IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 11-4245, *et al.* (Consolidated for certain purposes)

NEW JERSEY BOARD OF PUBLIC UTILITIES, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

PROOF BRIEF OF OLD DOMINION ELECTRIC COOPERATIVE, AMERICAN PUBLIC POWER ASSOCIATION, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION, DELAWARE MUNICIPAL ELECTRIC CORPORATION, AMERICAN MUNICIPAL POWER, INC., AND SOUTHERN MARYLAND ELECTRIC COOPERATIVE, INC. ("LOAD PETITIONERS")

Proof Initial Brief Dated:
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CORPORATE DISCLOSURE STATEMENT OF OLD DOMINION ELECTRIC COOPERATIVE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Old Dominion Electric Cooperative ("ODEC") states as follows:

ODEC is a not-for-profit power supply electric cooperative with no parent entity and no publicly-traded stock.

By: */s/ Harvey L. Reiter*
Harvey L. Reiter

Counsel to Old Dominion Electric Cooperative

Dated: September 6, 2012

CORPORATE DISCLOSURE STATEMENT OF AMERICAN PUBLIC POWER ASSOCIATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the American Public Power Association states as follows:

The APPA is an association of governmental entities to which Rule 26.1 does not apply. *See* Fed. R. App. P.26.1(a).

By: */s/ Harvey L. Reiter*
Harvey L. Reiter

Counsel to American Public Power Association

Dated: September 6, 2012

CORPORATE DISCLOSURE STATEMENT OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the National Rural Electric Cooperative Association ("NRECA") states as follows:

National Rural Electric Cooperative Association is a not-for-profit national service organization with no parent entity and no publicly-traded stock.

By: */s/ Harvey L. Reiter*
Harvey L. Reiter

Counsel to National Rural Electric Cooperative Association

Dated: September 6, 2012

CORPORATE DISCLOSURE STATEMENT OF NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, North Carolina Electric Membership Corporation states as follows:

North Carolina Electric Membership Corporation ("NCEMC") is a not-for-profit generation and transmission cooperative incorporated under North Carolina law that owns and or purchases generation and transmission services on behalf of its 25 member distribution cooperatives. NCEMC is wholly owned by its members and has no parent companies. No publicly held company has any ownership interest in NCEMC.

By: */s/ Harvey L. Reiter*
Harvey L. Reiter

Counsel to North Carolina Electric Membership Corporation

Dated: September 6, 2012

CORPORATE DISCLOSURE STATEMENT OF DELAWARE MUNICIPAL ELECTRIC CORPORATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Delaware Municipal Electric Corporation, Inc. ("DEMEC") states as follows:

DEMEC is a joint action agency established under Delaware law and is a government agency to which Rule 26.1 does not apply. *See* Fed. R. App. P.26.1(a). The Members of DEMEC are the Delaware Cities and Towns of Newark, Milford, New Castle, Seaford, Lewes, Smyrna, Clayton, Middletown, and Dover.

By: */s/ Harvey L. Reiter*
Harvey L. Reiter

Counsel to Delaware Municipal Electric Corporation

Dated: September 6, 2012

CORPORATE DISCLOSURE STATEMENT OF AMERICAN MUNICIPAL POWER, INC.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Circuit Rule 26.1.1 of this Court, American Municipal Power, Inc. ("AMP") submits the following Disclosure Statement:

1. AMP is a non-profit Ohio corporation organized in 1971 under the name American Municipal Power-Ohio, Inc. ("AMPO"), a name that was changed to American Municipal Power, Inc. as of July 1, 2009. It is a membership organization comprised of municipalities that own and operate utility systems. Eighty-two of these municipalities are located in Ohio, two are located in West Virginia, thirty are located in Pennsylvania, six are located in Michigan, five are located in Virginia, and three are located in Kentucky. AMP's membership also includes a joint action agency headquartered in Delaware.

2. AMP has issued term debt in the form of notes payable and bonds for the financing of its own assets and assets developed on behalf of specific members or groups of members. In connection with the financing undertaken by the electric systems of certain member communities, AMP has issued tax-exempt debt securities for municipal projects.

3. AMPO, Inc. is a for-profit subsidiary that provides electric and natural gas aggregation services to both members and non-members in Ohio. Through September 2002, it purchased and sold natural gas to the retail customers of AMP

members and non-members. In September 2002, AMPO, Inc. sold its remaining natural gas service contracts and earns its revenue from natural gas and electric aggregation consulting services to municipalities.

4. AMP does not have a parent corporation, and there is no publicly held corporation that holds 10% or more of its stock.

By: */s/ Harvey L. Reiter*
Harvey L. Reiter

Counsel to American Municipal Power, Inc.

Dated: September 6, 2012

CORPORATE DISCLOSURE STATEMENT OF SOUTHERN MARYLAND ELECTRIC COOPERATIVE, INC.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Southern Maryland Electric Cooperative, Inc. ("SMECO") is a cooperative, nonprofit membership corporation, incorporated under the Electric Cooperative Act of Maryland, owned and controlled by its members, with no parent entity and no publicly-traded stock.

By: */s/ Harvey L. Reiter*
Harvey L. Reiter

Counsel to Southern Maryland Electric Cooperative, Inc.

Dated: September 6, 2012

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INTRODUCTION

PJM Interconnection LLC ("PJM") is a Regional Transmission Organization (RTO) administering a tariff governing interstate transmission and sale for resale of electricity to 50,000,000 consumers from the Mid-Atlantic to Illinois. The Federal Energy Regulatory Commission ("FERC") regulates PJM under the Federal Power Act ("FPA"). These consolidated cases challenge FERC's approval of discrete but dramatic changes to the Minimum Offer Price Rule ("MOPR"), part of PJM's Reliability Pricing Model ("RPM"), a set of rules governing PJM's annual auctions of generating capacity.

The rule changes at issue, ostensibly intended to prevent "artificial price suppression," require sellers of most new electric capacity in PJM's auctions to prove their offer prices are not too *low*. These restraints on seller pricing -- imposed without evidence of anticompetitive misconduct and under rules that treat sellers' motive, ability and intent to engage in such misconduct as irrelevant -- limit consumer choices contrary to fundamental principles of competition. By redefining the concept of "artificial" price suppression and treating as abusive (or at least suspect) rational economic decision-making traditionally engaged in by much of the utility industry, the order threatens to make uneconomic potentially hundreds of millions of dollars in investments in new generating capacity that local utilities built or purchased to serve their own customers. The MOPR rule changes,

moreover, arbitrarily put these utilities at risk of paying twice for new electric generating capacity.

To ensure reliability, entities in PJM with legal duties to serve customers ("load serving entities" or "LSEs") must meet minimum generating capacity obligations. New generating capacity can be used to meet these targets only if it is offered into and clears PJM's annual "Base Residual Auction" ("Auction"). Originally, PJM's tariff guaranteed that LSEs' self-supply -- new capacity LSEs built or purchased to meet their customers' needs -- would clear the Auction and count toward the LSEs' capacity obligations. This "guaranteed clearing" meant the Auction explicitly functioned as a "last resort" mechanism for capacity not secured through self-supply – a way for LSEs to purchase short-term capacity resources needed to round out their capacity portfolios. LSEs could continue making long-term generation investments and purchases to supply their customers as they had done for over 70 years, without having those decisions second-guessed.

The orders at issue here eliminate guaranteed clearing, which puts this practice at risk. Now LSEs self-supplying new capacity must prove to the satisfaction of PJM or its Independent Market Monitor ("IMM") that their offers are sufficiently *high* to be "competitive" under a unit-specific review process FERC admits is inherently subjective. If the IMM/PJM find otherwise, and the higher "competitive" offer PJM substitutes is too high to clear the Auction, the

LSE's self-supplied capacity will not count toward its PJM-set capacity obligation and it will have to purchase *additional* capacity in PJM's Auction.

The risk of having to pay twice for new capacity will impede project financing, forcing many LSEs to abandon self-supply plans. Instead, they will buy capacity in the Auction from the very owners of existing generating capacity that demanded the rule change. This could convert a residual Auction into the only new capacity procurement option. LSEs that traditionally planned 10 years ahead and built 30+ year assets based on long-term assured revenue streams could instead be forced to buy only one year blocks of capacity three years ahead.

FERC's claimed intent is to prevent "net buyers" from exercising their alleged monopsony power to depress prices artificially – offering a little capacity into the auction at a price below cost and more than recouping their losses by purchasing their larger capacity requirements at reduced prices. But there is no record evidence of *any* sellers of new capacity in PJM doing this. And, FERC's revised rule applies even if a seller has no incentive or ability to engage in monopsony pricing without an explanation why that result is reasonable. It is as if FERC has effectively barred consumers from eating their own home-grown tomatoes unless the supermarket first determines that their decision to plant a garden was economically rational, based solely on *today's* price of produce.

Notwithstanding its claimed justification, FERC approved the MOPR changes to preserve the financial viability of existing generators that have chosen to rely solely on PJM's markets for their revenues. Only by eliminating competition from LSEs building or buying capacity to meet their own needs could these existing generators keep RPM prices high enough to maximize their profits.

Thus, the MOPR changes FERC approved to meet the financial needs of these existing generators impose an unjust and unreasonable burden on wholesale consumers, unlawfully protect competitors with existing resources at the expense of competition, and represent an unexplained departure from over 70 years of industry practice.

REQUIRED STATEMENTS AND REVIEW STANDARD

Petitioners submitting this brief ("Load Petitioners")[1] are also signatories to a Joint brief with New Jersey and Maryland state petitioners that contains a common standard of review applicable to all of their respective issues, as well as common statements (1) on jurisdiction, (2) regarding related cases and proceedings, (3) of the case and (4) of the facts.

[1] Load Petitioners (identified on the brief's cover) are a group of governmentally-owned and rural electric cooperative utilities and their respective national organizations.

STATEMENT OF THE ISSUES

1. A 2006 FERC-approved Settlement provided that PJM's Auction would be a "last resort" means to secure needed capacity after PJM "first" cleared all self-supplied new capacity, regardless of price. But here, FERC rejected objections to PJM's proposal to end guaranteed clearing of self-supply on grounds that guaranteed clearing would defeat the objective of that Settlement. By fundamentally changing not just the auction but the manner in which the industry procures new capacity, did FERC act arbitrarily or unlawfully? Load May Rehearing, 19-28; 39-42, 44-46; NRECA May Rehearing, 23-28; *PJM Interconnection, LLC,* 137 FERC ¶61,145, PP 5, 100 (2011) ("Rehearing Order"); APPA, *et al.* December Rehearing, 7-16; *PJM Interconnection, LLC,* 138 FERC ¶61,194, P 26 (2012) ("March Order"); *PJM Interconnection, LLC,* 135 FERC ¶61,022, P 192 (2011) ("Initial Order"); Load Protest, 32-35. R218, 220, 278, 283, 303, 203, 167.

2. Ending the guaranteed clearing of self-supplied new capacity in the Auction exposes LSEs investing in their own resources to the material risk of being forced to buy redundant capacity in the Auction to meet their regulatory capacity obligations. Was it unjust and unreasonable under the FPA to place these entities at risk of having to pay twice for capacity? Load May Rehearing, 4-5; 7-8. R218.

3. FERC requires that to participate in PJM's Auction, self-suppliers must first demonstrate their prices for new gas-fired generation capacity represent a "competitive" price under a process FERC describes as subjective and that does not take non-cost factors into account. In so doing and in barring self-suppliers from demonstrating that they lacked the intent, incentive or ability to exercise monopsony power, did FERC either violate fundamental competition principles it is required to follow or act arbitrarily in failing to address them? Initial Order, P 143; NRECA May Rehearing, 30-32; APPA, *et al.* December Rehearing, 7-16, 19-23; Rehearing Order, PP 5, 182; March Order, P 26. R203, 220, 283, 278, 303.

4. FERC in 2006 approved as just and reasonable a Settlement establishing the Auction as a "last resort" for capacity procurement and guaranteed clearing of self-supplied new capacity. Did FERC fail to engage in reasoned decision-making by not responding to requests that it consider the impact the tariff changes it approved would have on the 2006 Settlement? Load Protest, 23-25; NRECA May Rehearing, 28-29. R167, 220.

SUMMARY OF ARGUMENT

1. FERC dismissed challenges to the elimination of guaranteed clearing for new supply from the MOPR tariff provisions, holding that guaranteed clearing was inconsistent with the MOPR's objective to prevent monopsony power abuses. But because the MOPR already guaranteed self-supply clearing and contained

provisions preventing self-supply from exercising monopsony power, retaining that guarantee could not be inconsistent with the MOPR. FERC reached its erroneous conclusion because it assumed that there never was a guaranteed clearing provision, that Load Petitioners were instead objecting to removal of a non-existent total exemption from the MOPR for self-supply and that PJM's filing was just "clarifying" there never was such an exemption. Its ruling is unsustainable for several reasons.

First, FERC's ruling departed without explanation from prior orders where it approved a residual capacity auction design for PJM that expressly acknowledged LSEs' right to supply their own capacity.

Second, the existing tariff language unambiguously guarantees new self-supply to clear the Auction. And had there been any ambiguity, FERC should have construed it against the filing utility.

Third, contrary to FERC's assertion, self-suppliers of new capacity claimed guaranteed clearing rights, not a MOPR exemption. Their offers, although guaranteed to clear, could trigger adjustments to the clearing price preventing any self-supply-induced price suppression. FERC never explained why that aspect of the original MOPR would not address its monopsony power concerns or why, therefore, eliminating guaranteed clearing was reasonable.

Fourth, no evidence supported FERC's conclusion that elimination of guaranteed clearing, coupled with a process for evaluating sell offers, reasonably balanced the self-suppliers' need to clear and FERC's monopsony power concerns. There was no evidence that self-suppliers had previously engaged in predatory pricing and FERC ruled irrelevant evidence that sellers lacked incentive or ability to do so. The limited and subjective unit-specific exception analysis FERC ordered as an alternative to guaranteed clearing still requires upward re-pricing of self-supply offers, still fails to guarantee that self-supply offers will clear the auction, and thus, like elimination of the clearing guarantee, contradicts rational economic considerations under LSEs' long-standing business models. Given that the risks of non-clearance threaten the LSE self-supply model FERC professed a desire to protect, its orders struck no balance, much less a reasonable one.

Fifth, eliminating guaranteed clearing was inconsistent with FERC's determination that self-supplying sellers' offers should not be "automatically suspect." By requiring self-suppliers to prove the reasonableness of their sell offers in the absence of any evidence to the contrary, and by evaluating those offers under a cost-revenue test as opposed to a more traditional cost-benefit test, FERC *has* treated those offers as automatically suspect.

Finally, elimination of guaranteed clearing could not be justified as reasonable on grounds that self-suppliers could utilize the Fixed Resource

Requirement ("FRR") option to avoid the Auction. FERC never responded to Load Petitioners' substantial record evidence that FRR was not a viable alternative for them.

2. Under the modified MOPR, self-suppliers face the material risk that their self-supply offers will not clear the Auction, requiring them to purchase additional Auction capacity to replace their self-supply and meet their capacity obligations. Exposing self-supplying LSEs to this risk violates settled FERC policy holding it unreasonable to force customers to pay twice for the same service.

3. FERC is required to protect competition and to follow antitrust principles. But the revised MOPR protects existing competitors, not competition. By eliminating guaranteed clearing and mandating pre-screening and potential modifications of self-suppliers' offers for new gas-fired generating capacity into the Auction– without evidence of their ability, incentive or intent to price their services below cost– FERC violated those principles. Its actions penalize normal business behavior and create new regulatory barriers to entry, to fend off a purely theoretical threat. True instances of monopsony pricing are rare. Antitrust policy counsels that mistaken diagnoses of predation discourage beneficial vigorous price competition. FERC's failure to address either: (1) the inconsistency between its severe limits on seller offers and competition principles; or (2) the evidence that

these limits would potentially force self-suppliers to purchase capacity twice -- discouraging the self-supply model it professes to protect -- was arbitrary and capricious.

4. The MOPR was part of a comprehensive 2006 RPM Settlement. By ignoring requests that it not revise the MOPR in a vacuum, but instead consider whether other revisions were also necessary to maintain the bargain previously struck between load and generators, FERC failed to engage in reasoned decision-making.

ARGUMENT

I. There Was Neither Substantial Evidence Nor Logical Foundation to Support FERC Eliminating the PJM Tariff Provision Guaranteeing That Self-Supply Would Clear in the Auction.

In endorsing the RPM concept in 2006, FERC determined that a residual auction would be appropriate as a "last resort" means to secure capacity "*after* LSEs have had an opportunity to procure capacity on their own." *PJM Interconnection, LLC,* 115 FERC ¶61,079, P 71 (2006) ("April 2006 Order"). (emphasis added). Key to the subsequent 2006 Settlement establishing the MOPR, as FERC noted, was the assurance to LSEs, particularly governmentally-owned utilities and rural electric cooperatives, that self-supply would continue to be protected. *PJM Interconnection, LLC*, 119 FERC ¶61,318, P 68 (2007) ("2007 Rehearing Order"). The tariff language assuring LSEs that their investments in

self-supply would count towards their capacity obligations was central to that protection and critical to LSEs. For a range of legitimate business reasons, many LSEs cover the majority of their load obligations with capacity resources procured outside the RPM auctions. NRECA Protest, 11, citing attached Kirsch/Morey Affidavit, 17. R169.

The "Base *Residual* Auction" is defined in the tariff as the mechanism to procure resources "as necessary to satisfy any portion of the Unforced Capacity Obligation of the PJM Region not satisfied through self supply." PJM Tariff Attachment DD, Section 2.5. Prior to the recent tariff change, Section 5.14(h)(4) of the same attachment then expressly directed that, in the auction, PJM accept "*first*, all Sell Offers in their entirety designated as self-supply….*regardless of price*." (emphasis added) Thus, while the tariff required self-supply to be offered for sale into the Auction, that self-supply was guaranteed to clear; LSEs had assurance their resources procured outside of RPM auctions could be used to meet their capacity obligation. This concept – that the auction was to be a capacity procurement source of "last resort" -- was so critical to the RPM settlement that "Residual" is in the very name of the Auction. NRECA May Rehearing, 23-25. R220.

The clearing guarantee protected LSEs from the risk that they might have to pay twice for capacity - once for the resource that they acquired to meet their

loads' needs and a second time to purchase Auction capacity to satisfy their regulatory capacity obligations. Load Petitioners advised FERC that this risk would be intolerable. It would jeopardize LSEs' ability to obtain financing or service the financing for new resources, and undercut their ability to meet their obligation to protect their loads from long-term price volatility or supply unavailability. Load Protest, 9-10; Load May Rehearing, 30. R167, 218.

A. FERC's orders depart without explanation from prior rulings approving RPM's residual nature and rest on the factually unsustainable premise that PJM's tariff change simply "clarified" existing practice.

FERC's Orders eliminate guaranteed clearing for self-supply, departing without explanation from prior orders consistently approving RPM, as well as its predecessor, as a residual capacity construct.[2] Instead, they force all capacity – including new self-supply – to clear the auction based on the MOPR's proxy for a "competitive" offer or such other offer price that may be approved in what FERC itself states is a subjective, unit-specific review process that does not take non-cost factors into account. FERC's approval of the MOPR revisions departs from its prior orders that consistently recognized self-supply as the preferred capacity source for LSEs and ensured that RPM was a "last resort" to satisfy LSEs' residual

[2] April 2006 Order at P 71; *PJM Interconnection, LLC*, 95 FERC ¶ 61,175, 61,563 (2001) ("Load serving entities typically satisfy approximately 95 percent of their capacity obligations through self-supply and bilateral contracts"); *PJM Interconnection, LLC*, 117 FERC ¶ 61,331, P 13 (2006).

capacity needs.[3] Load May Rehearing, 25-26. R218. FERC's unexplained departure from that precedent and its new characterization of self-supply as a threat to RPM and/or other types of planned generation is not reasoned decision-making. *Donovan v. Adams Steel Erection*, *Inc.*, 766 F.2d 804, 807 (3d Cir.1985).

The essence of FERC's defense to this objection is the unsustainable assertion that there has been no departure. Starting with the faulty premise that Load Petitioners objected to elimination of a complete self-supply exemption from the MOPR, FERC bases its orders eliminating guaranteed clearing on the equally faulty premise that the proposed tariff change simply clarified that there was never a self-supply exemption (Initial Order, PP 191-192, R203) and that such an exemption would contradict "the very basis upon which the Commission approved the MOPR," Rehearing Order, P 205. R278.

But, whether self-supply should be subject to the MOPR was never at issue. "PJM Load Group and NRECA both explained in their protests how self-supply was *not* exempt from triggering the MOPR, but nevertheless was guaranteed to be cleared by PJM." Load May Rehearing, 23 *n.*43. R218 (emphasis added). While the 2006 settlement guaranteed self-supply would clear, they added, self-supply could nevertheless trigger application of the MOPR in constrained areas, ensuring

[3] *Id.*

that RPM clearing prices in the market could not be artificially depressed. [4] In other words, Load Petitioners demonstrated to FERC that elimination of the clearing guarantee was not necessary to ensure that clearing prices would not be depressed artificially by self-supply. Because it responded to an argument never made, FERC arbitrarily failed to address LSEs' objection to loss of guaranteed clearing.

B. FERC's assertion that guaranteed clearing for self-supply would defeat the original purpose of the MOPR makes no sense, since it was part of the original MOPR.

Because FERC claimed there never was guaranteed clearing, it never grappled with the actual objection posed: that PJM had not met its burden under FPA Section 205 to prove that its proposed tariff change – elimination of guaranteed clearing -- was just and reasonable. FERC's failure of reasoned decision-making is evident from its conclusion that granting an exemption for self-supply would defeat the purpose of the MOPR. Rehearing Order, P 205. R278. This conclusion is deficient in several respects.

As noted above, the 2006 FERC-approved MOPR included a guaranteed clearing provision for self-supply,[5] so, by definition, retaining it could not possibly have defeated the MOPR's purpose. That MOPR also contained provisions

[4] If self-supply sell offers triggered a "sensitivity analysis" under the MOPR, PJM would calculate a higher clearing price and apply it to all remaining sell offers after taking into account the self-supply volumes. *Id.*; Load Protest, 10-12. R218, 167; Addendum B, Section 5.14(h)(3).

[5] Addendum B, Section 5.14(h)(3).

ensuring that even though self-supply sell offers must clear the auction, clearing prices would be recalculated, as necessary, to prevent any artificial suppression of auction prices. Load May Rehearing, 23. R218. Because it never even acknowledged the automatic clearing and anti-price suppression features of the 2006 MOPR, FERC did not address the logical fallacy in its conclusion. If anything, FERC's concern that if there is guaranteed clearing, "only self-supply investment will occur" Initial Order, P 195, R203, is antithetical to RPM's role as a "last resort."

In ruling against a "blanket, across-the-board MOPR exemption for resources designated as self-supply,"[6] FERC also overlooked that there simply was no such exemption being claimed. Instead, as just noted, while self-supply was guaranteed to clear the Auction, it could still trigger application of the MOPR such that a new clearing price would be calculated in order to prevent price suppression. NRECA Protest, 12-14; Load Protest, 10-12. R169, 167. FERC missed this distinction in the Tariff altogether.

While an agency is entitled to deference in the construction of ambiguous tariff provisions it regulates, it gets no deference where the language admits of only one meaning. *Idaho Power Co. v. FERC*, 312 F.3d 454, 461-62 (D.C. Cir. 2002). The tariff language guaranteeing clearing of self-supply could hardly be

[6] Rehearing Order, P 205. R278.

clearer. FERC's orders make no effort to parse the language, much less explain how a provision under which *it* notes that "self-supply [is] committed regardless of price" (Initial Order, P 191, R203) could be interpreted any other way.

Compounding its error, FERC cites only PJM's bare representation that self-supply was always intended to be "covered by the MOPR." Initial Order, P 191. R203. "In the absence of an ambiguity," however, "the Commission determines the meaning of an agreement from the language of that agreement without resort to extrinsic or parole evidence." *Amerada Hess Pipeline Corp*., 74 FERC ¶61,318, 62,006 (1996), *aff'd, Amerada Hess Corp*. v. FERC, 117 F.3d 596 (D.C. Cir. 1997). Not only did FERC cite no ambiguity, but in relying solely on PJM's representations, FERC also ignored the rule of tariff construction that the tariff interpretation claimed by the filing company "should be that reasonably communicated to those governed by it," *Jersey Central Power & Light Co. v. FERC,* 589 F.2d 142, 145 (3d Cir. 1979), and that "any doubt as to the meaning should be resolved against the filing utility." *Id.* In this case, even the P3 Complainants who sought to change the PJM tariff understood that under the Tariff, "Sell Offers designated as self-supply will *always* be accepted in full." P3

Complaint, 48. R1 (emphasis added).[7] FERC's unsupported finding to the contrary is therefore arbitrary and capricious.

C. By failing to acknowledge the existence of a PJM tariff provision guaranteeing self-supply clearing, FERC never explained why its elimination was reasonable.

Since FERC failed to acknowledge the existence of a guaranteed self-supply clearing provision, it never explained why elimination of that provision was just and reasonable under Section 205. As a result, FERC's action largely discounts record evidence addressing the Load Petitioners' foremost concern – that elimination of the guaranteed self-supply clearing right would force LSEs to abandon self-supply, and turn the Auction into their exclusive option to secure capacity. APPA, *et al.* December Rehearing, 12-16; NRECA May Rehearing, 23-28. R283, 220.

To be sure, FERC did give lip service to this concern. It was not enough, however, to support reasoned decision-making. FERC asserted that the MOPR, as modified, allows self-suppliers flexibility to demonstrate case-by-case that their offers below the administratively determined proxy for a "competitive price" are justified and that this flexibility strikes a "reasonable balance" between the need to protect against seller monopsony power and protection of self-supply rights.

[7] Even assuming FERC could properly rely on parole evidence, its failure to consider the evidence contradicting PJM's statement left FERC's orders bereft of substantial evidence. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951).

Rehearing Order, P 209. R278. But as Load Petitioners pointed out, FERC had no evidence that any self-supplier had exercised monopsony power or intended to do so. NRECA May Rehearing, 11. R220. FERC also never addressed Petitioners' arguments that elimination of the clearing guarantee was not necessary to ensure that self-supply offers would not artificially suppress RPM clearing prices since the *original* MOPR's repricing provisions already addressed that concern.

Nor did FERC's assertion that its orders struck a reasonable balance address the uncertainty at the core of self-supplier objections to the unit-specific review process. The unit-specific offer alternative, like the MOPR, imposes unnecessary and unacceptable risks on self-supply, including the risk, noted earlier, that approved offers still might not clear the auction, requiring LSEs and their customers to pay twice for capacity. That risk is even greater because, as FERC notes, the orders give PJM "unavoidable" and even "necessary" discretion in deciding which offers are "artificially" low. Rehearing Order, P 245. R278. PJM itself recognized that the subjectivity of its process could hinder legitimate self-supply. PJM March 21, 2011 Answer, 9 ("PJM Answer"). R186.[8]

[8] The MOPR "could sometimes capture market participant sell offers that do not really pose any significant threat to competition." *Id*. PJM characterized the self-supply concerns as "legitimate" and offered to work on a way to avoid "potential unintended consequences."*Id*.

Finally, FERC's bare assertion that it had balanced self-supplier concerns against the specter of monopsony power ignores the original MOPR provisions preventing self-supply from artificially depressing prices. FERC never explains why those provisions were inadequate. Indeed, FERC ignored evidence from PJM, the proponent of the tariff change, that there was no reason to subject legitimate self-suppliers with no intent to depress auction prices artificially, to the process. ("[T]he MOPR should not apply to legitimate resource investment, including resource investment planned and developed for self-supply, that is motivated in good faith and not with the objective of distorting prices.") Load May Rehearing, 17, citing PJM Answer, 4, R218. And, because it never acknowledged the existing tariff protections against price suppression in striking its "balance," FERC arbitrarily discounted evidence that, by replacing guaranteed clearing with a subjective unit-specific review process, FERC has created investment risks that will chill LSE generation investment to the detriment of competition and consumers. *Id*.

D. Having found that it should not deem self-supply "automatically suspect," FERC illogically did just that by presuming all sell offers of new gas-fired generation below its proxy price are anticompetitive and forcing self-suppliers to prove otherwise.

The notion that the newly-imposed MOPR changes struck a reasonable balance between the interests of self-supplying LSEs and FERC's inchoate monopsony power concerns also flies in the face of its own fact findings. FERC's

Rehearing Order finds that "certain advantages associated with long-standing and well-recognized business models should not be deemed automatically suspect… when determining whether a particular sell offer accurately reflects a resource's net costs." P 208. R.278. Yet, in the same paragraph FERC concedes that it presumes self-supplier sell offers *are* automatically suspect: When LSEs make a sell offer that is below the "pre-determined threshold, the presumption is therefore that the offer may not be competitive." Rehearing Order at P 207. R278.

Reasoned decision-making requires a "rational connection between the facts found and the choice made," *Motor Vehicle Mfr. Ass'n v. State Farm Mut.,* 463 U.S. 29, 43 (1983). Having found that self-supply sell offers should not be treated as automatically suspect, FERC acted arbitrarily when it placed the burden on such sellers to prove their innocence. The lack of guaranteed clearing is not trivial. When PJM proposed that those submitting sell offers that failed the MOPR could apply to FERC for an exception from the MOPR under FPA Section 206, FERC rejected the proposal as unreasonable because it could expose LSEs to a burdensome process. Initial Order, PP 118, 121. R203. But the alternative it approved - a unit-specific review process before PJM and its IMM - does not alleviate this problem. By FERC's own account, the outcome of the process is uncertain: PJM's determination whether a particular offer is cost-justified "will

obviously involve the exercise of judgment and discretion on the part of the IMM and PJM." Rehearing Order, P 245. R278.

FERC also ignored arguments and evidence demonstrating that the unit-specific review discriminates against the very types of "long-standing business models" that FERC professed to protect. Rehearing Order, P 208. R278. NRECA's Protest explained that subjecting self-supply to the MOPR's upward adjustment contradicts rational economic factors LSEs such as electric cooperative utilities consider in making resource investments. NRECA Protest, 32. R169.

The unit-specific test treats identically a one-year slice of capacity from the undifferentiated market pool and a 30-year multi-purpose asset because it disregards reasons rational LSEs have long chosen self-supply -- including long-term cost and revenue benefits, increased long-term reliability, economic development, and resource diversity. *Id.* at 32; *see also*, attached Kirsch/Morey Affidavit, 5-9. Having stated that RPM, as amended, "has no feature to explicitly recognize, for example, environmental or technological goals, nor does it contemplate reliability concerns beyond a three year forecast," Rehearing Order, P 90, R278, FERC cannot reasonably say it is not treating long-standing business models – which are traditionally obligated to consider these factors -- as "automatically suspect." By excluding these factors from consideration, FERC converted the cost-benefit analysis utilities have always conducted into the much

narrower cost-revenue analysis used only by independent power producers with no obligation to serve consumers. FERC thereby redefined what is or is not an "economic" or "rational" investment and thus what constitutes an "artificially low" or "uncompetitive" offer, and has done so in a way that benefits the owners of existing generation without adequately considering how its test discriminates against LSEs with a traditional obligation to serve consumers with reliable and affordable power over the long-term.

E. FERC's reliance on the FRR "option" as an alternative to participation in RPM arbitrarily disregarded evidence that FRR was only viable for a handful of the very largest vertically-integrated LSEs.

The Initial Order approving elimination of guaranteed clearing for self-supply cited the availability of the FRR as "an alternative for those [LSEs] that wish to bring new generation resources into the PJM capacity market without risk of being mitigated under the MOPR."[9] According to FERC, "[t]he FRR option is the alternative for [LSEs] that wish to secure their own capacity resources outside of a competitive market, whether as directed by state-authorized integrated resource plans, or pursuant to other considerations."[10] FERC, however, did not address arguments that the FRR option was too prescriptive for Load Petitioners. Load Petitioners protested that it was impractical for smaller LSEs to match

[9] Initial Order, P 192. R203.
[10] *Id.*, P 193.

generation resources with all load in an FRR Service Area, which might differ from areas that might be affected by state/locality mandates to construct generation. Load Protest, 32-35. R167. NRECA objected that the five-year commitment and the requirement that only one LSE serve the entire load in the FRR service area made FRR difficult to utilize for all except large vertically-integrated utilities with diverse resource portfolios. NRECA Protest, 38-39. R.169.

When pressed on rehearing to address these concerns, FERC stated:

> Some parties argue that the FRR alternative may not be a viable substitute for many RPM participants. But this is an individual determination to be made by each state and distribution company. PJM's tariff provides this alternative method of satisfying resource requirements while preserving wholesale market prices, and states and distribution companies can make this choice based on their individual circumstances.

Rehearing Order, P 100. R278. All FERC did with this question-begging statement was recount Load Petitioners' arguments, without actually addressing them. FERC never discussed whether it believed the FRR alternative was viable or not, much less on what record basis it reached its conclusion. That each state or distribution company should make an individual determination as to whether to use the FRR alternative is of no use if the FRR is not a viable alternative. It is not enough for the agency simply to "characterize objections;" it must "answer them." *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 209 (D.C. Cir. 2011). The case law is quite clear that failure to engage the material arguments of a party

is arbitrary and grounds for remand. *PPL Wallingford Energy, LLC v. FERC*, 419 F.3d 1184, 1198 (D.C. Cir. 2005).

Its silence in response to the rehearing requests notwithstanding, FERC may argue that it had already warned LSEs that by choosing the FRR option they would forfeit the right to sell any surplus capacity into the residual auction. Initial Order, P 195, *n.*98. R203. But this is simply an explanation *why* FRR is not a viable alternative to self-supply--it deprives smaller entities of an economic outlet if their previously-developed estimates of capacity needs do not match up precisely with their later actual needs. This is not a response to objections about FRR's viability for self-supplying entities. The FRR limitations do not make it a viable alternative for self-supplying utilities; rather, they underscore the futility of relying on that option and the arbitrary nature of the MOPR changes FERC approved.

II. Subjecting Self-Supplying LSEs to the Material Risk of Double Paying for Capacity Results In Unjust and Unreasonable Rates.

FERC has often said tariff provisions that force customers to pay twice for the same service are self-evidently unreasonable. *PJM Interconnection, LLC*, 119 FERC ¶61,144, P 71 (2007); *Public Serv. Co. of Colorado*, 62 FERC ¶61,013 (1993); *Natural Gas Pipeline Co. of America*, 65 FERC ¶61,362, 62,971 (1993). Yet that is exactly the effect of the tariff changes on review here.

FERC does not dispute that self-suppliers face this risk under the newly approved tariff provisions. Indeed it admits that even the revised "case specific"

approach used to evaluate self-supply offers "will not guarantee that all resources designated as self-supply will clear in the auction." Rehearing Order, P 209. R278. As PJM itself has stated, there remains a risk that the MOPR "can have unintended consequences, complicating the capacity plans of market participants that have neither the intent nor the capability to significantly depress RPM auction prices." PJM Answer, 11. R186. FERC's failure to explain why it is reasonable to expose self-supplying utilities to a material risk of double-paying for capacity is arbitrary. *PPL Wallingford*, *supra*, 419 F.3d at 1198.

III. The Revised MOPR Protects Select Competitors with Existing Resources, Not Competition, Contrary to the Competition and Antitrust Policies FERC Is Required to Consider.

"Improving the competitiveness of organized wholesale markets," FERC has stated, "is integral to the Commission fulfilling its statutory mandate to ensure supplies of electric energy at just, reasonable and not unduly discriminatory or preferential rates." *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶31,281, P 1 (2008). "Effective wholesale competition," it added, "protects consumers by providing more supply options…..exerting downward pressure on costs, and shifting risks away from consumers." *Id*. These are not mere platitudes, but principles to which FERC must adhere:

> [W]hen an agency is statutorily required to adhere to basic economic and competition principles — or when it has exercised its discretion

> and chosen basic economic and competition principles as the guide for agency decision-making in a particular area, as FERC did in [this case] — the agency must adhere to those principles when deciding individual cases.

Mobil Pipe Line v. FERC, 676 F.3d 1098, 1104 (D.C. Cir. 2012). In requiring self-suppliers to prove that their RPM capacity auction offers are sufficiently high to be "competitive" -- without any prior evidence of competitive misconduct or even evidence that they have the incentive or ability to suppress prices artificially -- FERC has stood these competition principles on their head. Its actions discourage the very price competition it promises to protect and substitute a "guilty until proven innocent" policy utterly foreign to traditional competition principles. Worse yet, it threatens to upend the long-established self-supply business model that most of the industry has followed for more than 70 years and that Load Petitioners continue to follow successfully.

Under the MOPR, sellers face the risk that the admittedly subjective PJM review process (Rehearing Order, P 245; March Order, P 23, R278, 303) will deem their offers "too low." As discussed above, the double payment consequence of such a finding is enormous. Compounding the self-supplying seller's risk, under the MOPR review process it is irrelevant that the self-supplier possesses neither the ability nor the intent to suppress prices – and is able to prove it. (Initial Order, P 143, R203). Faced with the purely regulatory risk that large capital investments in

new capacity might not clear the Auction, would-be self suppliers will find it difficult to finance their self-supply resources, and will be forced to rely on the Auction to satisfy their capacity obligations. NRECA May Protest, 22-25, Kirsch/Morey Affidavit, 9-10. R169. Far from promoting or protecting competition, PJM's tariff will shield existing large capacity suppliers from the competitive discipline potential self-supply entry poses. It will force LSEs to buy a product they neither want nor need solely to prop up prices for existing generators.

FERC claims it need not look at a party's intention to suppress wholesale prices because "below-cost entry suppresses capacity prices." Initial Order, P 143. R203.[11] No cognizable competition theory, however, enjoins sellers from setting their own prices in the absence of a finding that the seller is acting anti-competitively. Low offers are not *per se* evidence of the exercise of monopsony power, especially where such offers are a rational effort by those self-supplying their capacity obligations with new resources that are economic over the life of the facilities. NRECA May Protest, Kirsch/Morey Affidavit, 9-10. R169. Indeed, the theory of competition is that new entry will result in lower prices; it is the "essence of competition." *Matsushita Electric Industrial Co., Ltd., et al. v. Zenith Radio*

[11] *See also*, Initial Order, P 141, R203; FERC has expressed this view on a number of occasions. *See also*, *ISO New England, Inc.*, 138 FERC ¶61,027, P 171 (2012).

Corp. et al., 475 U.S. 574, 594 (1986). FERC's actions serve only to protect existing competitors (to whose existing resources the MOPR does not apply) from self-supplied competition. But it has long been settled that our nation's competition policies are designed for the "protection of competition, not competitors." *Atlantic Richfield Co. v. USA Petroleum Co*., 495 U.S. 328, 338 (1990).

FERC's orders never address Load Petitioners' challenge to its failure to apply competitive principles to the MOPR provisions (NRECA May Rehearing, 30-31, R220; APPA, *et al.* December Rehearing, 21-23, R283). Instead, FERC makes only the conclusory assertion that the unit-specific exception mechanism approved in the Rehearing Order "appropriately balances the need to protect against uneconomic entry while also mitigating parties' concerns about having to pay twice for capacity as a result of failing to clear in the RPM."[12]

As discussed above, FERC engaged in no balancing at all. FERC, however, has a long-settled duty to consider the effect of public utility rates and practices on competition, deriving from its responsibility to consider antitrust policy in reviewing those rates and practices. *Conway Corp. v. FPC*, 426 U.S. 271, 279-80 (1976); *FPC v. Gulf States Utilities Co*., 411 U.S. 747 (1973). Thus, its monopsony power concerns do not arise in a vacuum; they are informed by the

[12] Rehearing Order, P 209. R278.

antitrust policies reflected in interpretations of the nation's antitrust laws. *See, e.g., Northern Natural Gas. Co. v. FPC*, 399 F.2d 953,958 (D.C. Cir. 1968). "Although the Commission is not bound by the dictates of the antitrust laws, it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the Commission is obliged to weigh antitrust policy." *Id*. *See also Connecticut Light & Power Co*., 8 FERC ¶61,187, 61,653 (1979); *Florida Power & Light Co*., 8 FERC ¶61,121 (1979). Antitrust law and policy encourages pricing activity that reduces prices and treats warily monopolists' and monopsonists' predatory pricing claims.[13] Load Petitioners pointed out that a mistaken finding that monopsony power is or could be exercised in the *residual* auction can chill the very conduct – aggressive bidding – that the antitrust laws were designed to encourage:

> [T]he costs of erroneous findings of predatory-pricing liability [are] quite high because '[t]he mechanism by which a firm engages in predatory pricing − lowering prices − is the same mechanism by which a firm stimulates competition,' and, therefore, mistaken

[13] Indeed the long-settled general rule in antitrust policy is that businesses should be free to decide with whom, and on what terms they will deal. *See Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 375 (7th Cir. 1986) (even "a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches."). The FERC-approved exception process, on the other hand, not only second-guesses the business judgments of self-supplying LSEs, it presumes they are attempting to exercise buyer-side market power unless they can affirmatively prove otherwise.

> findings of liability would 'chill the very conduct the antitrust laws are designed to protect.'

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320 (2007) (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993)).

Even where a seller is charged – after the fact – with monopsony pricing, our nation's competition principles counsel against imposing pricing restrictions that might do more harm than good. In this case, FERC has not only robbed self-suppliers of guaranteed clearing for their offers, it has placed *prior* restraints on their freedom to submit capacity sell offers – restraints that apply to all self-suppliers of new gas-fired generation without any showing that they have engaged in anticompetitive conduct or have the ability to exercise monopsony power. Such restraints – particularly to protect against theoretical damage to a "residual" auction -- cannot plausibly reflect a balance between protecting against inchoate threats to the RPM and the damage to self-suppliers FERC professed a desire to protect. FERC's failure to respond to this concern renders FERC's orders arbitrary and capricious. *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1990) (agency must "engage the arguments raised before it").

IV. FERC Failed To Address Arguments That It Must Consider The Impact of Its Orders On The 2006 Settlement.

Load Petitioners warned FERC against revising the MOPR in a vacuum since it was part of a comprehensive FERC-approved settlement which included market design and market mitigation provisions. Load Protest at 23-25; NRECA May Rehearing, 28-29. R167, 220. Instead, Load Petitioners requested that FERC consider whether, to maintain the balance between load and generator interests and continue RPM's goals, changes to the MOPR would necessitate changes to other RPM provisions. Load Protest, 23-25, R167. FERC's orders did not address the Load Petitioners' overall concerns. This violates FERC's duty to address the material arguments put before it. *State Farm Mut.,* 463 U.S. at 42.

CONCLUSION

FERC's orders fail to support, either with substantial evidence or conclusions that flow from the facts before it, its ruling that elimination of guaranteed clearing for new self-supply was just and reasonable under Section 205 of the FPA. Insofar as FERC's orders approve the challenged tariff changes, they should therefore be vacated.

Respectfully submitted,

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Dated: September 6, 2012

COMBINED CERTIFICATIONS

1. Certification of Bar Membership

I, Harvey L. Reiter, counsel for Petitioners, certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Word Count

Pursuant to Federal Rule of Appellate Procedure 32(a), I certify that this Brief of Old Dominion Electric Cooperative, American Public Power Association, National Rural Electric Cooperative Association, North Carolina Electric Membership Corporation, Delaware Municipal Electric Corporation, American Municipal Power, Inc. and Southern Maryland Electric Cooperative, Inc., was prepared using Microsoft Word 2007, Times New Roman, 14-point font, proportionately spaced and contains 6,907 words.

3. Identical Compliance of Briefs

Pursuant to 3d Cir. LAR 31.1(c), I certify that the copy of this brief that has been electronically filed is the only copy being submitted since the Court has ordered that only the final brief is required to be submitted in paper copy.

4. **Virus Check**

I further certify that a virus check of the electronic PDF version of this Brief was performed using Sophos Endpoint Security and Control Product, Version 10.0 software, which was updated September 6, 2012, and according to that program, it is free of viruses.

By: */s/ Harvey L. Reiter*
Harvey L. Reiter

Dated: September 6, 2012

ADDENDUM

*** Current through PL 112-173, approved 8/16/12 ***

TITLE 16. CONSERVATION
CHAPTER 12. FEDERAL REGULATION AND DEVELOPMENT OF POWER
LICENSES AND PUBLIC UTILITIES; PROCEDURAL AND ADMINISTRATIVE PROVISIONS

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16 USCS § 825l

§ 825l. Review of orders

(a) Application for rehearing; time periods; modification of order. Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act [*16 USCS §§ 791a* et seq.] to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any orders of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act [*16 USCS §§ 791a* et seq.].

(b) Judicial review. Any party to a proceeding under this Act [*16 USCS §§ 791a* et seq.] aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States [United States Court of Appeals] for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in *section 2112 of title 28, United States Code*. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or

new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (*U. S. C., title 28, secs. 346* and *347*) [*28 USCS § 1254*].

(c) Stay of Commission's order. The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

HISTORY:

(June 10, 1920, ch 285, Part III, § 313, as added Aug. 26, 1935, ch 687, Title II, § 213, 49 Stat. 860; Aug. 28, 1958, P.L. 85-791, § 16(a), (b), 72 Stat. 947; Aug. 8, 2005, P.L. 109-58, Title XII, Subtitle G, § 1284(c), 119 Stat. 980.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

In subsec. (b), "*28 USCS § 1254*" has been inserted in brackets pursuant to Act June 25, 1948, ch 646, the first section of which enacted Title 28 as positive law.

The bracketed words "United States Court of Appeals" were inserted for "Circuit Court of Appeals of the United States" in subsec. (b) on the authority of Act June 25, 1948, as amended by Act May 24, 1949. See *28 USCS §§ 43* and *451* note.

Amendments:

1958. Act Aug. 28, 1958, in subsec. (a) added sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals; and in subsec. (b), substituted "transmitted by the clerk of the court to" for "served upon", substituted "file with the court" for "certify and file with the court a transcript of"; inserted "as provided in section 2112 of Title 28", and substituted "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

2005. Act Aug. 8, 2005, in subsec. (a), inserted "electric utility," in two places, and substituted "any entity unless such entity" for "any person unless such person".

Transfer of functions:

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by 1950 Reorg. Plan No. 9, §§ 1, 2, eff. May 24, 1950, *15 Fed. Reg. 3175,* 64 Stat. 1205, which appears as *16 USCS § 792* note.

The Federal Power Commission was abolished and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy, with the exception of certain functions, which were transferred to the Federal Energy Regulatory Commission, pursuant to the Department of Energy Organization Act (Act Aug. 4, 1977, P.L. 95-91, 91 Stat. 565), which is classified generally as *42 USCS §§ 7101* et seq. See, in particular, *42 USCS §§ 7151(b)*, *7171(a)*, *7172(a)*, *7291*, and *7293*.

NOTES:

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*** Current through PL 112-173, approved 8/16/12 ***

TITLE 16. CONSERVATION
CHAPTER 12. FEDERAL REGULATION AND DEVELOPMENT OF POWER
REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

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16 USCS § 824d

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates. All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful. No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules. Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes. Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five month period. Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge,

classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause".

(1) Not later than 2 years after the date of the enactment of this subsection [Nov. 9, 1978] and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine--

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are--

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to--

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

HISTORY:

(June 10, 1920, ch 285, Part II, § 205, as added Aug. 26, 1935, ch 687, Title II, § 213, 49 Stat. 851; Nov. 9, 1978, P.L. 95-617, Title II, §§ 207(a), 208, 92 Stat. 3142.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1978. Act Nov. 9, 1978, in subsec. (d) in the sentences beginning "Unless the Commission . . ." and "The Commission . . ." substituted "sixty" for "thirty"; added subsec. (f).

TITLE 16. CONSERVATION
CHAPTER 12. FEDERAL REGULATION AND DEVELOPMENT OF POWER
REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

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16 USCS § 824e

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues. Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest. Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its

intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 205 of this Act [*16 USCS § 824d*] and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, 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. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company". Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

(d) Investigation of costs. The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales.

(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 201(f) [*16 USCS § 824(f)*] voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to--

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4) (A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

HISTORY:

(June 10, 1920, ch 285, Part II, § 206, as added Aug. 26, 1935, ch 687, Title II, § 213, 49 Stat. 852; Oct. 6, 1988, P.L. 100-473, § 2, 102 Stat. 2299; Aug. 8, 2005, P.L. 109-58, Title XII, Subtitle G, §§ 1285, 1286, Subtitle I, § 1295(b), 119 Stat. 980, 985.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

The "Public Utility Holding Company Act of 1935", referred to in subsec. (c), is Act Aug. 26, 1935, ch 687, which generally appears as *15 USCS §§ 79* et seq. For full classification of such Act, consult USCS Tables volumes.

Amendments:

1988. Act Oct. 6, 1988 (applicable as provided by § 4 of such Act, which appears as a note to this section), in subsec. (a)(1), after the sentence ending ". . . and shall fix the same by order.", added the material beginning "Any complaint or motion of the Commission to initiate a proceeding . . ."; redesignated subsec. (b) as subsec. (d); and inserted new subsecs. (b) and (c).

PJM OPEN ACCESS

TRANSMISSION TARIFF

Effective Date: 8/28/2012

ATTACHMENT DD

Reliability Pricing Model

References to section numbers in this Attachment DD refer to sections of this Attachment DD, unless otherwise specified.

Effective Date: 9/17/2010 - Docket #: ER10-2710-000

2.5 Base Residual Auction

"Base Residual Auction" shall mean the auction conducted three years prior to the start of the Delivery Year to secure commitments from Capacity Resources as necessary to satisfy any portion of the Unforced Capacity Obligation of the PJM Region not satisfied through Self-Supply.

2.6 Buy Bid

"Buy Bid" shall mean a bid to buy Capacity Resources in any Incremental Auction.

2.7 Capacity Credit

"Capacity Credit" shall have the meaning specified in Schedule 11 of the Operating Agreement, including Capacity Credits obtained prior to the termination of such Schedule applicable to periods after the termination of such Schedule.

2.8 Capacity Emergency Transfer Limit

"Capacity Emergency Transfer Limit" or "CETL" shall have the meaning provided in the Reliability Assurance Agreement.

2.9 Capacity Emergency Transfer Objective

"Capacity Emergency Transfer Objective" or "CETO" shall have the meaning provided in the Reliability Assurance Agreement.

2.9A Capacity Export Transmission Customer

"Capacity Export Transmission Customer" shall mean a customer taking point to point transmission service under Part II of this Tariff to export capacity from a generation resource located in the PJM Region that is delisted from Capacity Resource status as described in section 5.6.6(d).

2.10 Capacity Market Buyer

"Capacity Market Buyer" shall mean a Member that submits bids to buy Capacity Resources in any Incremental Auction.

2.11 Capacity Market Seller

"Capacity Market Seller" shall mean a Member that owns, or has the contractual authority to control the output or load reduction capability of, a Capacity Resource, that has not transferred such authority to another entity, and that offers such resource in the Base Residual Auction or an Incremental Auction.

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February 11, 2011

Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426-0001

Re: *PJM Interconnection, L.L.C.*, Docket No. ER11-__-000

Dear Ms. Bose:

PJM Interconnection, L.L.C. ("PJM"), pursuant to section 205 of the Federal Power Act, 16 U.S.C. § 824d, and the Commission's regulations, 18 C.F.R. part 35, hereby submits for filing revisions to the PJM Open Access Transmission Tariff ("Tariff") to update and simplify the Reliability Pricing Model's minimum offer price rule and to conform that rule to the Commission's recent precedents on similar rules in New York and New England. PJM also proposes to add to the Tariff a date certain for PJM to file changes to RPM's new entry price adjustment provision, as determined necessary after a stakeholder process, to address concerns that such provision does not currently provide sufficient revenue assurances to support new entry. The enclosed tariff changes reflect an effective date of April 13, 2011, which is 61 days after the date of this filing.

I. Introduction

The Reliability Pricing Model ("RPM") is the set of rules by which PJM obtains commitments of capacity to meet the PJM Region's reliability needs through auctions conducted three years before the year for which the capacity is needed (i.e., the Delivery Year). The annual RPM Base Residual Auctions therefore provide both certainty of supply three years into the future and a forward pricing signal and revenue stream to support and incent investments in capacity resources (of all types) where needed on the system to meet reliability goals.

RPM has shown notable success in meeting that design objective. RPM has encouraged investment needed to maintain both existing generation and demand response resources, as well as investment in new resources, including incremental upgrades to existing generators, new energy efficiency projects, new demand-side resources and new generation resources. PJM's report on the most recent Base Residual Auction found that 33,090 megawatts of capacity resources were offered into that auction that would not have been available absent the implementation of RPM. Based on similar evidence of capacity increases in response to RPM, the U.S. Court of Appeals for the District of Columbia Circuit recently found that the

Attachment B
Redlined Tariff Sheets

5.2 Nomination of Self Supplied Capacity Resources

A Capacity Market Seller, including a Load Serving Entity, may designate a Capacity Resource as Self-Supply for a Delivery year by submitting a Sell Offer for such resource in the Base Residual Auction *or an Incremental Auction* in accordance with the procedure and time schedule set forth in the PJM Manuals. *The* LSE shall indicate its intent in the Sell Offer *that the Capacity Resource be deemed Self-Supply and shall indicate whether it is* commit*ting* the resource regardless of clearing price *or with a price bid*. Any such Sell Offer shall be subject to the minimum offer price rule set forth in section 5.14(h). Upon receipt of a Self-Supply Sell Offer, the Office of the Interconnection will verify that the designated Capacity Resource is available, in accordance with Section 5.6, and*, if the LSE indicated that it is committing the resource regardless of clearing price*, will treat such Capacity Resource as committed in the clearing process of the *Reliability Pricing Model* Auction for *which it was offered for* such Delivery Year. To address capacity obligation quantity uncertainty associated with the Variable Resource Requirement Curve, a Load Serving Entity may submit a Sell Offer with a contingent designation of a portion of its Capacity Resources as either Self-Supply (to the extent required to meet a portion (as specified by the LSE) of the LSE's peak load forecast in each transmission zone) or as *not Self-Supply* (to the extent not so required) *and subject to an offer price*, in accordance with the PJM Manuals. *PJMSettlement shall not be the Counterparty with respect to a Capacity Resource designated as Self-Supply.*

5.14 Clearing Prices and Charges

a) Capacity Resource Clearing Prices

For each Base Residual Auction and Incremental Auction, the Office of the Interconnection shall calculate a clearing price to be paid for each megawatt-day of Unforced Capacity that clears in such auction. The Capacity Resource Clearing Price for each LDA will be the sum of the following: (1) the marginal value of system capacity for the PJM Region, without considering locational constraints, (2) the Locational Price Adder, if any in such LDA, (3) the Annual Resource Price Adder, if any, and (4) the Extended Summer Resource Price Adder, if any, all as determined by the Office of the Interconnection based on the optimization algorithm. If a Capacity Resource is located in more than one Locational Deliverability Area, it shall be paid the highest Locational Price Adder in any applicable LDA in which the Sell Offer for such Capacity Resource cleared. The Annual Resource Price Adder is applicable for Annual Resources only. The Extended Summer Resource Price Adder is applicable for Annual Resources and Extended Summer Demand Resources.

b) Resource Make-Whole Payments

If a Sell Offer specifies a minimum block, and only a portion of such block is needed to clear the market in a Base Residual or Incremental Auction, the MW portion of such Sell Offer needed to clear the market shall clear, and such Sell Offer shall set the marginal value of system capacity. In addition, the Capacity Market Seller shall receive a Resource Make-Whole Payment equal to the Capacity Resource Clearing Price in such auction times the difference between the Sell Offer's minimum block MW quantity and the Sell Offer's cleared MW quantity. The cost for any such Resource Make-Whole Payments required in a Base Residual Auction or Incremental Auction for adjustment of prior capacity commitments shall be collected pro rata from all LSEs in the LDA in which such payments were made, based on their Daily Unforced Capacity Obligations. The cost for any such Resource Make-Whole Payments required in an Incremental Auction for capacity replacement shall be collected from all Capacity Market Buyers in the LDA in which such payments were made, on a pro-rata basis based on the MWs purchased in such auction.

c) New Entry Price Adjustment

A Capacity Market Seller that submits a Sell Offer based on a Planned Generation Capacity Resource that clears in the BRA for a Delivery Year may, at its election, submit Sell Offers with a New Entry Price Adjustment in the BRAs for the two immediately succeeding Delivery Years if:

~~a~~1. Such Capacity Market Seller provides notice of such election at the time it submits its Sell Offer for such resource in the BRA for the first Delivery Year for which such resource is eligible to be considered a Planned Generation Capacity Resource;

~~b~~2. Acceptance of such Sell Offer in such BRA increases the total Unforced Capacity in the LDA in which such Resource will be located from a megawatt quantity below the

LDA Reliability Requirement to a megawatt quantity corresponding to a point on the VRR Curve where price is no greater than 0.40 times the applicable Net CONE divided by (one minus the pool-wide average EFORd); and

~~c~~3. Such Capacity Market Seller submits Sell Offers in the BRA for the two immediately succeeding Delivery Years for the entire Unforced Capacity of such Generation Capacity Resource equal to the lesser of: ~~1~~A) the price in such seller's Sell Offer for the BRA in which such resource qualified as a Planned Generation Capacity Resource; or ~~2~~B) 0.90 times the then-current Net CONE, on an Unforced Capacity basis, for such LDA.

If the Sell Offer is submitted consistent with the foregoing conditions, then:

(i) in the first Delivery Year, the Resource sets the Capacity Resource Clearing Price for the LDA and all resources in the LDA receive the Capacity Resource Clearing Price.

(ii) in the subsequent two BRAs, if the Resource clears, it shall receive the Capacity Resource Clearing Price for such LDA. If the Resource does not clear, it shall be deemed resubmitted at the highest price per MW at which the Unforced Capacity of such Resource that cleared the first-year BRA will clear the subsequent-year BRA pursuant to the optimization algorithm described in section 5.12(a) of this Attachment, and it shall clear and shall be committed to the PJM Region in the amount cleared, plus any additional minimum-block quantity from its Sell Offer for such Delivery Year, but such additional amount shall be no greater than the portion of a minimum-block quantity, if any, from its first-year Sell Offer that is entitled to compensation for such first year pursuant to section 5.14(b) of this Attachment. The Capacity Resource Clearing Price, and the resources cleared, shall be re-determined to reflect such resubmission. In such case, the Resource submitted under this provision shall be paid for the entire committed quantity the Sell Offer price that it initially submitted in such subsequent BRA. The difference between such Sell Offer Price and the Capacity Resource Clearing Price (as well as any difference between the cleared quantity and the committed quantity), will be treated as a Resource Make-Whole Payment in accordance with Section 5.14(b). Other capacity resources that clear the BRA in such LDA receive the Capacity Resource Clearing Price as determined in Section 5.14(a).

The failure to submit a Sell Offer consistent with Section 5.14(c)(i)-(iii) in the BRA for Delivery Year 3 shall not retroactively revoke the New Entry Price Adjustment for Delivery Year 2.

For each Delivery Year that the foregoing conditions are satisfied, the Office of the Interconnection shall maintain and employ in the auction clearing for such LDA a separate VRR Curve, notwithstanding the outcome of the test referenced in Section 5.10(a)(ii) of this Attachment.

4) On or before October 1, 2011, PJM shall file with FERC under FPA section 205 revisions to this section 5.14(c) as determined necessary by PJM following a stakeholder process, to address concerns expressed by some parties that this provision in its current form may not provide adequate long-term revenue assurances to support new entry. Any such changes also shall honor concerns expressed by FERC and others that any such revisions must not lead to undue price discrimination between existing and new resources.

d) Qualifying Transmission Upgrade Payments

A Capacity Market Seller that submitted a Sell Offer based on a Qualifying Transmission Upgrade that clears in the Base Residual Auction shall receive a payment equal to the Capacity Resource Clearing Price, including any Locational Price Adder, of the LDA into which the Qualifying Transmission Upgrade is to increase Capacity Emergency Transfer Limit, less the Capacity Resource Clearing Price, including any Locational Price Adder, of the LDA from which the upgrade was to provide such increased CETL, multiplied by the megawatt quantity of increased CETL cleared from such Sell Offer. Such payments shall be reflected in the Locational Price Adder determined as part of the Final Zonal Capacity Price for the Zone associated with such LDAs, and shall be funded through a reduction in the Capacity Transfer Rights allocated to Load-Serving Entities under section 5.15, as set forth in that section. *PJMSettlement shall be the Counterparty to any cleared capacity transaction resulting from a Sell Offer based on a Qualifying Transmission Upgrade.*

e) Locational Reliability Charge

In accordance with the Reliability Assurance Agreement, each LSE shall incur a Locational Reliability Charge (subject to certain offsets as described in sections 5.13 and 5.15) equal to such LSE's Daily Unforced Capacity Obligation in a Zone during such Delivery Year multiplied by the applicable Final Zonal Capacity Price in such Zone. *PJMSettlement shall be the Counterparty to the LSEs' obligations to pay, and payments of, Locational Reliability Charges.*

f) The Office of the Interconnection shall determine Zonal Capacity Prices in accordance with the following, based on the optimization algorithm:

i) The Office of the Interconnection shall calculate and post the Preliminary Zonal Capacity Prices for each Delivery Year following the Base Residual Auction for such Delivery Year. The Preliminary Zonal Capacity Price for each Zone shall be the sum of: 1) the marginal value of system capacity for the PJM Region, without considering locational constraints; 2) the Locational Price Adder, if any, for the LDA in which such Zone is located; provided however, that if the Zone contains multiple LDAs with different Capacity Resource Clearing Prices, the Zonal Capacity Price shall be a weighted average of the Capacity Resource Clearing Prices for such LDAs, weighted by the Unforced Capacity of Capacity Resources cleared in each such LDA; 3) an adjustment, if required, to account for adders paid to Annual Resources and Extended Summer Demand Resources in the LDA for which the zone is located;

and 4) an adjustment, if required, to account for Resource Make-Whole Payments, all as determined in accordance with the optimization algorithm.

ii) The Office of the Interconnection shall calculate and post the Adjusted Zonal Capacity Price following each Incremental Auction. The Adjusted Zonal Capacity Price for each Zone shall equal the sum of: (1) the average marginal value of system capacity weighted by the Unforced Capacity cleared in all auctions previously conducted for such Delivery Year (excluding any Unforced Capacity cleared as replacement capacity); (2) the average Locational Price Adder weighted by the Unforced Capacity cleared in all auctions previously conducted for such Delivery Year (excluding any Unforced Capacity cleared as replacement capacity); (3) an adjustment, if required, to account for adders paid to Annual Resources and Extended Summer Demand Resources for all auctions previously conducted for such Delivery Year (excluding any Unforced Capacity cleared as replacement capacity); and (4) an adjustment, if required, to account for Resource Make-Whole Payments for all actions previously conducted (excluding any Resource Make-Whole Payments to be charged to the buyers of replacement capacity). The Adjusted Zonal Capacity Price may decrease if Unforced Capacity is decommitted or the Resource Clearing Price decreases in an Incremental Auction.

iii) The Office of the Interconnection shall, through May 31, 2012, calculate and post the Final Zonal Capacity Price after all ILR resources are certified for the Delivery Years and, thereafter, shall calculate and post such price after the final auction is held for such Delivery Year, as set forth above. The Final Zonal Capacity Price for each Zone shall equal the Adjusted Zonal Capacity Price, as further adjusted (for the Delivery Years through May 31, 2012) to reflect the certified ILR compared to the ILR Forecast previously used for such Delivery Year, and any decreases in the Nominated Demand Resource Value of any existing Demand Resource cleared in the Base Residual Auction and Second Incremental Auction. For such purpose, for the three consecutive Delivery Years ending May 31, 2012 only, the Forecast ILR allocated to loads located in the AEP transmission zone that are served under the Reliability Pricing Model shall be in proportion for each such year to the load ratio share of such RPM loads compared to the total peak loads of such zone for such year; and any remaining ILR Forecast that otherwise would be allocated to such loads shall be allocated to all Zones in the PJM Region pro rata based on their Preliminary Zonal Peak Load Forecasts.

g) Resource Substitution Charge

Each Capacity Market Buyer in an Incremental Auction securing replacement capacity shall pay a Resource Substitution Charge equal to the Capacity Resource Clearing Price resulting from such auction multiplied by the megawatt quantity of Unforced Capacity purchased by such Market Buyer in such auction.

h) Minimum Offer Price Rule for Certain Planned Generation Capacity Resources

(1) For purposes of this section, the Net Asset Class Costs of New Entry shall be asset-class estimates of competitive, cost-based~~, real~~ nominal levelized ~~(year one)~~ Cost of New Entry, net of energy and ancillary service revenues. ~~Other than the levelization approach, d~~Determination of the gross Cost of New Entry component of the Net Asset Class Cost of New

Entry shall be consistent with the methodology used to determine the Cost of New Entry set forth in Section 5.10(a)(iv)(A) of this Attachment. ~~Until changed, t~~The gross Cost of New Entry component of Net Asset Class Cost of New Entry shall be, for purposes of the Delivery Year commencing on June 1, 2014, the values indicated in the table below for each CONE Area for a combustion turbine generator ("CT")~~shall be $ 96,485MW-year,~~ and ~~the Net Asset Class Cost of New Entry for~~ a combined cycle generator ("CC"), respectively, and shall be adjusted for subsequent Delivery Years in accordance with subsection (h)(2) below. The estimated energy and ancillary service revenues for each type of plant shall be determined as described in subsection (h)(3) below. ~~shall be $ 117,035/MW-year.~~ Notwithstanding the foregoing, the Net Asset Class Cost of New Entry shall be zero for: (i) Sell Offers based ~~load resources, such as~~ on nuclear, coal ~~and~~ or Integrated Gasification Combined Cycle facilities~~, that require a period for development greater than three years~~; or (ii) Sell Offers based on~~any facility associated with the production of~~ hydroelectric, wind, or solar facilities ~~power; (iii) any upgrade or addition to an Existing Generation Capacity Resource; or (iv) any Planned Generation Capacity Resource being developed in response to a state regulatory or legislative mandate to resolve a projected capacity shortfall in the Delivery Year affecting that state, as determined pursuant to a state evidentiary proceeding that includes due notice, PJM participation, and an opportunity to be heard~~.

	CONE Area 1	CONE Area 2	CONE Area 3	CONE Area 4	CONE Area 5
CT $/MW-yr	138,646	128,226	131,681	128,226	128,340
CC $/MW-yr	175,250	154,870	164,375	154,870	154,870

(2) Beginning with the Delivery Year that begins on June 1, 2015, the Cost of New Entry component of the Net Asset Class Cost of New Entry shall be adjusted to reflect changes in generating plant construction costs based on changes in the Applicable H-W Index, in the same manner as set forth for the cost of new entry in section 5.10(a)(iv)(B), provided, however, that nothing herein shall preclude the Office of the Interconnection from filing to change the Net Asset Class Cost of New Entry for any Delivery Year pursuant to appropriate filings with FERC under the Federal Power Act.

(3) For purposes of this provision, the net energy and ancillary services revenue estimate for a combustion turbine generator shall be that determined by section 5.10(a)(v)(A) of this Attachment DD, provided that the energy revenue estimate for each CONE Area shall be based on the Zone within such CONE Area that has the highest energy revenue estimate calculated under the methodology in that subsection. The net energy and ancillary services revenue estimate for a combined cycle generator shall be determined in the same manner as that prescribed for a combustion turbine generator in the previous sentence, except that the heat rate assumed for the combined cycle resource shall be 6.980 MMbtu/Mwh, the variable operations and maintenance expenses for such resource shall be $3.23 per MWh, the Peak-Hour Dispatch scenario shall be modified to dispatch the CC resource continuously during the full peak-hour period, as described in section 2.46, for each such period that the resource is economic (using the test set forth in such section), rather than only during the four-hour blocks within such period that such resource is economic, and the ancillary service revenues shall be $3198 per MW-year.

(~~2~~4) Any Sell Offer that is based on a Planned Generation Capacity Resource submitted in a Base Residual Auction for the first Delivery Year in which such resource qualifies as such a resource, or submitted in any Base Residual Auction up to and including the second successive Base Residual Auction after the Base Residual Auction in which such resource first clears, in any LDA for which a separate VRR Curve has been established, and that is less than 90 percent of the applicable Net Asset Class Cost of New Entry or, if there is no applicable Net Asset Class Cost of New Entry, less than 70 percent of the Net Asset Class Cost of New Entry for a combustion turbine generator as provided in subsection (h)(1) above ~~meets each of the following criteria,~~ shall be set to equal 90 percent of the applicable Net Asset Class Cost of New Entry (or set equal to 70 percent of such cost for a combustion turbine, where there is no otherwise applicable net asset class figure)~~subject to the provisions of subsection (3) hereof~~, unless the Capacity Market Seller obtains the prior~~a~~ determination from FERC described in subsection (5) hereof~~prior to such Base Residual Auction that such Sell Offer is consistent with the real levelized (year one) competitive, cost-based, fixed, net cost of new entry were the resource to rely solely on revenues from PJM-administered markets (i.e., were all output from the unit sold in PJM-administered spot markets):~~

~~i. Sell Offer affects the Clearing Price;~~

~~ii. Sell Offer is less than 80 percent of the applicable Net Asset Class Cost of New Entry or, if there is no applicable Net Asset Class Cost of New Entry, less than 70 percent of the Net Asset Class Cost of New Entry for a combustion turbine generator as stated in subsection (h)(1) above; and~~

~~iii. The Capacity Market Seller and any Affiliates has or have a "net short position" in such Base Residual Auction for such LDA that equals or exceeds (a) ten percent of the LDA Reliability Requirement, if less than 10,000 megawatts, or (b) five percent of the total LDA Reliability Requirement, if equal to or greater than 10,000 megawatts. A "net short position" shall be calculated as the actual retail load obligation minus the portfolio of supply. An "actual retail load obligation" shall mean the LSE's combined load served in the LDA at or around the time of the Base Residual Auction adjusted to account for load growth up to the Delivery Year, using the Forecast Pool Requirement. A "portfolio of supply" shall mean the Generation Capacity Resources (on an unforced capacity basis) owned by the Capacity Market Seller and any Affiliates at the time of the Base Residual Auction plus or minus any generation that is, at the time of the BRA, under contract for the Delivery Year.~~

(5) A Sell Offer meeting the criteria in subsection (4) shall be permitted if the Capacity Market Seller submits to FERC a filing under section 206 of the Federal Power Act sufficiently in advance of the Base Residual Auction to obtain a determination from FERC, and in fact obtains a determination from FERC prior to such auction, that such Sell Offer is permissible because it is either (A) 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 (i.e., were all output from the unit sold in PJM-administered spot markets,

and the resource received no out-of-market payments); or (B) the Sell Offer is based on new entry that is pursuant to a state-mandated requirement that furthers a specific legitimate state objective and that the Sell Offer would not lead to artificially depressed capacity prices or directly and adversely impact FERC's ability to set just and reasonable rates for capacity sales in the PJM Region or any affected Locational Deliverability Area.

~~(3) The Office of the Interconnection shall perform a sensitivity analysis on any Base Residual Auction that included Sell Offers meeting the criteria of Section 5.14(h)(2), for which the Capacity Market Seller has not obtained a prior favorable determination from FERC as described in subsection (2) hereof. Such analysis shall re-calculate the clearing price for the Base Residual Auction employing in place of each actual Sell Offer meeting the criteria a substitute Sell Offer equal to 90 percent of the applicable estimated cost determined in accordance with Section 5.14(h)(1) above, or, if there is no applicable estimated cost, equal to 80 percent of the then-applicable Net CONE. If the resulting difference in price between the new clearing price and the initial clearing price differs by an amount greater than the greater of 20 percent or 25 dollars per megawatt-day for a total LDA Reliability Requirement greater than 15,000 megawatts; or the greater of 25 percent or 25 dollars per megawatt-day for a total LDA Reliability Requirement greater than 5,000 and less than 15,000 megawatts; or the greater of 30 percent or 25 dollars per megawatt-day for a total LDA Reliability Requirement of less than 5,000 megawatts; then the Office of the interconnection shall discard the results of the Base Residual Auction and determine a replacement clearing price and the identity of the accepted Capacity Resources using the procedure set forth in section 5.14(h)(4) below.~~

~~(4) Including all of the Sell Offers in a single Base Residual Auction that meet the criteria of 5.14(h)(3) above, PJM shall first calculate the replacement clearing price and the total quantity of Capacity Resources needed for the LDA. PJM shall then accept Sell Offers to provide Capacity Resources in accordance with the following priority and criteria for allocation: (i) first, all Sell Offers in their entirety designated as self-supply *committed regardless of price*; (ii) then, all Sell Offers of zero, prorating to the extent necessary, and (iii) then all remaining Sell Offers in order of the lowest price, subject to the optimization principles set forth in Section 5.14.~~

~~(5) Notwithstanding the foregoing, this provision shall terminate when there exists a positive net demand for new resources, as defined in Section 5.10(a)(iv)(B) of this Attachment, calculated over a period of consecutive Delivery Years beginning with the first Delivery Year for which this Attachment is effective and concluding with the last Delivery Year preceding such calculation, in an area comprised of the Unconstrained LDA Group (as defined in section 6.3) in existence during such first Delivery Year. Notwithstanding the foregoing, the Office of the Interconnection shall reinstate the provisions of this section, solely under conditions in which a constrained LDA has a gross Cost of New Entry equal to or greater than 150 percent of the greatest prevailing gross Cost of New Entry in any adjacent LDA.~~

(i) Capacity Export Charges and Credits

(1) Charge

Each Capacity Export Transmission Customer shall incur for each day of each Delivery Year a Capacity Export Charge equal to the Reserved Capacity of Long-Term Firm Transmission Service used for such export ("Export Reserved Capacity") multiplied by (the Final Zonal Capacity Price for such Delivery Year for the Zone encompassing the interface with the Control Area to which such capacity is exported minus the Final Zonal Capacity Price for such Delivery Year for the Zone in which the resources designated for export are located, but not less than zero). If more than one Zone forms the interface with such Control Area, then the amount of Reserved Capacity described above shall be apportioned among such Zones for purposes of the above calculation in proportion to the flows from such resource through each such Zone directly to such interface under CETO/CETL analysis conditions, as determined by the Office of the Interconnection using procedures set forth in the PJM Manuals. The amount of the Reserved Capacity that is associated with a fully controllable facility that crosses such interface shall be completely apportioned to the Zone within which such facility terminates.

(2) Credit

To recognize the value of firm Transmission Service held by any such Capacity Export Transmission Customer, such customer assessed a charge under section 5.14(i)(1) also shall receive a credit, comparable to the Capacity Transfer Rights provided to Load-Serving Entities under section 5.15. Such credit shall be equal to the locational capacity price difference specified in section 5.14(i)(1) times the Export Customer's Allocated Share determined as follows:

Export Customer's Allocated Share equals

(Export Path Import * Export Reserved Capacity) /

(Export Reserved Capacity + Daily Unforced Capacity Obligations of all LSEs in such Zone).

Where:

"Export Path Import" means the megawatts of Unforced Capacity imported into the export interface Zone from the Zone in which the resource designated for export is located.

If more than one Zone forms the interface with such Control Area, then the amount of Export Reserved Capacity shall be apportioned among such Zones for purposes of the above calculation in the same manner as set forth in subsection (i)(1) above.

(3) Distribution of Revenues

Any revenues collected from the Capacity Export Charge with respect to any capacity export for a Delivery Year, less the credit provided in subsection (i)(2) for such Delivery Year, shall be distributed to the Load Serving Entities in the export-interface Zone that were assessed a

Locational Reliability Charge for such Delivery Year, pro rata based on the Daily Unforced Capacity Obligations of such Load-serving Entities in such Zone during such Delivery Year. If

more than one Zone forms the interface with such Control Area, then the revenues shall be apportioned among such Zones for purposes of the above calculation in the same manner as set forth in subsection (i)(1) above.

CERTIFICATE OF SERVICE

I, Harvey L. Reiter, hereby certify that on September 6, 2012, I electronically filed the foregoing Brief of Old Dominion Electric Cooperative, American Public Power Association, National Rural Electric Cooperative Association, North Carolina Electric Membership Corporation, Delaware Municipal Electric Corporation, American Municipal Power, Inc., and Southern Maryland Electric Cooperative ("Load Petitioners"), with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Harvey L. Reiter
Harvey L. Reiter

Dated: September 6, 2012