

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

PJM Interconnection, L.L.C.)	
)	Docket Nos. ER18-1314-000
)	ER18-1314-001
)	

**MOTION TO INTERVENE AND COMMENTS
OF THE NUCLEAR ENERGY INSTITUTE**

Pursuant to Rules 212 and 214 of the Federal Energy Regulatory Commission’s (“FERC” or the “Commission”) Rules of Practice and Procedure,¹ the Nuclear Energy Institute (“NEI”) submits this Motion to Intervene and Comments in the above-captioned proceedings, which were initiated by PJM Interconnection, L.L.C.’s (“PJM”) April 9, 2018 filing containing proposed revisions to the capacity market provisions of the PJM tariff (the “Capacity Filing”).²

NEI believes that PJM has failed to demonstrate that either of the two options presented in the Capacity Filing are necessary, or more broadly that there is a need to depart from the status quo. Moreover, PJM’s bifurcated proposal essentially contains two competing, completely different, and mutually-exclusive section 205 filings in one. PJM asks the Commission to decide between the two, which is not permitted under section 205 of the Federal Power Act (“FPA”). For these reasons and others, the Commission should reject PJM’s Capacity Filing.

If, however, the Commission both finds PJM’s filing procedurally acceptable, and that it must choose between PJM’s two proposals, NEI urges the Commission to adopt PJM’s primary Capacity Repricing proposal. Notably, though, the only way in which the Commission could reach such a determination is by first concluding that PJM’s competing alternatives approach is

¹ 18 C.F.R. §§ 385.212, 385.214 (2018).
² PJM Interconnection, L.L.C., Tariff Filing, Docket No. ER18-1314-000 (filed Apr. 9, 2018).

permitted under section 205 of the FPA *and* that current state actions in the region unduly influence PJM's capacity market.

Of the two options proposed by PJM, Capacity Repricing is the far superior way to address an issue with which the Commission has grappled in recent years—how to accommodate legitimate state interests in encouraging or retaining various types of generating resources on public policy grounds without unduly interfering in the Commission's wholesale markets. As states are increasingly recognizing the benefits of compensating nuclear generation for its beneficial environmental attributes, the accommodation of such programs is of the utmost importance.

Nuclear units that receive state price support receive such support because the states at issue made a public interest determination that the preservation of nuclear units presents among the cheapest ways for states to meet their clean energy goals. Capacity Repricing respects these choices, and avoids the possibility of load paying twice for capacity—a critical flaw with any rule that result in over-mitigation like MOPR-Ex.

By contrast, as will be discussed in greater detail below, PJM's "MOPR-Ex" proposal is unjust and unreasonable, and unduly discriminatory on its face, and should be rejected. The MOPR-Ex proposal discriminates against specific generation resources (including nuclear resources), while creating individualized carve-outs for other types of resources. In the process, MOPR-Ex would severely undercut state efforts that were designed to support certain resources and their unique attributes, thereby resulting in less efficient and more distorted markets that would over-procure redundant capacity

I. ABOUT NEI

NEI is the Washington, D.C.-based policy organization of the nuclear technologies industry. NEI's mission is to foster the beneficial uses of nuclear technology and to communicate accurate information about the importance of nuclear energy and technology. NEI is responsible for establishing unified policy on behalf of its members relating to matters affecting the nuclear energy industry. NEI's members include entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect and engineering firms, fuel cycle facilities, nuclear materials licensees, and other organizations involved in the nuclear energy industry.

II. COMMUNICATIONS

All correspondence, communications, pleadings, and other documents related to these proceedings should be addressed to the following persons:

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III. BACKGROUND

In its April 9, 2018 Capacity Filing, PJM seeks to address “supply-side state subsidies and their impact on the determination of just and reasonable prices in the PJM capacity market”³ by presenting two proposals to the Commission—“Option A” or “Capacity Repricing,” and “Option B” or “MOPR-Ex.”

³ Capacity Filing at 1.

A. Capacity Repricing

Under Capacity Repricing, PJM would address the impacts of state support of generation by instituting a two-stage Base Residual Auction in which clearing resources and assigning capacity commitments is performed in the first stage, and determining market clearing prices is performed in the second stage.⁴ According to PJM, this two-stage approach would allow all Capacity Resources—including those for which the seller receives, directly or indirectly, material support from any state governmental entity—to clear the Base Residual Auction based on their submitted (*i.e.*, unmitigated) offers.⁵ PJM states that in the first stage, it would not seek to mitigate offer prices that may be suppressed due to out-of-market subsidies (as PJM had done in the past through the Minimum Offer Price Rule (“MOPR”)), and in the second stage, it would re-run the auction using the same demand curve, and the same supply stack.⁶ In that supply stack, PJM would use the same Sell Offers considered in the first stage, but for those cleared resources that qualify as Capacity Resources with an Actionable Subsidy (a term PJM defines in its Capacity Filing), PJM would reprice their offers to the Actionable Subsidy Reference Price.⁷ PJM states that each Actionable Subsidy Reference Price would be a “competitive” offer price that is determined for that resource in accordance with the provisions of the revised market rules. The Capacity Market Clearing Price would be determined by the intersection of the demand curve and the reconstituted supply stack that uses Actionable Subsidy Reference Prices.⁸ PJM also represents that, under Capacity Repricing, Base Residual Auctions would continue to clear resources and determine clearing prices in the same manner as in the past, until the megawatt

⁴ *Id.* at 59.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 60.

⁸ *Id.*

quantity of Capacity Resources with Actionable Subsidy reaches a level so as to have a materially suppressive impact on clearing prices. However, PJM notes that “[f]rom that point on, the two-stage approach will be used to the extent any Capacity Resources with Actionable Subsidies clear in stage one.”⁹

B. MOPR-Ex

Under MOPR-Ex, PJM proposes to extend the MOPR to cover existing resources that may receive material state subsidies. Specifically, MOPR-Ex would apply to new *and* existing resources, explicitly targeting resources that receive a Material Subsidy and that would qualify as Capacity Resources with Actionable Subsidies. The Capacity Resources with Actionable Subsidies would apply to all types of Generation Capacity Resources, regardless of fuel type, unless the resource is a Qualifying Facility.¹⁰ MOPR-Ex would also extend the geographic reach of the MOPR beyond the boundaries of the PJM Region to external Capacity Resources, and would expand on the MOPR’s historic practice of categorically exempting certain resources based on the characteristics of the seller or resource.¹¹ PJM proposes to retain the Unit-Specific Exception to allow Capacity Resources with Actionable Subsidies, new and existing, to be able to offer below the MOPR Floor Offer Price, and to re-establish that categorical exemptions can preclude resources from being subject to the MOPR.¹²

IV. MOTION TO INTERVENE

NEI moves to intervene in the above-captioned proceedings. In its role representing its commercial nuclear energy industry members, NEI has a direct and substantial interest that will be affected by the outcome of these proceedings. PJM’s Capacity Filing raises facts and

⁹ *Id.*

¹⁰ *Id.* at 98.

¹¹ *Id.* at 99.

¹² *Id.* PJM proposes four categorical exemptions from being a Capacity Resource with Actionable Subsidy.

arguments that are especially relevant to nuclear generators, and NEI has a broad and unique perspective that should be considered by the Commission and cannot be adequately represented by any other party. Accordingly, NEI requests that the Commission grant this motion, and permit NEI to participate fully as a party in the above-referenced proceedings.

V. COMMENTS

A. PJM's Capacity Filing Is Procedurally Deficient and Should Be Rejected

Before discussing the substance of PJM's Capacity Filing, NEI emphasizes that PJM's filing is procedurally deficient, which alone warrants its rejection. By asking the Commission to choose between two completely different and mutually-exclusive sets of tariff provisions in order to determine if one is *more* just and reasonable than the other, PJM's two-option approach does not satisfy section 205 of the FPA and should be rejected. Moreover, it does not appear that PJM is authorized by its tariff to make such a filing.

The examples cited by PJM to support its approach—most of which fall under section 4 of the Natural Gas Act rather than section 205 of the FPA—are distinguishable from PJM's approach here. In the past, alternative tariff revisions have been filed at the Commission when the applicant (1) attempts to accommodate an upcoming Commission decision on issues still pending in a separate proceeding,¹³ (2) offers an alternative rate proposal that either challenges a prior Commission directive or reflects multiple interpretations of that directive,¹⁴ or (3) reflects a single variable (such as different amortization periods) within an otherwise identical rate change filing.¹⁵ PJM's approach on the other hand, is unique and seemingly unprecedented.¹⁶

¹³ See, e.g., *Gulf S. Pipeline Co.*, 149 FERC ¶ 61,173 (2014).

¹⁴ See *Midcontinent Indep. Sys. Operator, Inc.*, 157 FERC ¶ 61,242 (2016) (accepting "alternative" tariff revisions that incorporate cost calculations discussed in prior deficiency letter and rejecting "preferred" tariff provisions that did not reflect such cost calculations).

¹⁵ See *ISO New England Inc.*, 155 FERC ¶ 61,136 (2016).

As PJM recognizes in its Capacity Filing, “the power to initiate rate changes rests with the utility.”¹⁷ PJM seeks to delegate this power to the Commission and expand the Commission’s authority under section 205. PJM has not filed a rate for Commission acceptance; rather, it filed two choices from which the *Commission* is to set PJM’s rate. Whereas the Commission has historically played a passive role that is limited to either accepting or rejecting a proposed rate change (along with suggesting *minor* changes),¹⁸ the Capacity Filing asks the Commission to make a policy-based decision between two vastly different and mutually-exclusive proposals. Such an approach goes too far and is not consistent with a utility’s obligation under section 205 to set its own rates subject to Commission review. Therefore, PJM’s Capacity Filing is procedurally deficient in this regard under section 205 of the FPA, and NEI urges the Commission to reject it.

B. PJM Has Not Justified a Departure from the Status Quo

Under current market rules, nuclear units receiving state support are not subject to mitigation, nor should they be. Given PJM’s inability to marshal enough stakeholder support to justify either of its two proposals standing alone, the Commission should question whether the tariff should be modified at all.

First, PJM’s filing fails to provide sufficient justification for its filing, and does not demonstrate actual customer harm resulting from Zero Emission Credits (“ZECs”) or similar programs. PJM’s filing relies heavily on the principle that any non-PJM market revenue can impact the wholesale market, but PJM does not demonstrate the basis for the contention that

¹⁶ While ISO New England Inc. has a “jump ball” provision in its tariff that envisions alternative tariff proposals, *see ISO New England Inc. & New England Power Pool*, 130 FERC ¶ 61,105, at P 51 (2010), PJM does not and is unable to point to any equivalent authority that would specifically authorize it to file alternative tariff proposals.

¹⁷ Capacity Filing at 47 (quoting *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002)).

¹⁸ *See NRG Power Mktg, LLC v. FERC*, 862 F.3d 108, 114-15 (D.C. Cir. 2017).

ZECs or similar programs are actually having a deleterious effect on the wholesale market. In fact, the sole evidence of harm to the market contained in PJM’s filing is a five-page affidavit from Mr. Keech describing certain price *simulations*, not real-world evidence of harm.

Second, the out-of-market state programs that the Capacity Filing seeks to address—such as renewable energy credits and ZECs—compensate certain resources, including nuclear generators, for their unique and legitimate environmental attributes. In 2017, nuclear energy produced twenty percent of U.S. electricity supply (804.9 billion kilowatt-hours), and prevented 547.5 million metric tons of carbon dioxide emissions.¹⁹ Nuclear energy also accounted for fifty-six percent of America’s carbon-free electricity—three times more than wind energy. The amount of carbon dioxide emissions avoided by U.S. nuclear energy facilities is equal to the carbon dioxide emissions produced from 117 million passenger cars—essentially the equivalent of removing the operation of all the passenger cars in the United States.²⁰ Without nuclear power plants operating in thirty states, carbon emissions from the U.S. electric sector would be approximately thirty percent higher. All of these environmental attributes have value, and in turn, certain states have chosen to support the resources that provide such attributes in order to better serve the public interest.

Similar to any other clean generator that can produce electricity without simultaneously creating air pollution, nuclear generators provide a general, externalized benefit to society. However, wholesale markets do not compensate clean generators for these externalities, thus leading to inefficiencies and distorted incentives in the market. By pricing externalities, states

¹⁹ NEI, NUCLEAR BY THE NUMBERS (Apr. 2018), *available at* <https://www.nei.org/CorporateSite/media/filefolder/resources/fact-sheets/nuclear-by-the-numbers-20180412.pdf>.

²⁰ No other form of generation so fully accounts for its broader environmental impacts. Nuclear power avoids not only carbon emissions, but emissions of sulfur oxides, nitrogen oxides, mercury, and other dangerous pollutants associated with fossil fuel generation. Nuclear power is also the only power generation source that financially accounts for its environmental impacts up front, unlike all other generation sources.

complement the wholesale markets by accounting for the true economic costs (for example, the cost of pollutants emitted by other generators) and benefits of generating electricity in a way that would otherwise go unrecognized in the wholesale power market.²¹

To date, certain states have determined that their consumers should pay for the unique and valuable attributes provided by various resources. These state-based programs play a crucial role in reflecting generators' true economic costs and benefits.²² Far from "distorting" or negatively impacting the wholesale market, these state programs actually help correct larger distortions created by the markets' inability to properly reflect these costs and benefits.

It is entirely appropriate that these mechanisms remain free from unnecessary mitigation in the capacity market. Adopting any proposal that would stifle these state programs, which already help reflect the true economic costs and benefits of generating electricity, would effectively force customers to overpay for capacity, leading to unjust and unreasonable outcomes. For all of these reasons, PJM has not justified departing from the status quo.

C. As Between the Two Proposals, Capacity Repricing Is Far Superior

If the Commission entertains PJM's filing and finds action is needed, Capacity Repricing is a far superior framework in comparison to MOPR-Ex, which is fatally flawed.

1. The MOPR-Ex Proposal Is Facially Unduly Discriminatory

The Commission should reject PJM's MOPR-Ex proposal for several reasons, but its facially discriminatory nature is perhaps its most egregious flaw. The MOPR-Ex proposal discriminates against specific generation resources (including nuclear resources), while creating individualized carve-outs for other types of resources (including, as PJM recognizes, most state

²¹ See, e.g., *Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059, at P 31 (2010).

²² See *ISO New England Inc.*, 158 FERC ¶ 61,138, at P 58 (2017) (stating that when private and social costs are better aligned, competition is more robust and the markets' price signals are more accurate, which helps better guide the orderly entry and exit of resources).

Renewable Portfolio Standards (“RPS”) programs). In the process, MOPR-Ex would severely undercut state legislative efforts that were designed to support certain resources and their unique attributes, thereby resulting in less efficient and more distorted markets that would over-procure redundant capacity.

The MOPR-Ex proposal lacks any reasonable justification for singling out and arbitrarily discriminating against certain state programs that provide financial support outside the wholesale market. For example, the MOPR-Ex proposal includes a new “RPS Exemption” for certain RPS programs that are “competitive and non-discriminatory.”²³ Yet the “competitive and non-discriminatory” requirements under MOPR-Ex are entirely unrelated as to whether or not the state RPS program will actually impact prices in PJM’s capacity market. In fact, PJM itself readily recognizes that these RPS programs will affect wholesale market prices.²⁴

PJM attempts to justify its RPS Exemption by claiming MOPR-Ex recognizes some “deference to [state] public policies.”²⁵ However, this “deference” is completely arbitrary. It limits the exemption to only resources that fall under an RPS program while excluding other state programs for non-renewable resources without consideration of their effect on capacity markets and regardless of whether they offer the same environmental benefits.

To illustrate the arbitrary nature of the RPS Exemption, PJM (after listing RPS as a “subsidy of concern”) exempts resources procured under RPS processes by the end of 2018, on the theory that such programs relied on the capacity markets “longstanding practice of applying the MOPR to only gas-fired generation resources and not to renewable resources.”²⁶ The same could be said of ZEC programs and any other state clean energy programs for existing units that

²³ Capacity Filing at 112-113.

²⁴ *Id.* at 113-114.

²⁵ *Id.* at 114.

²⁶ *Id.* at 112.

received state support relying on PJM’s “longstanding practice” of applying the MOPR only to new units. This rationale illustrates the contradictions inherent in the MOPR-Ex proposal. PJM contends that impact on the market is really what matters when it comes to state programs, yet PJM ignores market impacts and exempts resources based on reliance or out of a desire not to intrude too much into state choices.

Beyond RPS, MOPR-Ex is replete with exemptions, including those for recipients of non-environmental state subsidy programs and federal production tax credits and tax incentives, which suffer from the same discriminatory and preferential constructs as the RPS Exemption.²⁷ That is, they all affect wholesale market prices, thus defeating the very goal MOPR-Ex is purportedly designed to accomplish. In sum, the inherently discriminatory nature of the MOPR-Ex proposal makes it unduly discriminatory under the FPA, and the Commission acceptance of MOPR-Ex would be reversible error.

Moreover, an anticipated result of the over-mitigation that would occur under MOPR-Ex is that the ratepayers who have made these clean energy investments could get zero capacity credit for those nuclear plants, causing them to have to pay twice for capacity.²⁸ Specifically, a unit that retail customers have supported through a state program may not clear the capacity market if mitigated under MOPR-Ex. The customers who paid for that resource would receive

²⁷ PJM notes that it is excluding all federal subsidies from consideration as actionable subsidies, including nuclear plant liability limitations such as the Price-Anderson Nuclear Industries Indemnity Act (“Price-Anderson Act”), because the Commission’s jurisdiction under the FPA is unlikely to countermand other acts of Congress. *Id.* at 71. To be clear, the nuclear plant liability limitations under the Price-Anderson Act cannot credibly be listed among the “federal subsidies” that could materially affect market prices. At its core, the Price-Anderson Act organizes a means for the nuclear industry to provide a total of about \$13 billion in insurance coverage to compensate the public in the extremely unlikely event of a nuclear accident. *See Backgrounder on Nuclear Insurance and Disaster Relief*, NRC, <https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/nuclear-insurance.html>. The costs of obtaining the insurance required under the Price-Anderson Act are borne by the industry, unlike the corresponding costs of some other power sources (*e.g.*, dam failure and resultant flooding costs are borne by the public). To date, the public has paid nothing under the Price-Anderson Act framework for commercial nuclear activities.

²⁸ *See* Capacity Filing at 43 (“If the resource can remain in service without PJM capacity market revenues, then loads bearing the cost of the subsidy will effectively pay twice for the same increment of capacity—once through the PJM capacity market, and once through the subsidy payments.”).

no capacity credit for that resource and would be forced to buy replacement capacity that they do not need. Especially in contrast to the Capacity Repricing proposal, which does not carry that risk, the Commission would somehow have to find that double-payments for capacity is just and reasonable in order to find MOPR-Ex acceptable.

Finally, PJM seems to concede that MOPR-Ex's discriminatory nature may be illegal, but simply punts the question to the Commission. PJM even suggests that the discrimination issue could be resolved by removing the RPS exemption or remanding it for further stakeholder consideration.²⁹ This is plain acknowledgment that there is no rational basis in PJM's proposal for distinguishing between state-supported resources that would be subject to mitigation under MOPR-Ex and those that would not. This option-within-an-option further illustrates the unorthodox and unlawful nature of PJM's filing.

2. Capacity Repricing Is Far Superior to MOPR-Ex

As the Commission is well aware, the legal and policy struggle for the last several years has centered around how states, with legitimate interests in supporting various forms of generation for reasons relating to clean air, carbon emissions, fuel diversity, and general prudent long-term planning, can make these policy decisions without undermining the effectiveness of wholesale markets. While there are no easy answers, the Capacity Repricing proposal balances PJM's purported need to protect wholesale markets from perceived undue interference, while acknowledging that the states' police power extends to environmental regulation and that the FPA expressly reserves to the states the ability to regulate generation.

²⁹ *Id.* at 114 (“Given that this RPS Exemption allows resources receiving out-of-market subsidies to escape mitigation in deference to public policies favoring renewable generation resources, not because such resources do not suppress prices, some parties may assert that this rule discriminates in favor of resources versus other types of subsidized generation resources. Whether or not this form of discrimination is undue, in light of the CASPR Order, is a decision for this Commission. PJM offers the option of either (i) applying the standards set forth in Capacity Repricing to govern the treatment of renewables, or (ii) identifying this question for further stakeholder consideration in subsequent processes.”).

The essence of Capacity Repricing is that it permits ratepayers in states with these generation support programs to receive the benefit of their investment by ensuring they get capacity credit for their resources in PJM's capacity market, but establishes a market price for generators who clear the market that reflects a level that is not suppressed by the state support programs.

Indeed, Capacity Repricing is imperfect (especially in contrast to the status quo), but it is a far more balanced a solution than MOPR-Ex. While there may be generators who might have cleared absent the state-supported resources, the fact is that state-supported resources do exist and these state programs have legitimate purposes; to encourage clean generators to run more and emitting generation to run less to improve air quality and reduce carbon pollution.

In contrast to Capacity Repricing, the MOPR-Ex proposal does not balance the public interests in legitimate state support programs. MOPR-Ex is a significant expansion of the controversial minimum offer price rule that has been in place in PJM for the last several years. Viewed in isolation, a MOPR-like mechanism has value when a state program is used to exercise buyer market power. But in the current case, the MOPR-Ex proposal is an inferior solution to the issue of how to harmonize state policy with wholesale markets.

In addition, nuclear units that receive state price support receive such support because the states at issue made a public interest determination that the preservation of nuclear units satisfies their economic and environmental objectives. Capacity Repricing respects these choices, and avoids the possibility of load paying twice for capacity—a critical flaw with any rule that result in over-mitigation like MOPR-Ex.

In sum, if the Commission decides to accept one of PJM's competing proposals, NEI urges the Commission adopt PJM's Capacity Repricing proposal and reject MOPR-Ex.

VI. CONCLUSION

The Commission should grant this motion and accept these comments. For the reasons stated above, the Commission should reject PJM's Capacity Filing and maintain the status quo in PJM. To the extent that the Commission nevertheless concludes that further action is necessary, it should accept the Capacity Repricing proposal and reject MOPR-Ex.

Respectfully submitted,

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May 7, 2018

CERTIFICATE OF SERVICE

I certify that on this 7th day of May, 2018, I have caused a copy of the foregoing document to be served electronically on each person listed on the Secretary's official service list for the above-referenced proceeding.

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