

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**Nos. 21-3205  
(consolidated with Nos. 21-3068, 21-3243 & 22-1158)**

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**ELECTRIC POWER SUPPLY ASSOCIATION *ET AL.*,  
*Petitioners,***

v.

**FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.***

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ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION

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**BRIEF OF INTERVENOR FOR PETITIONERS,  
INDEPENDENT MARKET MONITOR FOR PJM  
(MONITORING ANALYTICS, LLC)**

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Dated: May 23, 2022

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and L.A.R. 26.1, Intervenor for Petitioners Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM (“Market Monitor”), hereby provides the following disclosure statement in this case:

Monitoring Analytics, LLC has no parent corporation or publicly traded stock. Monitoring Analytics, LLC acts in its capacity as the Independent Market Monitor for PJM and performs the market monitoring function for PJM Interconnection, L.L.C. (“PJM”), which is a Regional Transmission Organization approved by the Federal Energy Regulatory Commission. *See* 18 CFR § 35.28(g)(3) (2021); PJM Open Access Transmission Tariff Attachment M.

*/s/ Jeffrey Whitefield Mayes*

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## **INTRODUCTION**

The Market Monitor incorporates by reference the Introduction included in the Brief of Petitioner Electric Supply Association.

## **JURISDICTIONAL STATEMENT**

The Market Monitor incorporates by reference the Jurisdictional Statement included in the Brief of Petitioner Electric Supply Association.

## **ISSUES PRESENTED FOR REVIEW**

The Market Monitor incorporates by reference the Issues Presented for Review included in the Brief of Petitioner Electric Supply Association.

## **STATEMENT OF RELATED CASES AND PROCEEDINGS**

The Market Monitor incorporates by reference the Statement of Related Cases and Proceedings included in the Brief of Petitioner Electric Supply Association.

## **STATEMENT OF THE CASE AND FACTS**

The Market Monitor incorporates by reference the Statement of the Case and Facts included in the Brief of Petitioner Electric Supply Association.

## **STANDARD OF REVIEW**

The Market Monitor incorporates by reference the Standard of Review included in the Brief of Petitioner Electric Supply Association.

## **SUMMARY OF ARGUMENT**

Allowing the revised Minimum Offer Price Rule, referred to here as the “Pseudo MOPR” to become effective is unjust and unreasonable, and arbitrary and capricious. The Market Monitor explains in this brief the harmful impact to PJM markets that will result. The Pseudo MOPR is a pseudo MOPR because it avoids the core purpose of a MOPR rule: to address the impact of subsidies on markets, including the suppression of prices below competitive levels. The Pseudo MOPR instead prohibits subsidy programs only for reasons that already result in preemption under the Federal law. The problem of subsidies and the harm to markets is unaddressed. The PJM markets would be better off, more competitive, and more efficient with no MOPR than with the Pseudo MOPR. The Pseudo MOPR effectively eliminates the MOPR while creating a confusing and inefficient administrative process that effectively makes it both unnecessary and impossible to prove buyer side market power as PJM has defined it. The Pseudo MOPR also undercuts supplier side market power rules that will interfere with the existing ability of the Market Monitor to address market power and market misconduct outside of the MOPR.

## ARGUMENT

### A. THE MOPR IS RELATED TO CORE MARKET MONITOR FUNCTIONS.

A core function of the Market Monitor is to help ensure a competitive market design.<sup>1</sup>

A Minimum Offer Price Rule (“MOPR”) is a rule designed to ensure offers at competitive levels in PJM capacity markets.<sup>2</sup> A MOPR is a rule designed to prevent the exercise of market power in PJM capacity markets. Market power is the ability of a market participant to increase the market price above the competitive level or to decrease the market price below the competitive level. A MOPR protects against offers below competitive levels. One reason that a market participant would offer below the competitive level is that the participant receives subsidies that reduce its costs or increase its revenues compared to market revenues. Offers below competitive levels result in price suppression and inefficiency. A MOPR complements the rules for offer capping in PJM capacity markets, which protect against offers above competitive levels. The application of a MOPR is not concerned with sellers’ intent or motives. The application of a MOPR is based on the existence of structural market power, using a defined test.

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<sup>1</sup> See OATT Attachment M § IV; 18 CFR § 35.28(g)(3)(ii)(A).

<sup>2</sup> The Market Monitor’s role in implementing the MOPR is set forth in OATT Attachment M–Appendix § II.D.



Market power harms market efficiency, interferes with competitive pricing and results in unjust and unreasonable rates even if its exercise is unintended.

Another core function of the Market Monitor is to monitor the markets for misconduct, including the intentional exercise of market power.<sup>3</sup>

**B. ALLOWING THE PSEUDO MOPR TO BECOME EFFECTIVE IS UNJUST AND UNREASONABLE.**

The Commission’s failure to reject the ineffective version of the MOPR (“Pseudo MOPR”) proposed by PJM Interconnection, L.L.C. (“PJM”) in a filing submitted under Section 205 of the Federal Power Act on July 30, 2021, is arbitrary and capricious.<sup>4</sup> The Commission did not find the Pseudo MOPR just and reasonable. A Commission split 2–2 allowed the MOPR to become effective by operation of law. Petitioners have explained the legal deficiencies of the process that lead to this result, and their arguments are not repeated here. The Market Monitor instead explains the resulting harm to the PJM competitive market design.

The Pseudo MOPR is unjust and unreasonable because it fails to prevent the exercise of market power through offers below competitive levels in the PJM capacity market, and therefore fails to ensure just and reasonable rates in that market. The Pseudo MOPR is unjust and unreasonable because it incorrectly

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<sup>3</sup> See OATT Attachment M § IV.E.I; 18 CFR § 35.28(g)(3)(ii)(C).

<sup>4</sup> PJM Section 205 Filing, Docket No. ER21-2582-000 (July 30, 2021) (“PJM Pseudo MOPR Filing”).

defines market power so as to weaken a fundamental rule that sustains competition in PJM markets. The Pseudo MOPR is unjust and unreasonable because it interferes with the Market Monitor's ability to detect, deter and prevent the exercise of market power when such exercise is the result of market misconduct. The Commission failed to maintain its core duty to ensure just and reasonable rates under the Federal Power Act when it allowed the Pseudo MOPR to take effect.<sup>5</sup> The Commission's actions were therefore arbitrary and capricious.

### **C. THE PSEUDO MOPR IS WORSE THAN NO MOPR.**

The PJM markets would be better off, more competitive, and more efficient with no MOPR than with the Pseudo MOPR. The Pseudo MOPR would effectively

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<sup>5</sup> See, e.g., *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 at P 1 & n.1 (2018), *order establishing just & reasonable rate, Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 at P 1 (2019), *order on reh'g & clarification, Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,034 (2020), *order, on reh'g & clarification, Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035 (2020), *order on reh'g & compliance, Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 173 FERC ¶ 61,061 (2020), *order on compliance & clarification, Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 174 FERC ¶ 61,036 (2021), *order setting aside prior order, in part, Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 174 FERC ¶ 61,109 (2021); *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 143 (2011), *order on reh'g, PJM Interconnection, L.L.C. v. PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 (2011), *order on reh'g, PJM Power Providers Group v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,194 (2012), *aff'd, N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 100 (3d Cir. 2014); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 104 (2006), *order on reh'g and clarification, PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318 (2007); *Devon Power LLC*, 115 FERC ¶ 61,340 at P 113 (2006); *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 103, *order on reh'g*, 124 FERC ¶ 61,301 at P 27 (2008).

eliminate the MOPR while creating a confusing and inefficient administrative process that effectively makes it both unnecessary and impossible to prove buyer side market power as the Pseudo MOPR defines it.

The Pseudo MOPR consists of two primary elements: a redefinition of the standards for applying MOPR and a redefinition of buyer side market power. All of PJM's arguments about why prior versions of MOPR should be eliminated can and do equally support the complete elimination of MOPR.<sup>6</sup> PJM did not attempt to create a more focused version of MOPR, but simply proposed to effectively eliminate MOPR. PJM created a convoluted and impossible to enforce definition of market power while making the task of evaluating offers for buyer side market power almost impossible. The markets would work better and more efficiently if the MOPR were eliminated without pretense than with PJM's effective elimination of MOPR plus the addition of a new, incorrect and entirely unnecessary definition of buyer side market power.

The Pseudo MOPR exempts the only two identified sources of structural buyer side market power from application of the MOPR. There is not a single example of an actual case that would fail the Pseudo MOPR tests. The Pseudo MOPR includes an unenforceable definition of market power, complete with a

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<sup>6</sup> PJM Pseudo MOPR Filing, *passim*.

complex set of barriers to gathering information and impossible deadlines for the Market Monitor.

**D. THE PSEUDO MOPR IS IMPROPERLY ELIMINATED FOR STATE SUBSIDIZED RESOURCES.**

Under the Pseudo MOPR, the MOPR is eliminated for state subsidized resources, the primary focus of MOPR to date. The Pseudo MOPR simply accepts all state subsidies (as long as one key phrase is not included) as legitimate state actions to define the nature of generation under the Federal Power Act.<sup>7</sup>

That key phrase is that states are not allowed to condition subsidies on a resource clearing in a capacity auction. This is the definition of Conditioned State Support that violates the MOPR.<sup>8</sup> By focusing on participation and not the subsidy, the Pseudo MOPR applies only to programs that are already preempted by Federal law.

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<sup>7</sup> The Federal Power Act assigns to the Commission exclusive jurisdiction over the sale of energy at wholesale in interstate commerce. 16 U.S.C. § 824(a); *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 371 (1988). The Act reserves jurisdiction to the states over facilities used for the generation of electric energy. 16 U.S.C. § 824(b)(1).

<sup>8</sup> *See* OATT § 1 (Definitions—C–D) (“‘Conditioned State Support’ shall mean any financial benefit required or incentivized by a state, or political subdivision of a state acting in its sovereign capacity, that is provided outside of PJM Markets and in exchange for the sale of a FERC-jurisdictional product conditioned on clearing in any RPM Auction, where “conditioned on clearing in any RPM Auction” refers to specific directives as to the level of the offer that must be entered for the relevant Generation Capacity Resource in the RPM Auction or directives that the Generation Capacity Resource is required to clear in any RPM Auction. Conditioned State Support shall not include any Legacy Policy. ”).

In *Hughes v. Talen Energy Marketing* the Supreme Court held that a state program providing subsidies to a new generator through state mandated contracts, conditioned on the generator selling capacity into a FERC-regulated wholesale auction, was preempted “because it disregards an interstate wholesale rate required by FERC.”<sup>9</sup> In subsequent cases, the United States Courts of Appeal for the Second and Seventh Circuits found that the subsidy programs under review were not preempted even if prices in the relevant markets were affected because the subsidy programs did not depend on participation in FERC regulated markets.<sup>10</sup> Reading the cases together, the conclusion is that only state programs that explicitly require participation in PJM markets are preempted.

The definition of Conditioned State Support addresses only state programs that explicitly require participation in PJM markets, and it is therefore substantively the same as the Courts’ definition of preempted state action. The Pseudo MOPR protects federal policies only from state policies that are already preempted.<sup>11</sup> State programs that are preempted are unlawful and should be invalidated. States know the law and can be expected to avoid explicit

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<sup>9</sup> See *Hughes v. Talen Energy Marketing*, 136 S. Ct. 1288, 1291 (2016).

<sup>10</sup> See *Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41, 50 (2<sup>nd</sup> Cir. 2018); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 523 (7<sup>th</sup> Cir. 2018).

<sup>11</sup> PJM explains that its definition of Conditioned State Support is designed to reflect the holding in *Hughes*. See July 30<sup>th</sup> MOPR Proposal, citing *Hughes* at 1296 & 1299.

requirements that result in preemption. The Pseudo MOPR fails to address subsidies that have not been found preempted but nevertheless suppress prices below competitive levels.

**E. THE PSEUDO MOPR IMPROPERLY EXCLUDES SELF SUPPLY ENTITIES.**

Self supply entities refers to load serving entities with business models under which these companies are compensated by customers directly in rates for the costs of capacity and do not depend on the capacity market for such revenues. Such load serving entities include, for example vertically integrated utilities and public power entities.<sup>12</sup> Self supply entities procure capacity resources outside of PJM auctions and use them to satisfy commitments in such auctions. Subsidies for self supply, thus, may have direct impact on prices in PJM capacity market auctions if the resources are offered at prices below the competitive level.<sup>13</sup>

The Pseudo MOPR is also based on the core assertion that self supply entities have the unlimited right to subsidize resources and that the resultant subsidized resources are part of the economic fundamentals of the market.<sup>14</sup> Self supply subsidies are not evidence of bad intent or evidence of an explicit goal of

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<sup>12</sup> See OATT § 1 (Definitions–R–S).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* Under the Pseudo MOPR’s definition of Self-Supply Seller, Self-Supply Sellers cannot exercise buyer side market power by definition. References to self supply entities in this filing are equivalent to Self-Supply Sellers.

reducing market prices. Self supply entities are guaranteed full recovery of all the costs associated with building and operating capacity resources through cost of service ratemaking. Those nonmarket revenues are subsidies which affect the offer behavior of self supply entities. The Pseudo MOPR simply ignores these basic facts. A just and reasonable MOPR must protect the market while also protecting the ability of self supply resources to meet their competitive objectives without interference.

It is a fact that both states and self supply entities have legitimate reasons for providing subsidies. It is a fact that both states and self supply entities have structural market power. That is neither bad nor good but just a fact about their position in the PJM markets. Both types of entities clearly have the ability to reduce the market price below the competitive level. Nonetheless, states have generally not done that and self supply entities have also not done that as measured by what was termed the long/short test.<sup>15</sup> Creating a clear rule is not equivalent to accusing any entity of bad intent. Even if market power were exercised by a state or self supply entity, that would not require bad intent. A well designed rule should be designed to protect the market against the exercise of market power, with or without intent and with or without a demonstration that an entity actually

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<sup>15</sup> See OATT § 5.14(h)(6)(iii), as effective December 8, 2014.

benefitted. That is essential for a competitive market with appropriate incentives for entry and exit.

**F. THE PSEUDO MOPR IMPROPERLY EXCLUDES DEMAND RESOURCES AND ENERGY EFFICIENCY RESOURCES.**

The Pseudo MOPR does not apply to demand resources or energy efficiency resources. Demand resources are demand reductions treated as the equivalent of supply. Efficiency resources are defined investments that permanently reduce demand over a defined period. Efficiency resources are treated as the equivalent of supply for the defined period.

The Pseudo MOPR contradicts the Commission’s previous rejection of PJM’s proposed exclusion of energy efficiency resource from MOPR.<sup>16</sup> Demand resources and energy efficiency resources participate as capacity resources and should be subject to the same rules that apply to generators and other capacity resources. PJM argued, in support of this exclusion, that the MOPR did not apply to these resources prior to the current MOPR, and also that these resource tend to be “small scale and low cost.”<sup>17</sup> Neither is correct. In the 2022/2023 BRA, demand resources and energy efficiency resources accounted for 9.4 percent of the cleared

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<sup>16</sup> 169 FERC ¶ 61,239 at P 54.

<sup>17</sup> PJM Pseudo MOPR Filing at 26.



capacity.<sup>18</sup> Ownership of demand resources for the current delivery year, 2021/2022, is highly concentrated with an HHI of 2584, and the four largest companies own 89.0 percent of all committed demand response capacity.<sup>19</sup> Demand resources have extremely high strike prices that can affect energy market prices.<sup>20</sup> Demand resources and energy efficiency resources are a significant source of capacity in the PJM Capacity Market and should not be excluded from the MOPR.

**G. THE PSEUDO MOPR INTERFERES WITH THE ABILITY TO ADDRESS BUYER SIDE MARKET POWER.**

The Pseudo MOPR's approach to buyer side market power is convoluted, unnecessarily complicated and unenforceable. Given that the Pseudo MOPR eliminates the only two sources of buyer side market power from consideration, there is no reason to have this definition in the tariff at all. There is no corresponding definition of supplier side market power in the tariff. The Pseudo MOPR now provides the only definition of market power in the PJM tariff,

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<sup>18</sup> PJM Interconnection, L.L.C., "2022/2023 RPM Base Residual Auction Results," (June 2, 2021) at 2, <<https://pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2022-2023/2022-2023-base-residual-auction-report.ashx>>.

<sup>19</sup> Monitoring Analytics, L.L.C., "Quarterly State of the Market Report for PJM: January through June," (August 12, 2021) at 335 <[http://www.monitoringanalytics.com/reports/PJM\\_State\\_of\\_the\\_Market/2021/2021q2-som-pjm-sec6.pdf](http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2021/2021q2-som-pjm-sec6.pdf)>.

<sup>20</sup> *Id.* at 345. Almost all, 97.3 percent of nominated MW, of the demand response registrations in the emergency and pre emergency full option have a minimum dispatch price above \$1,000 per MWh.

potentially undermining all rules related to the prevention against the exercise of supplier side market power. The implications for the definition of supplier side market power are significant and unacceptable. A definition of supplier side market power incorporating even parts of the Pseudo MOPR's definition of buyer side market power would undo 20 years of evolution and refinement of the definition of market power actually applied in PJM markets.

PJM includes this statement about buyer side market power without any evident irony:

Taking advantage of the fact that Capacity Market Sellers know best whether their Generation Capacity Resources is [sic] entitled to receive Conditioned State Support or whether the Capacity Market Seller plans to use the resource to exercise Buyer-Side Market Power, PJM is proposing that sellers 'self-certify' whether their resources should be subject to the MOPR. [footnote omitted]<sup>21</sup>

The Pseudo MOPR's operational definitions of buyer side market power and the exercise of buyer side market power are spread across various locations in the tariff.

The Pseudo MOPR defines buyer side market power as "the ability of Capacity Market Sellers with a Load Interest to suppress RPM Auction clearing

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<sup>21</sup> PJM Pseudo MOPR Filing at 26.

prices for the overall benefit of their (and/or affiliates) portfolio of generation and load.”<sup>22</sup>

The actual exercise of buyer side market power is defined as: “anti-competitive behavior of a Capacity Market Seller with a Load Interest ... to uneconomically lower RPM Auction Sell Offer(s) in order to suppress RPM Auction clearing prices for the overall benefit of the Capacity Market Seller’s ... portfolio of generation and load ...”<sup>23</sup>

PJM defines a load interest as: “responsibility for serving load within the PJM Region ...”<sup>24</sup>

There are several issues with this definition of market power, including limiting the relevant sellers to those with a load interest and requiring a benefit to the seller’s overall portfolio. There is no reason to exclude generation owners with no load because such owners can have the ability and incentive to reduce prices and their activities can reduce prices without intent or incentive to do so. It is impossible to evaluate whether a potential action benefits an entire portfolio because there is a lack of knowledge about all aspects of a market seller’s portfolio, including financial positions taken either bilaterally or on platforms to which PJM and the Market Monitor do not have access. There is no reason to

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<sup>22</sup> See OATT Definitions § 1 (Definitions–A–B).

<sup>23</sup> See OATT Definitions § 1 (Definitions–E–F).

<sup>24</sup> See OATT Definitions § 1 (Definitions–L–M–N).

include this benefit or profitability test because it assumes that market power is only market power when the exerciser benefits rather than when the rest of the market is hurt, i.e., the result is noncompetitive, unjust and unreasonable prices. Participants make mistakes. Participants cannot perfectly predict the results of the market. Some profits resulting from exercises of market power may not be realized solely in the defined delivery year or solely in the capacity market or solely in PJM markets. But market power is still market power and market power is still inconsistent with efficient, competitive markets.

The Pseudo MOPR does not define either the term anti-competitive or the term suppress. In the absence of a definition, enforcement is subjective. The Pseudo MOPR's corresponding operational proposals for determining whether market power exists and is exercised are vague and subjective and not fact based.

In the unexpected event that a market seller does not disavow the intent to exercise market power, PJM establishes a lengthy gauntlet that the Market Monitor must run in order to obtain data relevant to proving market power. (Most of the same rules apply to PJM.)

In addition to being inconsistent with the established process in PJM market rules for identifying supplier side market power, the requirement of intent in determining market power is not consistent with economic theory. The existence of market power is structural and its consequences (removing pressure to reduce

costs, increasing the profit maximizing price above competitive levels, and creating incentives for market preemption) exist regardless of intent and regardless of whether any particular strategy is ultimately profitable. Endemic structural market power in PJM markets is why they are and will continue to be regulated under the Federal Power Act.

Furthermore, the requirement of intent is not consistent with Commission policy. An asserted lack of intent to raise or lower prices is not part of the Commission's review of market based rates applications or merger filings, and it is not a condition for the application of market power mitigation in any market. The principal purpose of a MOPR is not to prevent market manipulation, which does require intent under Commission policy. The purpose is to prevent buyer side market power from undermining market efficiency and competitiveness. A definition of buyer side market power that requires intent does not meet that standard.

#### **1. Market Power Review Process.**

The detailed tariff language that defines how the Pseudo k MOPR works includes a series of steps. None of the steps or definitions are written in a way designed to clearly or correctly define market power or to permit the Market Monitor to pursue an investigation.

The basic steps in the tariff include: the self certification process; the definition of Conditioned State Support and a long but only partial list of exclusions that can be expanded by PJM; the detailed rules limiting Market Monitor investigations; the definition of the existence of buyer side market power; the definition of exercising buyer side market power including a long list of exceptions; the definition of MOPR offer floors for new entrants; the definition of exercising buyer side market power for existing resources; and a unit specific exception process for calculating MOPR offer floors.

The definition of market power excludes all state actions. Under the Pseudo MOPR, states cannot have or exercise market power, by definition, with only one exception.

Section 5.14(h-2)(1) sets out the definition of self certification that the seller does not intend to exercise market power. There are no requirements to provide any support, explanation or documentation of the assertions in the certifications.

Conditioned State Support is the only defined basis for a finding of buyer side market power for state actions. Conditioned State Support means that any defined incentives must include "specific directives as to the level of the offer" or "directives that the Generation Capacity Resource is required to clear in any RPM Auction." There are also additional exclusions including all existing policies

(legacy policies) and certain types of programs and situations defined in Section 5.14(h-2)(2)(A)(ii).<sup>25</sup>

Section 5.14(h-2)(2)(B) addresses buyer side market power. If PJM and/or the Market Monitor “reasonably suspects” a violation of the rules, the Pseudo MOPR identifies a set of defined steps that must be taken and criteria that must be met. The review must be “fact-specific” and identify the ability and incentive to exercise market power. The seller’s rights to respond are specified. PJM and/or the Market Monitor must notify the subject of the bases for inquiry and initiation of review at least 135 days in advance. There is no basis for assuming the Market Monitor or PJM would have adequate information to act by the defined deadline. The deadline is more likely to prevent investigations of market power than to facilitate them. If information becomes available later, the defined deadlines could prohibit investigation, creating conflicts with other long standing tariff provisions requiring investigations and referral of market misconduct.<sup>26</sup>

In addition to the fact that the standards for identifying buyer side market power have no basis in economics, the Pseudo MOPR’s rules for conducting a review of a buyer side market power certification will make it effectively

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<sup>25</sup> For example, government programs that provide incentives through renewable energy credits or zero emissions credits are excluded. State retail service auctions and PURPA obligations are excluded as well. Also excluded are undefined “policies or programs that provide incentives related to fuel supplies.”

<sup>26</sup> See OATT Attachment M § IV.I.

impossible to pursue and complete a timely investigation. In order to initiate a review PJM and the Market Monitor must “confer with the Capacity Market Seller in advance of any such requests.” The review is described as a “fact-specific review,” yet it would rely on a projection of capacity market outcomes using assumptions about supply conditions and sell offer prices.

Last but not least, the Pseudo MOPR includes a long but not exhaustive list of reasons that would preclude even an inquiry into market power, let alone a finding of market power (§ 5.14(h-2)(2)(B)(ii)). The section ends with the broad, subjective, undefined, unenforceable and incomprehensible condition for exemption from the market power rules: “In addition, to the extent a Generation Capacity Resource may receive compensation in support of characteristics aligned with well demonstrated customer preferences, such compensation shall not, in and of itself, be a basis for the determination of Buyer-Side Market Power.”<sup>27</sup> Market power is a significant problem in markets regulated through competition, and the rules should not be designed in a manner that attenuates the ability to address market power concerns.

## **2. Tests for Market Power.**

The Pseudo MOPR is unenforceable.

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<sup>27</sup> See OATT Attachment DD § 5.14(h-2)(2)(B)(ii).



In the unlikely event that any market participant is potentially subject to the Pseudo MOPR's rules, the test for the existence of market power (§ 5.14(h-2)(2)(B)(i)(a)) requires ex ante modeling based on a series of estimates, expectations, subjective judgments and results from prior auctions. If that modeling shows a material impact from the single participant, the existence of market power is demonstrated. This approach cannot be reasonably characterized as fact based. Material is not defined. Modeling assumptions based on judgments can and will significantly affect the outcome of this test. It is excessively complicated with no corresponding benefit.

If market power exists under that test, PJM proposes an additional test to determine if the market participant has an incentive to exercise market power (§ 5.14(h-2)(2)(B)(i)(b)). This test also requires ex ante modeling based on a series of estimates and subjective judgments and results from prior auctions in order to calculate what PJM defines to be net benefits. The seller is allowed to include subsidies, for example state renewal energy credits and zero emissions credits, in the revenues that define whether a resource is economic. The Pseudo MOPR requires only that a resource offer be justified, "economically or otherwise" without benefit of the suppressed prices that result from the seller's actions. That is a meaningless and unenforceable standard. The Pseudo MOPR's incentive test ignores the price suppression impacts on other suppliers and the longer term effects

of noncompetitive outcomes. An imperfect screen run based on estimated data well prior to the actual market clearing and that is likely to differ from the actual market results, is not an adequate substitute for actual market power mitigation rules and not an adequate protection against market power.

The process defined in the Pseudo MOPR, including extensive ex ante review, is likely to reveal substantial market sensitive information to the market participant undergoing the inquiry. This is a very significant matter, given that expected market clearing prices and the impacts of various offers on those prices are highly confidential and market sensitive. The Pseudo MOPR does not address this issue and PJM failed to address the issue in its filing.

### **3. MOPR Offer Floors.**

The Pseudo MOPR only incompletely addresses a key issue that had been fully clarified in a prior version of MOPR. PJM failed to clarify that the same base financial parameters must be used for all technologies and proposed resources, without exceptions. As has been recognized by both the Commission and PJM at various times, use of the same base financial parameters for all resources is essential to avoid gaming.<sup>28</sup>

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<sup>28</sup> See 169 FERC ¶ 61,239 at P 153: (“We also agree with PJM that default MOPR values should maintain the same basic financial assumptions, such as the 20-year asset life, across resource types. The Commission has previously determined that standardized inputs are a simplifying tool appropriate for

It is essential that all resource types use the same base financial parameters. No new combined cycle should be assumed to have a longer financial life than another combined cycle. No new solar resource should be assumed to have a longer financial life than another solar resource. Solar or wind resources should not be assumed to have a longer financial life than a combined cycle. In order to maintain a fair comparison across projects they must be compared using the same basic financial parameters. Project value can be easily manipulated by using a longer unit life for example. But there is no reason to permit one project to use a 35 year financial life while another project uses a 20 year life. The result is simply to arbitrarily make one project look better than another. All projects should use the same base financial assumptions used for the reference CONE unit defined in the prior quadrennial review.<sup>29</sup> That is currently a 20 year life. Use of a longer financial life in the MOPR floor prices than for the reference CONE unit creates a mismatch in the capacity market.

The relevant base financial parameters that should be fixed for all resource types are: nominal levelization; asset life of 20 years; no residual value; all project

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determining default offer price floors, [footnote deleted] and we reaffirm that it is reasonable to maintain these basic financial assumptions for default offer price floors in the capacity market to ensure resource offers are evaluated on a comparable basis. Therefore, we find 20 years to be an appropriately conservative estimate.”).

<sup>29</sup> *See id.*

costs included with no sunk costs; use of first year net revenues; weighted average cost of capital based on actual cost of capital for the entity building the resource.<sup>30</sup>

The tariff provides one potential caveat. A seller that wants to use a different asset life (but no greater than 35 years) has to provide supporting evidence. But the defined supporting evidence is vague and is not linked to the financial life of the asset. The financial life/modeled asset life should be defined to be based on the duration of the financing.

In the unit specific MOPR floor process, resource owners persistently request offer floors significantly below the net cost of new entry (net CONE). The actual behavior of most new entrants is generally consistent with offers at net avoidable cost (ACR) and not net cost of new entry, both for subsidized and nonsubsidized resources.

## CONCLUSION

The petition for review should be granted. The Court should vacate the Commission's default acceptance of the Pseudo MOPR and remand the case to the Commission for further proceedings.

Respectfully submitted,

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<sup>30</sup> See OATT Attachment DD § 5.14(h-1)(2)(B).

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Dated: May 23, 2022

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for Petitioner certifies that this brief:

(i) complies with Rule 32(a)(7)(B) and the briefing schedule approved by this Court (see Dkt. 101, 104) because it contains less than 6,500 words (half of the 13,000 words allotted to the two intervenors supporting petitioners), including footnotes and excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it is set in Times New Roman font in 14 point font.

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## **CERTIFICATE OF SERVICE**

I hereby certify that that on May 23, 2022, I filed the foregoing brief via the Court's CM/ECF system, which effected service on all registered parties to this case.

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