurisdictional wholesale markets, without any mitigation whatsoever in the FERC jurisdictional capacity markets. The Commission has, on multiple occasions, cited the compelling need to protect its jurisdictional wholesale markets from just this type of anti-competitive bidding behavior, but inexplicably deviated from this precedent by approving the worst aspects of PJM's deeply flawed MOPR Proposal, while rejecting the few rays of pro-market light in what PJM proposed.

The results of the May 2013 RPM Base Residual Auction for the 2016/2017 delivery year (the Auction") clearly demonstrate the magnitude of the problems now confronting the PJM market as a result of the decisions made in the *MOPR Order*. Over 4,000 MW of new combined cycle natural gas resources cleared in the Auction despite Auction prices suggesting that: (i) many new entrants bid into the market at levels significantly below the actual cost of bringing new entry into the PJM market, net of revenues; (ii) several new entrants apparently intend to make up the shortfall between their expected costs and the prices in the PJM capacity market by relying on revenues from outside the FERC-jurisdictional markets; and (iii) this new entry occurred despite an increase in the already-existing capacity surplus in PJM. This uneconomic new entry includes several new combined cycle resources located in the unconstrained Rest-of-Pool, or RTO Region of PJM, which cleared at an Auction price of $59.37/MW-Day – far below any reasonable measure of those resource's actual costs. Far from reflecting supply and demand economics, the Auction procured new generation resources that are not needed and not economic. The fact that these uneconomic resources were able to enter the PJM Auction unmitigated and cratered capacity prices below competitive levels is irrefutable evidence that the *MOPR Order* installed rates that are far outside the zone of reasonableness.[2]

The Commission accomplished this unprecedented weakening of the MOPR in violation of Sections 205 and 206 of the Federal Power Act. Under the guise of "approving in part, and rejecting in part," the integrated rate proposed by PJM under Section 205 of the FPA, what the Commission actually did was act under Section 206 by (i) finding the rate filed by PJM unjust and unreasonable, and then (ii) imposing an entirely new rate of the Commission's own design on PJM and its customers. The Commission correctly found that the PJM integrated rate filing was inconsistent with

---

[2] *See Farmers Union Central Exchange, Inc. v. FERC,* 734 F.2d 1486 at 1509-10 (D.C. Cir. 1984) (acknowledging that just and reasonable rates could be accomplished in a "light-handed" regulatory scheme that used competition to keep rates within a "zone of reasonableness.").

the Commission's statutory mandate. But having made that decision, the Commission was then required to reject the PJM Filing entirely because the Commission could not (and did not) carry its burden under Section 206 that the Commission imposed rate was just and reasonable. The legal jujitsu engaged in by the *MOPR Order* – seemingly acting under Section 205 but in reality acting under Section 206 (and not carrying its burden under Section 206) – is prohibited by the FPA.

The NRG Companies are deeply concerned that the Commission is abandoning the regulatory compact that it created with investors. This compact requires that the Commission set rates for its regulated entities that are both just (compensatory) and reasonable (fair to the consumer). In the capacity market context, this means that the Commission must establish rates, terms and conditions that provide capacity suppliers a "reasonable opportunity" to earn a just and reasonable rate of return on their capital invested to provide capacity reliability services to the PJM region.[3] By permitting entire classes of new entrants to enter a market that is already oversupplied with capacity as price takers, without any form of mitigation, the *MOPR Order* abandons this legal standard without cause or justification. Moreover, the Commission's actions will directly lead to captive ratepayers being saddled with unnecessary costs – the exempted resources are uneconomic and would not have been built but for being backed by ratepayer funds. The end result is that the *MOPR Order* allows utilities to commit their

[3] *See Bridgeport Energy, LLC,* 113 FERC ¶ 61,311 at P 29 (2005).

captive ratepayers to paying for capacity at a cost far in excess of the actual market value of that capacity and at the same time undermines investor confidence in those companies, like NRG, that previously invested billions of dollars in the PJM market.

For the reasons set forth herein, we respectfully request that the Commission grant rehearing in this proceeding and rescind the rate it unilaterally imposed on PJM and its customers and reject the PJM Filing in its entirety, as required by the FPA.

II. STATEMENT OF ISSUES

Pursuant to Rules 203(a)(7) and 713(c)(1), 18 C.F.R. §§ 385.203(a)(7) and 385.713(c)(1), the NRG Companies present the following identification of errors and statement of issues:

1. The *MOPR Order* cuts the legs out from under the buyer-side power mitigation rules by selectively approving the elements of the PJM proposal that would weaken the MOPR, while rejecting those elements that would strengthen the buyer-side market power protections, despite numerous prior Commission findings that strong buyer-side market power protections are critical to functioning markets.

   Mississippi Valley v. FERC, 659 F2d 488 (5th Cir. 1981); *American Mining Congress v. U.S. EPA*, 907 F.2d 1179 (D.C. Cir. 1990); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D.C. Cir. 1993); *Northeast Energy Assoc. v. FERC,* 158 F.3d 150 (D.C. Cir. 1998); *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999); *Panhandle Eastern Pipe Line Co. v. FERC*, 196 F.3d 1273 (D.C. Cir. 1999); *PJM Interconnection, LLC*, 115 FERC ¶ 61,079 (2006); *Devon Power LLC*, 115 FERC ¶ 61,340 (2006); *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 (2008); *ISO New England, Inc. v. ISO New England Inc.*, 135 FERC ¶ 61,029 (2011); *PJM Interconnection, LLC, et al.*, 137 FERC ¶ 61,145 (2011); *Astoria Generating Co. L.P and TC Ravenswood, LLC v. New York Independent System Operator, Inc.*, 140 FERC ¶ 61,189 (2012); *ISO New England, Inc., et al.*, 138 FERC ¶ 61,027 (2012).

2. The *MOPR Order* erred by failing to respond to record evidence provided by Mr. Robert Stoddard, among others, demonstrating that the various exceptions and exemptions provided to certain market participants would irreparably harm the RPM construct.

   Public Serv. Comm'n of New York v. FPC, 511 F.2d 338 (D.C. Cir. 1975); *City of Charlottesville v. FERC*, 661 F.2d 945 (D.C. Cir. 1981); *Tarpon Transmission Co. v. FERC*, 860 F.2d 439 (D.C. Cir. 1988); *Moraine Pipeline Co. v. FERC*, 906 F.2d 5 (D.C. Cir. 1990); *Tenneco Gas v. FERC*, 969 F.2d 1187 (D.C. Cir. 1992); *Bangor Hydro-Elec. Co. v. FERC,* 78 F.3d 659 (D.C. Cir. 1996); *Morall v. Drug Enforcement Admin.,* 412 F.3d 165 (D.C. Cir. 2005); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233 (9th Cir. 2005).

3. The *MOPR Order* unlawfully blurs Section 205 and 206 of the FPA in its creation of new rates, terms and conditions that are materially different from those proposed by the public utility. When imposing a rate of its own design, the Commission bears the burden of proving that its preferred rate design is just and reasonable, and not unduly discriminatory, which it did not do in this proceeding.

   Section 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d and 824e; *Sea Robin Pipeline Company v. FERC*, 795 F.2d 182 (D.C. Cir. 1986); *Western Resources, Inc. v. FERC*, 9 F.3d 1568 (D.C. Cir. 1993); *Complex" Consol. Edison Co. v. FERC*, 165 F.3d 992 (D.C Cir 1999); *Atlantic City Elec. Co.* v. *FERC,* 295 F. 3d 1 (D.C. Cir. 2002); *PJM Interconnection, LLC*, 108 FERC ¶ 61,302 (2004); *New York Independent System Operator, Inc.*, 121 FERC ¶ 61,039 (2007); *New York Independent System Operator, Inc.*, 121 FERC ¶ 61,039 (2007).

4. The *MOPR Order* wrongly concludes that the approved RPM construct can reasonably be expected to return clearing prices that average, over time, the cost of new entry. The record evidence demonstrates the contrary; namely, that the approved construct denies capacity suppliers any realistic opportunity of earning a just and reasonable rate of return, as borne out by the results of the 2013 Auction.

   Elizabethtown Gas Co. v. FERC, 10 F.3d 866, 870 (D.C. Cir. 1993); *Devon Power LLC*, 103 FERC ¶ 61,082 (2003); *Devon Power LLC,* 107 FERC ¶ 61,240 (2004); *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311 (2005); *Devon Power LLC,* 115 FERC ¶ 61,340 (2006); *ISO New England, Inc.*, 125 FERC ¶ 61,102 (2008); *ISO New England, Inc., New England Power Pool Participants Committee; New England Power Generators Association v. ISO New England Inc.; PSEG Energy Resources & Trade LLC, PSEG*

Power Connecticut LLC, NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, Somerset Power LLC v. ISO New England Inc., 135 FERC ¶ 61,029 (2011).

5. By approving the competitive entry and self-supply exemptions after deciding to retain the unit-specific cost process, the *MOPR Order* lacks reasoned decisionmaking and runs contrary to prior precedent reflecting the need for all uneconomic entry to be mitigated.

   New York Indep. Sys. Operator, Inc., 124 FERC ¶ 61,301 (2008); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 (2008), *on reh'g & compliance*, 124 FERC ¶ 61,301 (2008), *order on clarification, reh'g and compliance*, 131 FERC ¶ 61,170 (2010); *PJM Interconnection, LLC, PJM Power Providers Group v. PJM Interconnection, LLC*, 135 FERC ¶ 61,022 (2011); *PJM Interconnection, LLC, PJM Power Providers Group v. PJM Interconnection, LLC*, 137 FERC ¶ 61,145 (2011).

6. The *MOPR Order* erred by exempting ratepayer supported generation facilities from the MOPR, thereby allowing these facilities to bid into the Auction at prices that are far below their actual costs of bringing such resources to market.

   PJM Interconnection, LLC, PJM Power Providers Group v. PJM Interconnection, LLC, 137 FERC ¶ 61,145 (2011).

7. The *MOPR Order* erred by adopting net buyer and net seller criteria that look at an entity's incentive to affect market prices in only a single-year when the Commission itself has recognized that entering a capacity market entails a multi-year analysis of competitive conditions.

   Bridgeport Energy, LLC, 113 FERC ¶ 61,311 (2005); *PJM Interconnection, LLC, PJM Power Providers Group v. PJM Interconnection, LLC*, 138 FERC ¶ 61,194 (2011).

8. The *MOPR Order* erred in adopting a "net-short" and "net-long" test comparable to tests it previously rejected. And then the Commission compounded its error by requiring PJM to conduct a review of its net short and net long threshold *after* the conduct of an auction, which ensures that unwarranted incentives to suppress price will only be addressed after the opportunity to engage in price suppression has already occurred.

   Panhandle Eastern Pipe Line Co. v. FERC, 196 F.3d 1273, 1275 (D.C. Cir. 1999); *PJM Interconnection, LLC*, 115 FERC ¶ 61,079 (2006); *ISO New England, Inc., et al.*, 138 FERC ¶ 61,027 (2012); *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301

(2008); *ISO New England, Inc., et al.*, 135 FERC ¶ 61,029 (2011); *Astoria Generating Co. L.P and TC Ravenswood, LLC v. New York Independent System Operator, Inc.*, 140 FERC ¶ 61,189 (2012).

III. REQUEST FOR REHEARING

The 2013 Base Residual Auction ("BRA") that took place only weeks after the *MOPR Order* went into effect shows the harm done by the Commission's elimination of price floors for the vast majority of new entrants. The current PJM rate on file indicates that construction of a new combined cycle natural gas fired generator would only be economically justified if Auction prices exceeded a minimum of $175/MW-Day.[4] Yet the 2013 BRA attracted over 4,200 MW of new combined cycle generation, even though prices in the areas attracting the new entry cleared between $59.37/MW-Day to $119.13/MW-Day.[5] These prices clearly suggest that much of this new entry was not economically warranted – or needed.

Several of the new generation units clearing the 2013 BRA were located in the unconstrained RTO Zone, which cleared at sub-$60/MW-Day prices. The current PJM rate indicates that a new combined cycle generating facility built in the RTO Zone

---

[4] PJM's current tariff states that new entry for a combined cycle facility would be expected to occur at between $176.78/MW-Day to $284.74/MW-Day depending on its respective CONE Area to warrant its entry into the market. "Preliminary MOPR Floor Offer Prices for 2016/2017" (dated February 12, 2013); http://pjm.com/~/media/markets-ops/rpm/rpm-auction-info/preliminary-mopr-floor-offer-prices-for-2016-2017.ashx.

[5] PJM indicates that none of the new combined cycle resources cleared in the PSEG zone, where prices cleared at $219/MW-Day. *See* http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2016-2017-base-residual-auction-report.ashx, at p. 31.

would require prices in excess of $198/MW-Day to be economically justified.[6] While the identity of the new resources is not published by PJM, it appears that this dramatic revenue shortfall is being made up, in at least some cases, by recovery from captive ratepayers via state pass-through of the costs that the combination of the PJM capacity, energy and ancillary services markets do not otherwise provide. Therefore, captive ratepayers are being forced to purchase capacity at significantly above price signals being sent by the Auction. While there is nothing inherently wrong with load serving entities seeking long-term contracting opportunities via a competitive bidding process, the Commission has made clear in a slew of orders that allowing projects with state or ratepayer backing to enter the market unchecked (and in this case below their costs and the PJM cost of entry) means the destruction of competitive markets.

As the Commission itself recognizes, competitive power producers cannot compete against an integrated utility, engaging in a self-build, that does not conduct a competitive solicitation process, and then receives guaranteed ratepayer recovery. Yet that is exactly the competitive dynamic that the Commission has now endorsed by allowing such projects into RPM without any mitigation or control. Therefore, we respectfully request that the Commission grant rehearing in this proceeding for the reasons discussed below.

[6] The PJM tariff specifies that generators located in the unconstrained RTO Region would require either $198.06/MW-Day (CONE Area 5) or $284.74/MW-Day (CONE Area 3) in order for new combined cycle resources to be economic to build. *See id.*

A. The *MOPR Order* Significantly Weakens Buyer-Side Market Power Protections in Contradiction of its Precedent.

In establishing competitive market constructs, the Commission expressly created a regulatory compact with companies, including NRG, that own generation in PJM and other markets. The Commission has often phrased its obligation as one that requires the Commission to establish a regulatory regime that provides generators a "reasonable opportunity" to earn a return of and on equity, over a sufficiently long period of time.[7] This is not a guarantee of profits or any particular result, but is a promise that the Commission will provide a fair and level playing field to achieve this result. One critical aspect of a capacity market that meets this criteria is the requirement that all sellers of capacity are required to sell their capacity into the market *and* that all buyers are required to buy their capacity needs from the market – or stay out of the market altogether.[8]

---

[7] *See Bridgeport Energy, LLC*, 113 FERC ¶ 61,311 at P 29 (2005). *See also ISO New England, Inc.*, 125 FERC ¶ 61,102 (2008); *Devon Power LLC*, 115 FERC ¶ 61,340 (2006); *Devon Power LLC*, 103 FERC ¶ 61,082 (2003); *Devon Power LLC*, 107 FERC ¶ 61,240 (2004); *ISO New England, Inc., New England Power Pool Participants Committee; New England Power Generators Association v. ISO New England Inc.*; *PSEG Energy Resources & Trade LLC, PSEG Power Connecticut LLC, NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, Somerset Power LLC v. ISO New England Inc.*, 135 FERC ¶ 61,029, P 254 (2011) (*citing Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870, (D.C. Cir. 1993)).

[8] In *PJM Interconnection, LLC*, 115 FERC ¶ 61,079 (2006), the Commission approved the creation of a Fixed Resource Requirement "opt out" mechanism for load serving entities that wished not to participate in RPM. The Commission stated that "We find that the use of a sloped demand curve, in a forward procurement auction, as proposed by PJM, would be a just and reasonable option for acquiring capacity as long as load can choose

The Commission has long recognized that the exercise of market power, on either the seller or buyer side, is one of the greatest threats to this regulatory compact. In its seminal 2006 *Devon Power* order directing a capacity market in New England, the Commission expressly recognized that "when loads own new resources, they may have an interest in depressing the auction price, since doing so could reduce the prices they must pay for existing capacity procured in the auction."[9] Since then, the Commission has consistently protected markets from increasingly sophisticated schemes to introduce new, ratepayer-supported, supply into the capacity market.

The *MOPR Order* itself clearly identifies the need to protect capacity markets against manipulation. The purpose of the MOPR, as the Commission describes it, is:[10]

> … to prevent the exercise of buyer-side market power in the forward capacity market, which occurs when a large net-buyer--that is, an entity that buys more capacity from the market than it sells into the market--invests in capacity and then offers that capacity into the auction at a reduced price. Given the uniform clearing prices in PJM's markets, such behavior would benefit the net-buyer so long as the reduction in the net-buyer's purchasing costs exceeds its losses from selling the underpriced capacity.

---

to avoid the auction and, instead, satisfy a fixed resource requirement through the more traditional alternative of self-supplying sufficient capacity to meet its obligations." *Id.* at P 104.

[9] *Devon Power LLC*, 115 FERC ¶ 61,340 at P 113 (2006).

[10] *MOPR Order*, at P 20 (citing *TC Ravenswood, LLC v. FERC*, 705 F.3d 474 at 476 (D.C. Cir. Jan. 22, 2013) (uneconomic entry "occurs when a large net buyer of capacity makes a capacity purchase or investment and then offers the capacity for sale at auction at reduced prices, thus lowering the market-clearing price").

The Commission clearly recognized that:[11]

> [w]hile these strategies reduce capacity costs in the short-run, by producing a capacity surplus, these strategies harm other suppliers and, of even greater concern, are deleterious to the market in the long-run. Ultimately, this strategy will prove more costly as existing generators become unable to recover their costs and therefore choose to exit the market, thus tightening capacity and raising prices. Similarly, new merchant generators will be reluctant to enter a market in which their expected prices are susceptible to such reduction.

The Commission has similarly recognized the need to adequately protect capacity market constructs against uneconomic entry in a slew of recent orders, including those in New York,[12] New England,[13] and of course, multiple cases in PJM itself.[14] While the details differ, the underlying economic challenge is the same: how to protect the FERC regulated wholesale market, the sunk investments made by existing generators and the needed new resources from unjust and unreasonable (and artificial) price suppression created by the clearing of new generating units at below their actual cost, including ratepayer subsidized and, therefore, underpriced, units. Without such protections,

---

[11] *Id.* at P 21 (citations omitted).

[12] *See Astoria Generating Co. L.P and TC Ravenswood, LLC v. New York Independent System Operator, Inc.*, 140 FERC ¶ 61,189 at P 64 (2012) (waiving a tariff requirement in a specific instance in order "[t]o be an effective deterrent to uneconomic entry").

[13] *ISO New England, Inc.*, *et al.*, 135 FERC ¶ 61,029, P 61 (2011), *citing N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at P 29 (2008) ("all uneconomic entry has the effect of depressing prices below the competitive level and that this is the key element that mitigation of uneconomic entry should address."), *order on reh'g, ISO New England, Inc., et al.*, 138 FERC ¶ 61,027 (2012).

[14] *PJM Interconnection, LLC, et al.*, 137 FERC ¶ 61,145 at P 62 (2011) (accepting tariff changes to "prevent uneconomic offers from escaping mitigation"), *reh'g denied, 138* FERC ¶ 61,194 at P 19 (2012) (reaffirming that the unit-specific review process "appropriately balances the need to protect against uneconomic entry . . .").

investment in the merchant sector will dry up, existing resources will prematurely exit the market, and ratepayers will bear the freight associated with inefficient investment.

While the Commission is clear-eyed in its identification of the problem, it then proceeds to permit exactly the "deleterious" activity that it states it is charged with preventing. The *Order* systematically undermined market protections by ransacking PJM's rate proposal for elements that would weaken the MOPR's protections – to allow resources to bid below their actual costs – and approving those elements, while at the same time, rejecting the portions of PJM's proposal that have provided tepid enhancements to the PJM MOPR.[15]

The litany of decisions the Commission made to weaken the MOPR in this proceeding is lengthy:

- Rejected proposals to require state subsidized units to clear at the bid floor price for 3 years, and instead retained the one-year clearing requirement.

- Rejected proposals to require state subsidized units to bid into the market at 100% of the administratively determined Net Cost of New Entry ("Net CONE"), instead giving them the option to develop a unit-specific Net CONE.

- Retained, over PJM's objections, the existing unit-specific process for determining new cost of new entry, which PJM states "can raise, and has raised, significant questions" about the integrity of the auction process.[16]

[15] *See PJM Interconnection, LLC*, PJM Filing Letter, Docket No. ER13-353-000 at p. 16 (filed Dec. 7, 2012) ("PJM Filing Letter") ("Because the MOPR now will be much more targeted at the resources that are most likely to present legitimate price suppression concerns, this filing also strengthens the applicability criteria, to ensure that projects that should be mitigated are indeed meaningfully mitigated.").

[16] *See id.* at p. 25.

- Largely exempted ratepayer-supported new entry sponsored by public power entities from any mitigation, which have the same price-suppressive effects as other new generation builds.

- Largely exempted ratepayer-supported new entry sponsored by vertically integrated utilities from any mitigation, despite the clear and present danger of such units bidding in less than their actual cost.

- Allow "merchant" generators to bid into the auction at prices lower than their annualized cost of new entry.

The end effect was to create a rate that significantly *decreases* the market power safeguards under the existing tariff in direct contradiction of PJM's stated intent to *strengthen* those same protections.

The end effect was to engage in arbitrary and capricious decisionmaking because an agency is prohibited from making such changes without adequately explaining its departure from prior precedent. *See Panhandle Eastern Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) (holding that the agency may not abandon its prior policy without providing a reasonable explanation for "the reasons for its departure").[17] Readers of the *MOPR Order* are left to wonder why the Commission backtracked so

[17] *See also, Northeast Energy Assoc. v. FERC*, 158 F.3d 150 (D.C. Cir. 1998) (remand for failure to explain deviation from past precedent and policy); *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 at 897 (D.C. Cir. 1999) ("We therefore hold that the Commission's 180 degree turn away from Kentucky Utilities was arbitrary and capricious. For the agency to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious."); *Mississippi Valley v. FERC,* 659 F2d 488, 506-07 (5th Cir. 1981) ("While the Commission is entitled to depart from previous policies, to engage in reasoned decision making the Commission must explain the basis for any departure.").

markedly from its prior buyer-side market power precedent, or why it designed a rate with so many exceptions that those exceptions swallow the intent of the MOPR rule. Review of the *MOPR Order* provides few answers to this question. This lack of clarity, by itself, requires reversal.[18]

Further, the Commission engaged in arbitrary and capricious decisionmaking by entirely ignoring the two affidavits by Mr. Robert Stoddard, sponsored by NRG. At no point does the *MOPR Order* mention the submission of any expert testimony by NRG or meaningfully address the issues raised by Mr. Stoddard. This blatant failure to address record evidence is also plain error.[19] Examples of arguments raised by Mr. Stoddard, but not meaningfully addressed by the Commission, include:

- Mr. Stoddard showed how the self-supply exemption would permit large numbers of new power plants to be built with ratepayer support, but without any price mitigation.[20] Specifically, he illustrated that allowing vertically integrated utilities and public power to self-supply with few meaningful bounds will lead to a redoubling of capacity additions by vertically integrated utilities and public power to ensure that capacity prices they pay under contracts and spot purchases stay low, and therefore eliminating the ability of

---

[18] *See, e.g., American Mining Congress v. U.S. EPA,* 907 F.2d 1179, 1187 (D.C. Cir. 1990) (noting FERC's obligation to articulated a satisfactory explanation for its action)

[19] An agency decision cannot withstand review if the decisionmaker fails to articulate a rational connection between the facts and the decision, or ignores or minimizes relevant evidence as the *MOPR Order* has done. *See,* e.g. *Bangor Hydro-Elec. Co. v. FERC,* 78 F.3d 659, 663 n. 3 (D.C. Cir. 1996); *Moral! v. Drug Enforcement Admin.,* 412 F.3d 165, 178 (D.C. Cir. 2005); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1241 (9th Cir. 2005).

[20] Stoddard Affidavit at 11-12.

RPM to send proper market signals when new capacity resources are brought into the market.[21]

- Even with the net-long/net-short requirements, by using data from Southwest Mid-Atlantic Area Council ("SWMAAC") as an example, Mr. Stoddard showed that under the self-supply exemption, four public power entities in Maryland would have enough latitude to depress prices in the state to the RTO price by adding new capacity.[22]

- Through using Dominion Virginia Power's capacity obligation as an example, Mr. Stoddard also illustrated that the blanket self-supply exemption for vertically integrated utilities could materially impact market prices to the benefit of the regulated utility.[23]

- Mr. Stoddard demonstrated that allowing new entrants to enter the market at a zero price will lead to "'irrational exuberance' that could lead to cycles of over-building, depressed prices, bankruptcies, and capacity shortages. Such cycles are disruptive, expensive, and generally inconsistent with traditional rate-making principles that seek stability and predictability in consumer prices."[24]

The Commission erred by failing to address the arguments raised by Mr. Stoddard concerning the material impacts to market prices and the likely failure of the RPM market to send proper market signals should the merchant and self-supply exemptions be adopted. As recognized by the D.C. Circuit, subsumed in the requirement for the Commission to support its decisions with substantial evidence (and engaged in reasoned decisionmaking), is the "expectation that [the Commission] will

[21] *Id.* at 4.
[22] *Id.* at 10.
[23] *Id.* at 12.
[24] *Id.* at 18.

treat fully 'each of the pertinent factors' and issues before them."[25] By failing to consider the evidence submitted by Mr. Stoddard, the Commission engaged in arbitrary and capricious decisionmaking.[26]

B. The *MOPR Order* Impermissibly Shifts the Burden between Section 205 and 206 of the Federal Power Act.

The Commission accomplished its unprecedented weakening of the MOPR by violating the Federal Power Act. The Commission impermissibly blurred the lines between Sections 205 and 206 of the FPA. The Commission took the PJM filing under Section 205 and transformed it to its own actions under Section 206 but did not carry it burden under Section 206.

In this proceeding, PJM proposed, pursuant to Section 205, an integrated rate proposal for the Commission's consideration, which the Commission was obligated to either accept or reject. Rather than accept or reject that proposal under Section 205, [27]

---

[25] *See Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992) (quoting *Public Serv. Comm'n of New York v. FPC*, 511 F.2d 338, 345 (D.C. Cir. 1975)).

[26] *See Moraine Pipeline Co.* v. FERC, 906 F.2d 5, 9 (D.C. Cir. 1990) (remanding a Commission Order where the Commission breached its obligation to engage in reasoned decisionmaking by failing to respond to arguments to articulate its decision based on evidence in the record); *see also Tarpon Transmission Co. v. Federal Energy Regulatory Com.*, 860 F.2d 439, 445-446 (D.C. Cir. 1988); *City of Charlottesville v. FERC*, 661 F.2d 945, 950 (D.C. Cir. 1981).

[27] *See PJM Interconnection, LLC*, 108 FERC ¶ 61,302 at P 14 (2004) (While the party filing under § 205 of the FPA, bears the burden of showing that its tariff is just and reasonable, the burden falls on … the Commission if the Commission seeks to amend or change that proposal."); *New York Independent System Operator, Inc.*, 121 FERC ¶ 61,039 at P 14 (2007) ("The United States Court of Appeals for the District of Columbia has held the

the Commission took a third path (and in doing so acted under Section 206). That path consisted of selectively cherry-picking individual elements of PJM's integrated filing and imposing an entirely new rate of the Commission's own creation. This new rate deviated significantly from both the rate previously on file and the rate filed by PJM. However, the Commission neither acknowledged that it was crafting a new rate under Section 206, nor carried the burden of proving that its new Section 206 rate was just, reasonable, and not unduly preferential.[28]

There is no question that in this proceeding the Commission took the PJM packaged rate, sliced and diced the package into various constituent elements – rejecting some and accepting others – and then reassembled the accepted elements into a rate that bears little-to-no resemblance to the initial package rate that PJM proposed. PJM described its "filing not as a list of discrete Tariff changes, but as a hard-fought compromise package" and requested that the Commission "approve it as such."[29] The Commission did exactly the opposite. While labels are not dispositive, the procedural history of this case makes it clear that a diverse group of PJM Stakeholders – including both load and generation owners – agreed on a delicately balanced package proposal that they, and PJM, intended to be an inseparable and integrated rate, not susceptible to

---

Commission must comply with FPA section 206, when it alters aspects of a utility's rate structure which the utility did not propose to change under FPA section 205.").

[28] *Id.*

[29] PJM Filing Letter at p. 15.

being broken into its constituent pieces.[30] In other words, the Commission incorrectly treated the filing, not as an integrated whole, but as separate rate elements, which it was free to accept or reject without taking into account the delicate interplay between the various provisions.

The *Order's* treatment of the unit-specific Net CONE calculation is an excellent example of the Commission's overreach. The centerpiece of the PJM proposal, and in fact the impetus for the entire filing, was the desire to eliminate the unit-specific Net CONE calculation that PJM asserted was undermining market confidence in its markets. But the Commission found the existing unit specific bid determination process just and reasonable, and thus entirely rejected the main reason that many market participants agreed to support the PJM proposal in the Stakeholder process. In fact, PJM Stakeholders considered – and overwhelmingly rejected – a proposal that closely resembled the one approved by the Commission.[31] In doing so, the Commission lost sight of the law. It is the *utility* – in this case PJM – that has the

---

[30] *Id.*

[31] *See*, "MOPR Matrix" reflecting packages voted upon during the PJM MOPR Stakeholder Process on November 29, 2012, including Package 2 which contained both the self-supply and competitive entry exemptions as well as a modified unit-specific exemption. *available at:* http://www.pjm.com/~/media/committees-groups/committees/mc/20121129/20121129-item-03-mopr-matrix.ashx. *See also* Draft Minutes November 29, 2012 Markets and Reliability Committee Meeting (reflecting a .44 vote in support of Package 2) *available at:* http://www.pjm.com/~/media/committees-groups/committees/mrc/20121220/20121220-draft-minutes-mrc-20121129.ashx

statutory "right to file rates and terms for services rendered with its assets."[32] By ignoring PJM's stated desire to improve the MOPR through its compromise proposal, the Commission effectively stripped PJM of its filing rights and imposed its own preferred rate design.

The "third way" taken in the *MOPR Order* impermissibly blurs the lines between Section 205 and Section 206 and is thus prohibited by law because the Commission did not carry its burden under Section 206. The Commission cannot lawfully usurp that right as it did here and cannot go back and forth between Sections 205 and 206. The courts have repeatedly cautioned the Commission that the statutory requirements of Section 205 and 206 of the FPA must be strictly followed.[33] In prior cases the Commission has likewise recognized its limitations under Section 205, rejected tariff proposals unsupported by evidence and instituted Section 206 proceedings, as applicable.[34] There can be no serious question that what the Commission actually did

---

[32] *Atlantic City Elec. Co.* v. *FERC*, 295 F. 3d 1, 9 (D.C. Cir. 2002).

[33] "*Complex" Consol. Edison Co. v. FERC,* 165 F.3d 992 (D.C. Cir 1999) (noting that the court had rejected a series of rate orders on the grounds that the Commission had failed to adhere to the statutory distinction between Section 4 and 5 of the Natural Gas Act and the corollary provisions in Sections 205 and 206 of the FPA); *Sea Robin Pipeline Company v. FERC*, 795 F.2d 182 (D.C. Cir. 1986.)("The Commission is not free to blend, or pick and choose at will between, its section 4 and 5 authority [205 and 206 authority]; FERC must use the appropriate authorization in the appropriate way in order to remain within the bounds Congress has set for the agency.").

[34] *See, e.g., New York Independent System Operator, Inc.*, 118 FERC ¶ 61,182 at PP 13-14 (2007) (rejecting NYISO's proposal to lower the price cap for capacity offered into the in-city installed capacity market after finding that the NYISO had failed to provide cost support or sufficient economic justification for the proposal, but instituting a

was reject PJM's proposed rate as unjust and unreasonable and then install its own rate. When it does so, the Commission is clearly acting under Section 206.[35] As the courts have said, "when the rate imposed by the Commission differs significantly from that proposed by the [the utility], it can no longer be attributed to the [utility]" and "qualify for [§ 205] treatment."[36]

If a reviewing court agrees that the Commission acted under Section 206, the next issue is "whether the Commission appropriately carried its burden under Section 206?" The clear answer is no. The courts will only accept a rate formulated by the Commission under Section 206 if the Commission shows that the proposed (and rejected) rate is unjust and unreasonable and that its alternative MOPR rate established in the *MOPR Order* was just and reasonable.[37] Even assuming that the Commission

---

proceeding under Section 206 of the FPA to investigate the just and reasonableness of the NYISO in-city ICAP market).

[35] *Western Resources, Inc. v. FERC,* 9 F.3d 1568 at 1579 (D.C. Cir. 1993) ("minor deviations from the pipeline's proposed rate based, for example, upon differences as to the extent of specific cost items, may be handled in a § 4 [205] proceeding, but the imposition by the Commission of only half of a proposed rate surely requires more[,]" *i.e.,* action under Section 5, or in this case, Section 206); *see also New York Independent System Operator, Inc.,* 121 FERC ¶ 61,039 at P 17 (2007) (finding that the rate filed under Section 205 provided only additional compensation for the variable costs of burning an alternative fuel and did not address the lack of compensation for oil storage and delivery infrastructure for which Section 206 or another 205 filing would be required.).

[36] *See "Complex" Consolid. Edison Co.,* 165 F.3d at 1003; *see also, Western Resources,* 9 F.3d 1568 at 1579 ("FERC should bear the burden under § 5 [Section 206] when it moves beyond rejection of the proposed rate to the task redesigning it.").

[37] *See "Complex" Consolid. Edison Co.,* 165 F.3d at 1003 ("[W]e will not approve a rate formulation by FERC unless the Commission has shown (i) that the proposed and

showed that the PJM proposed rate was unjust and unreasonable, the Commission did not show that its alternative formulation was just and reasonable. The Commission has no lawful ability to create an entirely new rate and then impose that rate on PJM's customers (including NRG) without acknowledging that it is acting under Section 206 of the FPA and bearing the burden of proof that its new rate meets the statutory criteria.[38] For the reasons set forth in the previous section and in remainder of this rehearing, the Commission cannot show that the FERC imposed rate results in just and reasonable rates.

Setting aside the legal infirmities, if the Commission does not reverse its decision on rehearing, it delivers a chilling message that it has the statutory authority to dissect any public utility's Section 205 filing into meaningless pieces and then reassemble those elements in a manner that bears no relation to the goal of the initial filing. Certainly, this approach will have a chilling effect on future industry-wide agreements, which is unfortunate as this type of industry-wide agreement is one of the best means of resolving complex market design disputes. The unfortunate fruits of the Commission's decision will simply be more litigation and less compromise.

---

rejected rate is unjust and unreasonable and (ii) that its alternative formulation is just and reasonable.")

[38] Section 206(b): "the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant."

C. The Commission Erred in Exempting Entire Classes of New Entrants from Cost-Based Mitigation.

Perhaps the gravest error in the *MOPR Order* is its release of many capacity buyers from their obligations to buy capacity through the auction. Under the new rules, capacity buyers are now permitted to procure new entry outside of the auction and then bid that capacity into the market at less than its actual cost, in contradiction of the Commission's prior holdings. This uneconomic entry dramatically distorts the Auction clearing price and irreparably harms capacity market sellers, as witnessed in the past auction, where many thousands of megawatts entered the market at prices that appear less than compensatory.

As the Commission has previously recognized on several occasions, a FERC wholesale capacity market construct will only provide a "reasonable opportunity" to earn a return of and on equity, over a sufficiently long period of time if (i) the FERC wholesale market is relied upon to maintain and build new generation or (ii) if alternative approaches are used, those approaches bid into the FERC market at or above their costs.[39] A competitive dynamic requires both that capacity sellers sell all of their

---

[39] *See, e.g., ISO New England, Inc.*, 125 FERC ¶ 61,102 (2008); *Devon Power LLC*, 115 FERC ¶ 61,340 (2006); *Devon Power LLC*, 103 FERC ¶ 61,082 (2003); *Devon Power LLC*, 107 FERC ¶ 61,240 (2004); *ISO New England, Inc., New England Power Pool Participants Committee; New England Power Generators Association v. ISO New England Inc.; PSEG Energy Resources & Trade LLC, PSEG Power Connecticut LLC, NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, Somerset Power LLC v. ISO New England Inc.,* 135 FERC ¶ 61,029, P 254 (2011) (*citing Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870, (D.C. Cir. 1993)).

capacity into the market and that all capacity buyers purchase their capacity needs from the same market. Within this framework, the RPM demand curve structure is designed to replicate competitive outcomes to the maximum extent possible. But RPM is not a free functioning market, where existing sellers may choose whether and how to participate at will, and thus there must be reciprocity whereby capacity purchasers and new entry must be required to participate in the auction or purchasers outside the FERC market must be required to bid in at or above their costs, certainly not below their costs as allowed under the *MOPR Order*.

The very objective of a single-clearing price market is to set a single clearing price that reflects supply and demand and thus results in an efficient outcome. Generators are supposed to suffer low prices when there is surplus, but benefit when supply is tight and when there is new entry by obtaining prices close to the cost of new entry. In the 2013 Auction, there was significant new entry but prices do not support such new entry – unless the cost of the generation is being supported elsewhere. This support – be it in the form of ratepayer recovery or contract – is a market distortion. And NRG does not suggest that it is the Commission's job to prohibit such mechanisms, but rather it is the Commission's job to ensure that the resulting market price is free from such distortions and thus just and reasonable. The 2013 Auction result is not a just and reasonable outcome and further, it is direct evidence of the Commission's failures in

---

ISO New England, Inc. v. ISO New England Inc., 135 FERC ¶ 61,029, PP 254-255 (2011).

MOPR Order.

The *MOPR Order's* failure to enforce these fundamental tenants of FERC wholesale markets is a failure of reasoned decisionmaking and must be reversed on rehearing.

1. The Decision in the *MOPR Order* to Retain Cost Based Bidding Alleviated any Need for the Commission to Approve the Exemptions Proposed by PJM.

The version of the MOPR in existence prior to this proceeding operated on an exceedingly simple principle: market participants were required to bid into the market at a price that reflected their actual costs and their actual revenues. Under these previously effective rules, resources, such as NRG's own Old Bridge development project in New Jersey, with state mandated contractual support, were rightfully required to bid into the market at their actual costs or a default Net CONE value established by tariff, thereby ensuring that when such new entry was economic it could clear the market in an efficient manner. In the PJM MOPR context the Commission previously stated that "a sell offer would be permissible when such offer is consistent with the competitive, cost-based, fixed, nominal levelized, net cost of new entry were the resource to rely solely on revenues from PJM-administered markets."[40]

In its order on rehearing, the Commission affirmed its belief that competitive offers are those that reflect the actual costs and revenues of a specific new entrant, and

[40] *PJM Interconnection, LLC, PJM Power Providers Group v. PJM Interconnection, LLC,* 135 FERC ¶ 61,022 at P 122 (2011).

that requiring such competitive offers is critical to the function of RPM:[41]

> The MOPR imposes a minimum offer screen to determine whether an offer from a new resource is competitive. We continue to conclude that the MOPR serves a critical function to ensure that wholesale prices are just and reasonable and should elicit new entry when new capacity is needed. **The long-term viability of the PJM market demands an assurance of competitive offers from new entrants**.

The Commission clearly continued to recognize this principle in the *MOPR Order*, finding that requiring a resource to bid into a competitive market at its individualized cost is a sure way to ensure that the resource is neither under, nor over, mitigated:[42]

> The unit specific review process, however, recognizes that some resources, including those that would fail to qualify for PJM's proposed exemptions, may nonetheless have competitive costs that fall below the benchmark price. We note, moreover, that the benchmark price is only an estimate that several intervenors, including the IMM, argue is currently too high. In the base residual auction for 2012, resources that likely would not have qualified for either of PJM's proposed exemptions were able to justify their net costs through the unit-specific review process. PJM, moreover, concedes that the resulting auction prices were just and reasonable.

Having rejected PJM's proposal to eliminate the unit specific review process, and having found the existing rate just and reasonable, the Commission's work in this proceeding was done and it should have ended its inquiry.

Despite this clear recognition that the existing rate was just and reasonable, the *MOPR Order* inexplicably decided to take a further step and exempt public power and vertically integrated utilities from any mitigation whatsoever. Simply put, the

---

[41] *PJM Interconnection, LLC, PJM Power Providers Group v. PJM Interconnection, LLC,* 137 FERC ¶ 61,145 at P 2 (2011) (emphasis added).

[42] *MOPR Order* at P 143.

Commission's approval of the categorical exemptions makes no sense in the context of its decision to retain the unit-specific costing process, and its decision to do so is both contrary to its past statements on the need for all uneconomic entry to be mitigated and is not the product of reasoned decisionmaking.

2. New Entrants Supported by Vertically Integrated Utilities and Public Power Entities with Captive Ratepayers and Guaranteed Cost Recovery Should not be Exempt from MOPR.

The *MOPR Order* erred by exempting ratepayer supported generation facilities from the MOPR, thereby allowing these facilities to bid into the Auction at prices that are far below their actual costs of bringing such resources to market. The Commission has previously steadfastly opposed allowing integrated utilities or public power entities to bring new megawatts into the market unmitigated, and rejected just the kind of "across-the-board exemption from new resources designated as self-supply" that the Commission then turned around and approved in the *MOPR Order*.[43] The Commission's rationale in that case was compelling, as an automatic self-supply exemption "for new resources designated as self-supply would allow for an unacceptable opportunity to exercise buyer market power and inhibit competitive investment[.]"[44] Further, while the Commission agreed "that well-recognized business models should not be considered automatically suspect when determining whether a

[43] *PJM Interconnection, LLC, PJM Power Providers Group v. PJM Interconnection, LLC,* 137 FERC ¶ 61,145 at P 5 (2011) ("November 17 Order").
[44] *Id.* at P 5.

sell offer accurately reflects avoidable net costs," it was still imperative for PJM "to consider project costs as well as revenues the project would receive on a competitive basis[.]"[45] The Commission held that "[t]his approach is parallel to the need to establish a method of evaluating and mitigating generation sell offers that may be too high due to the exercise of seller market power."[46]

Further, the Commission itself rebutted arguments that requiring self-supply entities to justify the prices at which they seek to enter the market would impose on them an undue burden. The Commission said, "this unit-specific review process appropriately balances the need to protect against uneconomic entry while also mitigating concerns about placing an undue burden on resources choosing to procure or build capacity under long-standing business models."[47]

The Commission does nothing to explain this radical departure from its prior precedent requiring the mitigation of exactly these types of resources with guaranteed ratepayer recovery. Instead, the *MOPR Order* attempts to avoid addressing the implications of its decisions by citing to net buyer and net seller restrictions that, it claims, alleviate the need for it to follow its prior precedent. We address the fatal flaws in that scheme below.

Dominion Power's New Brunswick facility is a poster child for a project that

---

[45] *Id.*

[46] *Id.* at P 24.

[47] *PJM Interconnection, LLC, PJM Power Providers Group v. PJM Interconnection, LLC,* 138 FERC ¶ 61,194 at P 19 (2012).

clearly bid into the capacity market at far less than its actual costs. Estimates are that this facility will cost over $1.2 billion to construct, excluding financing costs (or $934/kW, also excluding financing costs). Dominion's ratepayers are guaranteeing the costs of this new facility.[48] PJM states that, based on its currently-approved FERC rate, "a new combined cycle generating facility in CONE Area 5 (Dominion) would require $198.06/MW-Day to warrant its entry into the market."[49] Yet Dominion has applied for permission to self-build its facility, despite clearing prices equal to less than one-third of the price that PJM has determined would be needed to support such new entry. The fact that this project, which is being entirely funded by Dominion's ratepayers, was apparently allowed into the Auction to "compete" with merchant entities demonstrates the major flaw in both the Commission's MOPR rate and PJM's initial MOPR Filing.

New Brunswick was not alone. There were over 3,000 MW of additional facilities that similarly entered the market under a variety of different exemptions, a substantial number of them apparently bidding in at a level below a reasonable estimate of their actual cost. This uneconomic new entry dramatically distorts capacity prices and harms investors who previously invested in PJM capacity – including NRG

---

[48] *See Application, Direct Testimony, Exhibits and Schedules of Virginia Electric and Power Co.*, Before the State Corporation Commission of Virginia, Case No. PUE-2012-00128 at Volume 1, p. 9 (filed Nov. 2, 2012). *Available at*: https://www.dom.com/about/electric-transmission/brunswick/pdf/Volume1of5.pdf

[49] "Preliminary MOPR Floor Offer Prices for 2016/2017". February 12, 2013. http://pjm.com/~/media/markets-ops/rpm/rpm-auction-info/preliminary-mopr-floor-offer-prices-for-2016-2017.ashx

and its investors and debt holders. In doing so, the *MOPR Order* eviscerates any "reasonable opportunity" owners of existing generating facilities providing reliability service to PJM have of earning a return on and of equity from the FERC-jurisdictional wholesale markets.

3. Allowing New Entrants to Bid Below their Costs Contradicts Prior Precedent that All Uneconomic Entry Requires Mitigation.

It is impossible to reconcile the Commission's decision to exempt multiple classes of new entry from buyer-side market power mitigation rules with its prior findings that "all uneconomic entry has the effect of depressing prices below the competitive level and that this is the key element that mitigation of uneconomic entry should address."[50]

So long as new entrants are permitted to bid at (or, if they wish, above) their actual costs, net of revenues, then there is no risk of over-mitigation or under-mitigation:[51]

> [We] conclude that a competitive capacity market would provide annual revenues over time that, on average, would approximate Net CONE. If annual revenues were significantly lower, prospective developers of new capacity would not enter the market, because they would not expect to recover the costs of their investments over time. Consequently, expecting that a typical supplier acting competitively would not likely offer to provide new capacity at a price significantly below its net entry cost is

---

[50] *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 at P 29 (2008). *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 87 (2008), *on reh'g & compliance*, 124 FERC ¶ 61,301 (2008), *order on clarification, reh'g and compliance*, 131 FERC ¶ 61,170 (2010). *See also*, *PJM Interconnection, LLC, PJM Power Providers Group v. PJM Interconnection, LLC*, 137 FERC ¶ 61,145 at P 5 (2011).

[51] *PJM Interconnection, LLC, PJM Power Providers Group v. PJM Interconnection, LLC*, 137 FERC ¶ 61,145 at P 25 (2011).

reasonable. Thus, a reasonable offer floor would be near Net CONE.

The Commission erred in abandoning this eminently defensible mitigation scheme, and instead replacing it with a series of "exemptions" that effectively eliminate the requirement for the vast majority of new capacity suppliers from any sort of cost review or bidding floor.

The 2013 BRA Auction results show the wisdom in the Commission's prior holdings and how the market will yield clearly non-compensatory results if uneconomic entry, regardless of how it occurs, is permitted to enter the market on a wholesale basis. Thus, the Commission should reevaluate its approval of the ill-founded merchant and self-supply exemptions or risk reversal by the courts.

D. Adoption of Net Buyer and Net Seller Criteria is Inconsistent with Prior Precedent.

There are several fatal flaws with the *MOPR Order's* acceptance of the net buyer and net seller criteria proposed by PJM, each of which independently require that the Commission reevaluate its decision to allow self-supply sponsored new entrants to bid into the market at less than their actual costs.

1. The *MOPR Order* Errs in Assuming only a Single-Year Outlook for Mitigation Purposes.

The Commission has previously stated that entering a capacity market entails a multi-year analysis of competitive conditions.[52] Yet the Commission adopted net buyer

[52] *See, e.g., Bridgeport Energy, LLC*, 113 FERC ¶ 61,311 at P 29 (2005).

and net seller criteria that look at an entity's incentive to affect market prices in only a single year. The Commission's *MOPR Order* completely ignores incentives that net capacity purchasers have in suppressing prices in *future* years. For example, a self-supply entity may look forward into the future and anticipate tightening of environmental regulations that might require a class of generators to retire and thereby move prices up the demand curve. In preparation for this anticipated wave of retirements, the self-supply entity could rationally bring new entry into the market with the express intent of suppressing capacity prices in future years. The net buyer and supplier provisions adopted by the Commission do nothing to prevent this very predictable form of market price suppression.

In fact, Old Dominion Electric Cooperative ("ODEC"), one self-supply entity that has expressed a desire to self-build a resource for the 2017/2018 Auction, previously argued that the Commission was expressly required to consider a multi-year review of a new entrant's anticipated costs and revenues. ODEC correctly stated that "a multi-year view to a new supply addition represents a critical piece in the underlying investment decision and should be a mandatory part of any review analysis undertaken by the IMM or PJM" and that permitting a demonstration that the sell offer "is consistent with the Capacity Market Seller's business model and is economic over a reasonable period of time identified by the Capacity Market Seller, which can include a multi-year view that is consistent with the duration of the investment in the planned generation resource, considering real or nominal levelized project specific non-sunk costs and forward looking energy, ancillary services, and capacity revenues."[53] In response, the Commission agreed, stating that, while it would not require "explicit mention of multi-year costs and revenues," the "tariff language accepted by the Commission does not preclude the submission of data reflecting a multi-year cost/revenue analysis."[54] Thus, the unsurprising fact is that prudent buyers and sellers of capacity service are always looking ahead multiple years before electing to make – or not make – an investment in the market. For the Commission to assume that simply because new entry may show it is cost effective for a single year it may enter the capacity market is not reasonable.

Further, because of the steepness of the demand curve, the price suppression "benefits" of new entry increase dramatically as the market reaches equilibrium conditions. As discussed below, this fact only enhances the incentive for self-supply entities to build today and prevent the market from ever reaching equilibrium conditions in the future. This conduct would not be captured even if PJM amends its net buyer and net seller thresholds on a regular basis.

2. The Commission's Approval of Net Buyer and Seller Restrictions are at Express Odds with Prior Commission Decisions.

It is particularly difficult to square the Commission's adoption of net-short and

[53] *See also, PJM Interconnection, LLC, PJM Power Providers Group v. PJM Interconnection, LLC*, 138 FERC ¶ 61,194 at P 14 (2011).
[54] *Id.* at P 24.

net-long thresholds with its prior rejection of a virtually identical test in the context of the functionally-similar New York Independent System Operator's capacity market. There, the Commission correctly recognized that such tests are inherently fraught with gaming opportunities and "defining net buyers raises significant complications and provides undesirable incentives for parties to evade mitigation measures."[55]

Despite this precedent, the *MOPR Order* reaches precisely the opposite conclusion, and adopts net-buyer and seller limitations:[56]

> We find that PJM has met this burden because entities that self-supply a sufficiently large portion of their capacity requirement do not have an incentive to use uncompetitive entry to lower capacity prices. However, the effectiveness of the exemption depends critically on the thresholds that limit the incentive of self-supply entities to influence market-clearing capacity prices *i.e.*, on the measurement issues PJM was required to address in response to Commission Staff's Deficiency Letter.

Despite NRG and other protesters raising this inconsistency between PJM's proposal and the Commission's prior holdings, the Commission neglected to address the issue. An agency's failure to follow its own precedent is, by itself, sufficient grounds for a court to remand this case back to the Commission.[57] Thus, the Commission should grant rehearing in this case, and follow its prior precedent.

Further, the Commission entirely ignored two pieces of record evidence that

---

[55] *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 at P 29 (2008).

[56] *MOPR Order* at P 110.

[57] *See Panhandle Eastern Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) (holding that the agency may not abandon its prior policy without providing a reasonable explanation for "the reasons for its departure").

convincingly demonstrate that the net-short and net-long requirements are ill-founded and should never have been approved:

1. Evidence from Mr. Stoddard demonstrating that there are no entities to whom the net-long/net-short requirements would apply;[58] and

2. Evidence from Mr. Stoddard and Dr. Tabors that many entities falling under the net-long/net-short limits imposed by the *MOPR Order* nonetheless will have a financial incentive when the market is at equilibrium conditions.[59]

The Commission's response to the first of these arguments is non-existent, and its response to the second requirement does nothing to prevent market suppression until *after* the uneconomic entry has occurred.

3. The *MOPR Order*'s After-the-Fact Remedy Does Nothing to Prevent Price Suppression.

The *MOPR Order* concedes that the net-short/net-long limits are applicable only to a snapshot of auction results, and only prevent economic price suppression at certain points along the demand curve. This finding is consistent with prior Commission orders which recognized that, in an administratively determined sloped demand curve, such as the one utilized by PJM, even "small changes in capacity near the IRM can result in a very large capacity price increase, so that withholding can be significantly

[58] Stoddard Affidavit at 11.

[59] *Id.* at 10-12; *PJM Interconnection, LLC,* Supplemental Protest of and Comments of the FirstEnergy Companies, Exhibit A – Tabors Affidavit, Docket No. ER13-535-001 at P15 (filed March 25, 2013).

more profitable under these supply conditions."[60] In recognition of this fact, the *MOPR Order* conceded that:[61]

> With respect to the proposed net-short and net-long thresholds, we note that the thresholds and PJM's Deficiency Letter analysis are based on data from the 2012 base residual auction. We find that this data adequately justifies PJM's proposed net-short and net-long thresholds, as they will be applied in existing market conditions. We share intervenors' concerns, however, that evolving market conditions could affect the accuracy and/or usefulness of these thresholds in the future.

However, the Commission's preferred solution to this problem, requiring PJM "to review and, if necessary, revise these thresholds on an appropriate, periodic basis,"[62] does virtually nothing to stop uneconomic entry until after the auction is conducted and the economic suppression has already occurred. While PJM has many powers, the ability to accurately predict auction results in the future is not generally one of them, and in any event, market participants cannot alter their economic decisions after the fact,[63] *i.e.*, the damage will have been done.

The Commission nowhere explains how PJM is supposed to alter its net-short/net-long rules until after the uneconomic entry has occurred. As the Commission has previously found, buyer-side market power mitigation is very difficult to impose on

---

[60] *PJM Interconnection, LLC,* 115 FERC ¶ 61,079 at P 104 (2006).
[61] *MOPR Order* at P 113.
[62] *Id.*
[63] *New York Independent System Operator, Inc.*, 92 FERC ¶ 61,073 at 61,036-07 (2000)(denying refunds because market participants cannot retroactively alter their conduct.).

entrants after they have already entered the market.[64]

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the NRG Companies respectfully request that the Commission grant rehearing in this proceeding and reject PJM's proposed MOPR so that capacity suppliers in PJM are provided the reasonable opportunity, over the long-run, to earn a return of and on their investment.

Cortney Madea Cortney Madea Senior Counsel – Regulatory NRG Energy, Inc. 211 Carnegie Center Princeton, NJ 08540 Telephone: (609) 524-5422 Cortney.Madea@nrgenergy.com	Abraham H. Silverman Abraham H. Silverman Assistant General Counsel – Regulatory NRG Energy, Inc. 211 Carnegie Center Princeton, NJ 08540 Telephone: (609) 524-4696 abe.silverman@nrgenergy.com

[64] *See ISO New England, Inc.*, *et al.*, 138 FERC ¶ 61,027, P 32 (2012), quoting *ISO New England, Inc.*, *et al.*, 135 FERC ¶ 61,029, P 214 (2011) ("The Commission noted, however, that the investment in that OOM capacity had already occurred, and that 'the purpose of buyer-side mitigation is to prevent uneconomic entry'; therefore subjecting historical OOM resources to future mitigation would not prevent the fact that those resources had already entered the market"); *see also Astoria Generating Co. L.P and TC Ravenswood, LLC v. New York Independent System Operator, Inc.*, 140 FERC ¶ 61,189 at P 64 (2012) ("To be an effective deterrent to uneconomic entry, the mitigation and offer floor determinations should at least be provided before the unit enters the capacity market, not after.").

CERTIFICATE OF SERVICE

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

Dated at Washington, DC this 3rd day of June, 2013.

/s/ Jennica Date
Jennica Date