UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Power Providers Group	)	
v.	)	Docket No. EL11-20-000
PJM Interconnection L.L.C.	)	
PJM Interconnection, L.L.C.	)	Docket No. ER11-2875-000
		(Not consolidated)

REQUEST FOR REHEARING AND/OR CLARIFICATION OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

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REQUEST FOR REHEARING AND/OR CLARIFICATION OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Pursuant to Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 8251 (2009), and Rule 713 of the Rules and Regulations of the Federal Energy Regulatory Commission ("Commission" or "FERC"), 18 C.F.R. § 385.713 (2010), the National Rural Electric Cooperative Association ("NRECA") submits this request for rehearing and/or clarification of the Order issued in the above-referenced proceedings on April 12, 2011.[1] For the reasons discussed herein, NRECA requests that the Commission grant rehearing of the April 12 Order and reinstate the assurance for self-supply Sell Offers to be committed in the PJM Interconnection, L.L.C. ("PJM") Reliability Pricing Model ("RPM") auction. Alternatively, if the Commission does not grant rehearing as requested, then NRECA requests that the Commission grant alternative requests for clarification or rehearing that will provide some opportunity for legitimate self-supply to be committed in the RPM auction.[2]

[1] *PJM Interconnection, L.L.C., et al.*, 135 FERC ¶ 61,022 (2011)("April 12 Order").

[2] Appendix B to the April 12 Order listed "National Rural Electric Association" as an intervenor in Docket No. EL11-20-000. NRECA believes the reference should be corrected to read "National Rural Electric

I. INTRODUCTION

This pleading is not a challenge to RPM. This pleading is not a challenge to the Minimum Offer Price Rule ("MOPR") provisions of RPM. This pleading does not challenge the concept of consumer-side market power or argue that PJM and its stakeholders should not seek a reasonable approach to address that risk. Most importantly, this pleading is not about picayune details about which economists may reasonably quibble.

Rather, this pleading challenges a minor step that could, without clarification or in the alternative rehearing, take the PJM market over a precipice that fundamentally changes the nature of the electric industry in the PJM region and potentially throughout the United States. NRECA asks the Commission to pause before taking that last step, rethink its approach, and find a way to address the concerns raised by PJM and the PJM Power Providers Group ("P3") in a manner that has less drastic impacts on the industry. [3]

If the Commission does not step back from the precipice and grant clarification or rehearing, it will have branded traditional vertically integrated utilities with an obligation to serve as inherently suspect and declared both the regulatory compact and bilateral market revenues to be unlawful subsidies. In an effort to address a relatively minor risk to a small portion of the much broader capacity markets, the order would force the industry away from long-term planning to meet the long-term needs of consumers, force

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Cooperative Association." To the extent clarification is necessary in order to ensure NRECA's status as a party to Docket No. EL11-20-000, then NRECA requests such clarification.

[3] In addition to the arguments raised in this pleading, NRECA endorses the Request for Rehearing of the PJM Load Group, particularly the demonstration of the error in the April 12 Order's determination that the Fixed Resource Requirement is a viable alternative to an exemption for self-supply to clear the RPM auctions regardless of price.

the industry out of the bilateral markets, and drive nearly all capacity acquisitions into the short-term centralized market.

It would be easy for the Commission to avoid the precipice. On clarification or rehearing, it can reinstate the requirement that new self-supply resources must be committed in the capacity auctions regardless of price and direct PJM to address concerns about buyer-side market power through the PJM stakeholder process; PJM, the Independent Market Monitor for PJM ("IMM"), and the stakeholders have all expressed an interest in addressing the issue. It could establish hearing procedures or alternative settlement processes to allow those discussions to take place under the Commission's aegis. Or, if the Commission feels some urgency, it can grant P3's alternative request for a clarification that for purposes of the MOPR, PJM is entitled to include as Affiliates parties which sponsor and effectively control the participation of other parties in the PJM capacity markets. Such a clarification would prevent any alleged abuses of buyer-side market power during stakeholder or settlement discussions. What the Commission cannot lawfully do is permit the April 12 Order to stand.

II. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

A. Statement of Issues

Pursuant to Rule 713(c)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(c)(2)(2010), NRECA provides its statement of issues raised in this pleading. If it affirms the April 12 order on rehearing, the Commission's order will be arbitrary and capricious and otherwise inconsistent with law for the reasons specified below.

1. Without rehearing, the order unlawfully approves rates, terms, and conditions of service that are unjust and unreasonable and otherwise inconsistent with law because they could deny utilities that own or have rights to capacity the authority to use that capacity toward meeting their capacity obligation, and thus force them to purchase unneeded capacity from the RPM. *ISO New England, Inc., et al.*, 131 FERC ¶ 61,065 (2010); *General Motors Corp. v FERC*, 656 F2d 791, 798 (D.C. Cir. 1981).

2. Without rehearing, the order unlawfully approves rates, terms, and conditions of service that are unjust and unreasonable and otherwise inconsistent with law because they could deny utilities that own or have rights to capacity the ability to sell that capacity to third parties in the bilateral market or in the RPM market at rates that are consistent with law. *Rate Changes Relating to Federal Corporate Income Tax Rates for Public Utilities*. Order No. 475, FERC Stats. & Regs. ¶ 30,752 at 30,738 (1987); *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981).

3. Without clarification, or in the alternative rehearing, the order unlawfully approves rates, terms, and conditions of service that are unjust and unreasonable and otherwise inconsistent with law because they improperly interfere with the lawful judgment of utility management, boards of directors, and regulators as to what constitutes an "economic" or prudent investment in capacity resources, or otherwise change without explanation 100 years of precedent as to what constitutes an economic or prudent investment. *Town of Norwood v. FERC*, 962 F.2d. 20, 222 (D.C. Cir. 1992); *Noram Gas Transmission Co. v. FERC*, 148 F.3d. 1158, 1165 (D.C. Cir. 1998); *KN Energy Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992); *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)*PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 103 (2006); *California Independent System Operator v FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004).

4. Without clarification, or in the alternative rehearing, the order unlawfully approves rates, terms, and conditions of service that are unjust and unreasonable and otherwise inconsistent with law because for the first time, and without explanation, the order would treat the inclusion of capacity resources in the rate base of a utility and the resulting availability of lower cost capital as uneconomic and unlawful subsidies. *Wholesale Competition in Regions with Organized Electric Markets*, Advance Notice of Proposed Rulemaking, FERC Statutes and Regulations, Proposed Regulations 2004-2007. ¶ 32,617 (2007); *National Association for the Advancement of Colored People v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976); *Northern States Power Co. v FERC*, 30 F.3d. 177, 180 (D.C. Cir. 1994); *Town of Norwood v. FERC*, 962 F.2d. 20, 222 (D.C. Cir. 1992); *Noram Gas Transmission Co. v. FERC*, 148 F.3d. 1158, 1165 (D.C. Cir. 1998; *KN Energy Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992)

5. Without clarification, or in the alternative rehearing, the order unlawfully approves rates, terms, and conditions of service that are unjust and unreasonable and otherwise inconsistent with law because for the first time, and without explanation, the order would treat the access to income from sales of energy and capacity in bilateral markets as uneconomic and unlawful subsidies. *Wholesale Competition in Regions with Organized Electric Markets*, Advance Notice of Proposed Rulemaking, FERC Statutes and Regulations, Proposed Regulations 2004-2007. ¶ 32,617 (2007); *National Association for the Advancement of Colored People v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976); *Northern States Power Co. v FERC*, 30 F.3d. 177, 180 (D.C. Cir. 1994); *Town of Norwood v. FERC*, 962 F.2d. 20, 222 (D.C. Cir. 1992); *Noram Gas Transmission Co. v. FERC*, 148 F.3d. 1158, 1165 (D.C. Cir. 1998; *KN Energy Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992).

6. Without rehearing, the order is arbitrary and capricious or otherwise inconsistent with law because, without explanation or justification, it fundamentally alters the RPM market from a residual market intended to permit load serving entities (LSEs) to acquire additional resources needed to provide reliability above and beyond those that the LSE has built or acquired in bilateral markets into the sole acceptable source for capacity. *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 (2006); *Northern States Power Co. v FERC*, 30 F.3d. 177, 180 (D.C. Cir. 1994); *Town of Norwood v. FERC*, 962 F.2d. 20, 222 (D.C. Cir. 1992); *Noram Gas Transmission Co. v. FERC*, 148 F.3d. 1158, 1165 (D.C. Cir. 1998); *KN Energy Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 103 (2006); *Mastrobuono v. Shearson Lehman Hutton. Inc.*, 514 U.S. 52, 63 (1995) *Boston Edison Co. v. Town of Concord*, 50 FERC ¶ 61,199 (1999).

7. Without rehearing, the order is arbitrary and capricious or otherwise inconsistent with law because it alters the terms of a comprehensive settlement to the benefit of one group of parties to that settlement without any review of the impact of the changes on the overall balance of interests. *Electricity Consumers Resources Council v. FERC*, 747 F.2d 1511, 1513-14 (D.C.Cir.1984); *City of Charlottesville v. FERC*, 661 F.2d 945, 950 (D.C.Cir.1981).

8. Without rehearing, the order is arbitrary and capricious or otherwise inconsistent with law because it approves without explanation or justification rates, terms and conditions of service that unduly shift risks and costs from competitive generators to consumers. Markets have been advocated on the basis that they protect consumers from the risk of loss from imprudent generation investments. The order reverses that proposition by artificially propping up the cost of capacity to guarantee independent power producers a return on their investment and by denying consumers the ability to reduce their exposure to those costs through new self-supply. *Regional Transmission*

Organizations, Order No. 2000, 89 FERC ¶ 61,285 (1999). *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Statutes and Regulations ¶ 31,281 (2008); *order on reh'g*, Order No. 719-A, FERC Statutes and Regulations ¶ 31,292 (2009); *order on reh'g*, 129 FERC ¶ 61,252 (2009). *Wholesale Competition in Regions with Organized Electric Markets,* Advance Notice of Proposed Rulemaking, FERC Statutes and Regulations, Proposed Regulations 2004-2007. ¶ 32,617 (2007); *National Association for the Advancement of Colored People v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976)(

9. Without rehearing, the order is arbitrary and capricious or otherwise inconsistent with law because the order rejects requests for a hearing notwithstanding outstanding issues of contested fact. In fact, the order fails even to acknowledge the existence of affidavits and pleadings establishing those outstanding issues of contested fact. *PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,015 (2008).

B. Specification of Errors

Pursuant to Commission Rule 713(c)(1), 18 C.F.R. § 385.713(c)(1), NRECA submits that the following points of error in the April 12 Order which must be corrected through clarification or rehearing:

1. The order unlawfully approves rates, terms, and conditions of service that are unjust and unreasonable and otherwise inconsistent with law because they could deny utilities that own or have rights to capacity the authority to use that capacity toward meeting their capacity obligation, and thus force them to purchase unneeded capacity from the RPM.

2. The order unlawfully approves rates, terms, and conditions of service that are unjust and unreasonable and otherwise inconsistent with law because they could deny utilities that own or have rights to capacity the ability to sell that capacity to third parties in the bilateral market or in the RPM market at rates that are consistent with law.

3. The order unlawfully approves rates, terms, and conditions of service that are unjust and unreasonable and otherwise inconsistent with law because they improperly interfere with the lawful judgment of utility management, boards of directors, and regulators as to what constitutes an "economic" or prudent investment in capacity resources, or otherwise change without explanation 100 years of precedent as to what constitutes an economic or prudent investment.

4. The order unlawfully approves rates, terms, and conditions of service that are unjust and unreasonable and otherwise inconsistent with law because for the

first time, and without explanation, the order would treat the inclusion of capacity resources in the rate base of a utility and the resulting availability of lower cost capital as uneconomic and unlawful subsidies.

5. The order unlawfully approves rates, terms, and conditions of service that are unjust and unreasonable and otherwise inconsistent with law because for the first time, and without explanation, the order would treat the access to income from sales of energy and capacity in bilateral markets as uneconomic and unlawful subsidies.

6. The order is arbitrary and capricious or otherwise inconsistent with law because, without explanation or justification, it fundamentally alters the RPM market from a residual market intended to permit load serving entities (LSEs) to acquire additional resources needed to provide reliability above and beyond those that the LSE has built or acquired in bilateral markets into the sole acceptable source for capacity.

7. The order is arbitrary and capricious or otherwise inconsistent with law because it alters the terms of a comprehensive settlement to the benefit of one group of parties to that settlement without any review of the impact of the changes on the overall balance of interests.

8. The order is arbitrary and capricious or otherwise inconsistent with law because it approves without explanation or justification rates, terms and conditions of service that unduly shift risks and costs from competitive generators to consumers. Markets have been advocated on the basis that they protect consumers from the risk of loss from imprudent generation investments. The order reverses that proposition by artificially propping up the cost of capacity to guarantee independent power producers a return on their investment and by denying consumers the ability to reduce their exposure to those costs through new self-supply.

9. The order is arbitrary and capricious or otherwise inconsistent with law because the order rejects requests for further procedures to address unintended and harmful impacts on load-serving entities' right to invest in resources outside the RPM construct.

III. DISCUSSION

A. Without rehearing, PJM's tariff could deny utilities that own or have rights to capacity the authority to use that capacity toward meeting their capacity obligation, and thus force them to purchase capacity from the RPM.

Prior to the April 12 Order, LSEs that owned or had rights to capacity could use that capacity to satisfy their capacity obligations. The only condition on the use of such

self-supply resources was that PJM had to verify the resource's availability.[4] While self-supply resources could trigger the application of the MOPR, the Tariff provided that notwithstanding the establishment of a replacement clearing price for the constrained area, PJM was required to accept first all self-supply Sell Offers in their entirety, without condition.[5]

The April 12 Order expressly eliminates the self-supply acceptance exemption from the MOPR[6] and directs PJM to adopt tariff provisions that prohibit sellers from acting as price takers in the RPM auctions. This removed the guarantee load-serving entities had previously enjoyed that they could use their owned or purchased capacity resources to satisfy their capacity obligation. As a result, the Order expressly and unlawfully subjected LSEs to the risk that they could be obligated to purchase capacity out of the RPM even though they owned or had contracted for sufficient resources to meet their needs.[7]

The Order further increased the risk for LSEs by apparently providing that LSEs could not submit Sell Offers that reflect their true costs and revenues. Instead, the Order

[4] Prior to PJM's Tariff revisions in this proceeding, the RPM provisions stated that "[u]pon receipt of a Self-Supply Sell Offer, the Office of the Interconnection will verify that the designated resource is available . . . and will treat such resource as committed in the clearing process of the [BRA] for such Delivery Year."

[5] PJM Tariff Section 5.14(h)(2) prior to its Tariff revisions in this proceeding. *See* NRECA's Protest in these proceedings for a detailed overview of the treatment of self-supply under the MOPR per the prior Tariff and PJM's proposed revisions which were accepted in the April 21 Order.

[6] April 12 Order at P 194 ("we agree with PJM that planned generation designated by a load serving entity as self-supply should be classified as a capacity resource and be subject to an offer floor based on its entry costs until it clears in the [BRA].") Notably, the Commission neglects to mention that PJM filed an Answer in this proceeding wherein it specifically stated that the MOPR should not apply to legitimate self-supply. *See* PJM's March 21, 2011 Answer at 4.

[7] *See Natural Gas Pipeline Co. of America,* 65 FERC ¶ 61,361 (1993)(the Commission rejected a proposal that would result in pipeline customers paying twice for the same service); *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,144 (2007), *order on reh'g,* 121 FERC ¶ 61,073 (2007)(the Commission required PJM to revise its tariff to ensure that customers did not pay twice for Firm Transmission Rights).

provided that an LSE could only submit an offer below the MOPR offer floor if it could demonstrate to PJM or to the Commission that such offer "is consistent with the competitive, cost-based, fixed, nominal levelized net cost of new entry were the resource to rely solely on revenues from PJM-administered markets."[8]

As explained in the Kirsch/Morey affidavit and as NRECA explained in its Protest filed in these proceedings on March 4, 2011,[9] this test would, without substantial clarifications discussed in subsequent sections of this pleading, represent a complete economic fiction that in no way reflects the actual costs or revenues experienced by real companies. To a real company with an obligation to serve, a generation investment is economic if, over its several-decade life, its expected energy, ancillary services, capacity, reliability, and other internal benefits, plus expected energy, ancillary services, and capacity revenues in all markets both centralized and bilateral, exceed its expected costs. Many internal benefits may not be immediately translatable into dollars, including the hedge value of fuel diversity, the goodwill and regulatory value of sustainable investments, the hedge value of proximity, and others. Each of these benefits varies over time. Therefore, experience dictates that it is unreasonable to expect that the net benefits of a generator will be stable from year to year, or that the recovery of capacity costs in a market setting will be stable from year to year. Prior to the April 12 Order, no rational company with an obligation to serve and no state regulator would ever narrow their prudence analysis for an investment in a power plant or long-term power purchase agreement to the sole question of whether the competitive cost-based, fixed, nominal

[8] April 12 Order at P 122

[9] Motion to Intervene, Protest and Request for Rejection or, in the Alternative, Further Procedures of the National Rural Electric Cooperative Association, filed in these proceedings on March 4, 2011 ("NRECA Protest")

levelized net cost of new entry ("CONE") for the plant, as that would be calculated under the April 12 Order, would be cost competitive with existing resources in the RPM market during the first few years of the investment's life.

Because the generic benchmark price established by the April 12 Order does not appear to include a number of benefits and revenue streams that would be considered by most LSEs in their investments, and because as discussed below the generic benchmark price would, without clarification or rehearing, treat as illegitimate several cost advantages enjoyed by vertically integrated utilities with an obligation to serve, that generic benchmark price is likely to be considerably higher than the price that a rational economic actor in the LSE's position would bid into the RPM. As a result, the test established by the April 12 Order could dramatically increase the risk that the LSE's resource will not clear in the market, and thus that the LSE will be forced to purchase capacity from the market to satisfy its obligation under the RPM, rather than using its own resources.

The risk that LSEs may be forced to "double pay" for capacity – once for the investment in resources or arrangements outside the RPM construct, then again for the capacity purchased as a replacement for the rejected self-supply – is contrary to law. While the April 12 Order explains why and how exercises of consumer market power may be unjust and unreasonable, it does not explain how its proposed solution – requiring LSEs to double pay for capacity when they have not exercised market power or engaged in market manipulation – could possibly be just and reasonable. Supermarkets cannot charge consumers who grow their own tomatoes for produce they do not need to buy at the market. Gas stations cannot charge consumers who buy electric cars for the gasoline

they do not need to purchase. The Commission would require a very good justification to establish a different rule in the electric capacity markets and the April 12 Order is devoid of such justification. The Commission did not find and there is no evidence in the record that the price at which LSEs have been bidding their new capacity into the market is unjust and unreasonable. The Commission did not find and there is no evidence in the record that LSEs have engaged in market manipulation by bidding their new resources into the RPM as price takers. The Commission did not find and there is no evidence in the record that double charging LSEs for capacity, once for their own resources and again in the RPM, appropriately balances costs and risks between the Independent Power Producers that will benefit from the April 12 Order and the consumers that are being asked to accept the risk of having to pay twice for capacity resources. To the extent that any party may characterize any language in the record as "evidence," there is certainly evidence in the record to the contrary, including the Kirsch/Morey affidavit. Given that contrary evidence, it would be arbitrary and capricious to impose such a dramatic new cost on consumers without a hearing.[10]

B. Without rehearing, PJM's tariff could unlawfully deny utilities that own or have rights to capacity the ability to sell that capacity to third parties in the bilateral market or in the RPM market at rates that are consistent with law.

The Commission's authority to modify rates for jurisdictional services is limited to those instances where the rates have been found to be unjust, unreasonable or unduly

[10] *See ISO New England, Inc., et al.*, 131 FERC ¶ 61,065 (2010)(the Commission directed the conduct of a paper hearing on a number of issues in order to provide a more fully developed record upon which determinations could be made); *General Motors Corp. v FERC*, 656 F2d 791, 798 (D.C. Cir. 1981)("We remind the Commission that it has a weighty burden in justifying a denial of an evidentiary hearing.")

discriminatory or preferential,[11] or have been found to constitute a manipulative or deceptive device or contrivance.[12] As discussed above, the April 12 Order requires self-supply Sell Offers to be subject to an offer floor and adopts a test for exception to the offer floor which is based on a generic "cost-based, fixed, nominal levelized net cost of new entry" which could, without substantial clarification or rehearing exclude all revenues except those derived from PJM markets. Thus, the April 12 Order could preclude Sell Offers based on true costs and revenues, except perhaps in the nearly impossible circumstance where the project-specific costs and revenues calculate to a Sell Offer that is the same as the "competitive, cost-based, fixed, nominal levelized net cost of new entry were the resource to rely solely on revenues from PJM-administered markets." As noted above, the costs and revenues for investment in a plant or long-term power purchase agreement properly include, over its several-decade life, the investment's expected energy, ancillary services, capacity, reliability, and other internal benefits, plus expected energy, ancillary services, and capacity revenues in all markets both centralized and bilateral. Moreover, many internal benefits may not be immediately translatable into dollars, including the hedge value of fuel diversity, the goodwill and regulatory value of sustainable investments, the hedge value of proximity, and others. Each of these benefits varies over time.

The April 12 Order forced this change in rates for self-supply Sell Offers without any showing by PJM or P3, or finding by the Commission, that that self supply Sell Offers reflecting LSEs' true costs and revenues are unjust and unreasonable or that they constitute a manipulative or deceptive device or contrivance.

[11] FPA Section 206, 16 U.S.C. § 824e.

[12] FPA Section 222, 16 U.S.C. § 824v.

In addition to preventing LSEs from selling resources in the RPM at prices that reflect their actual costs and revenues, the April 12 Order could also prevent LSEs from selling resources in the bilateral capacity markets at a price other than levelized net CONE. Any entity that may be interested in buying that capacity in the bilateral market must also be able to clear that resource in the RPM to use it to meet its own capacity obligations and, just like the LSE that builds or first contracts for the resource, it must be able to justify the cost of the resource under the terms of the PJM tariff. If the LSE that built the resource or first contracted for the resource would not be permitted to bid the resource into the RPM at its true costs because of the artificial offer floor required by the April 12 Order, any potential customer in the bilateral market would face the same bar. What value would it gain from obtaining the resource at the LSE's true low cost in the bilateral market if it is unable to use that bilateral capacity purchase towards its own capacity obligations due to the unit's offer price in the RPM auction being mitigated up and therefore does not clear in the RPM auction? That entity would be better off paying a higher price for capacity in the RPM that it knew for certain it could use to meet its capacity obligation, rather than buying less expensive capacity in the bilateral market. Thus, the April 12 Order could dictate bilateral market prices as well, even though the April 12 Order lacks any finding much less any evidence that such bilateral capacity market prices are unjust, unreasonable, unduly discriminatory or preferential, or the result of a manipulative device or contrivance.

If the April 12 Order constitutes a generic finding that it is unjust and unreasonable for LSEs to make capacity sales that reflect their true costs and revenues,

then the April 12 Order is contrary to law and must be reversed on rehearing.[13] In making such a generic finding, the April 20 Order also failed to engage in reasoned decision-making because it departs without justification from the Commission's longstanding policy of allowing utilities to recover market-based rates if they do not possess market power.[14]

C. Without clarification or in the alternative rehearing, PJM's tariff unlawfully interferes with the lawful judgment of utility management, boards of directors, and regulators as to what constitutes an "economic" or prudent investment in capacity resources, or otherwise change without explanation 100 years of precedent as to what constitutes an economic or prudent investment.

As discussed above and as NRECA detailed in its Protest and accompanying affidavit, utility management, boards of directors and regulators consider a wide variety of factors in deciding whether an investment in a new resource or arrangement is economic and prudent, including energy, ancillary services, capacity, reliability, and other benefits including the hedge value of fuel diversity, the goodwill and regulatory value of sustainable investments, and the hedge value of proximity of resources.[15] The

[13] While the PJM filing was submitted under the authority of FPA Section 205, the Commission effectively made a determination, *sua sponte*, that utilities cannot include in Sell Offers for capacity, their true costs and revenues. Absent a finding that rates are unjust, unreasonable, unduly discriminatory or preferential under FPA Section 206, or a finding that the rates are an exercise of market manipulation under FPA Section 222, the Commission has no such authority to order rate changes. In this proceeding, the Commission effectively and unreasonably used PJM's FPA Section 205 filing to force a change in rates for all LSEs subject to RPM and the MOPR. *See Rate Changes Relating to Federal Corporate Income Tax Rates for Public Utilities*. Order No. 475, FERC Stats. & Regs. ¶ 30,752 at 30,738 (1987)(" The Commission has no statutory authority to require utilities to make rate reductions under FPA section 205.")

[14] *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)(court must ensure that FERC has provided a satisfactory explanation for its action, including a rational connection between the facts found and the choice made); *Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981)("While it is generally true that 'an agency is free to alter its past rulings and practices even in an adjudicatory setting ... it is equally settled that an agency must provide a reasoned explanation for any failure to adhere to its own precedents.'") (citations omitted); 5 U.S.C. § 706(2)(A)(2006)("An agency decision must not be upheld if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.").

[15] NRECA Protest at 30; Kirsch/Morey Affidavit attached thereto at 5-6.

Commission apparently ignored NRECA's demonstration and arguments altogether[16] in directing PJM to use the overly narrow and unrealistic snapshot benchmark calculation to determine whether a new plant is economic.

The limited purpose of the MOPR is to address "the concern that net buyers might have an incentive to depress market clearing prices by offering some self-supply at less than a competitive level."[17] It is not to second-guess decisions regarding whether an investment in a new resource is economic and prudent, made in the absence of any attempt to exercise monopsony power. Moreover, by directing PJM to focus solely on the fixed levelized net CONE in applying the MOPR, the April 12 Order effectively forces utility management, directors, and regulators to ignore all other factors in judging the prudence of capacity investments, because of the economic risk that the April 12 Order imposes on any company that dares engage in a traditional cost-benefit analysis of an investment.

It is true that the April 12 Order does not tell utilities that they may not invest in a plant or long-term power supply arrangement based on a traditional analysis of the legitimate costs, benefits and revenue streams ignored by the snapshot benchmark calculation. But, it does potentially impose significant penalties on utilities for making those decisions. Prior to the April 12 Order, a rational utility would weigh the long-term

[16] The Commission's failure to address these arguments violates its duty to address arguments before it, and make a rational connection between the facts found and the choice made. *See Northern States Power Co. v FERC*, 30 F.3d. 177, 180 (D.C. Cir. 1994)(citing *Town of Norwood v. FERC*, 962 F.2d. 20, 222 (D.C. Cir. 1992)(FERC is required to be able to demonstrate that it has "made a reasoned decision based upon substantial evidence in the record."); *Noram Gas Transmission Co. v. FERC*, 148 F.3d. 1158, 1165 (D.C. Cir. 1998)(FERC cannot ignore arguments raised before it); *KN Energy Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992)(agency must engage the arguments raised before it); *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)(court must ensure that FERC has provided a satisfactory explanation for its action, including a rational connection between the facts found and the choice made).

[17] *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 103 (2006).

range of benefits and revenue streams that could come from the investment against the costs of the investment itself. After the April 12 Order, they must (1) add a significant thumb on the cost side of the scale to include the costs of purchasing capacity from the RPM market to meet their capacity obligation if their resource does not clear and (2) without substantial clarification or rehearing, remove from the revenue side of the scale any revenues that they might have received from selling excess capacity from the resource in the bilateral and centralized capacity markets in the event that the "mitigated" price of the resource is above the market clearing price during those years when excess might have been available before the LSE grew into the resource. Because the April 12 Order artificially modifies the cost-benefit analysis for LSEs and their regulators, it could well lead many LSEs to continue to buy capacity out of the RPM market even where they could otherwise have better served their consumers and the industry as a whole by investing in a new long-term resource. It could severely undermine long-term planning and long-term resource strategies and force many if not most LSEs into the short-term RPM markets.

For that reason, the April 12 Order constitutes an unjust and unreasonable intrusion into the discretion of utilities in making investment decisions and state regulators in determining prudence of those decisions.[18] Moreover, without significant clarification and/or rehearing, the April 12 Order is arbitrary and capricious because its determination that fixed levelized net CONE is the sole factor that may be considered in

[18] *See California Independent System Operator v FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004)(in rejecting FERC's intrusion into corporate governance decisions, the Court held that FERC's authority to assess the justness and reasonableness of practices that affect rates of electric utilities "is limited to those methods or ways of doing things on the part of the utility that directly affect the rate or are closely related to the rate, not all those remote things beyond the rate structure that might in some sense indirectly or ultimately do so."

determining the prudence of a new investment is a major change in the Commission's policy on prudence determinations, yet the April 12 Order lacks any justification.[19] .

D. Without clarification or, in the alternative, rehearing, PJM's tariff would unlawfully treat as uneconomic and unlawful subsidies both the inclusion of capacity resources in the rate base of a utility and the resulting availability of lower cost capital and access to income from sales of energy and capacity in bilateral markets.

The April 12 Order directs PJM to use an updated net CONE value for purposes of calculating the benchmark value which is used to assess the competitiveness of a Sell Offer.[20] It also requires that any competitive analysis for individual generator Sell Offers use a generic net CONE calculation which presumes that the only revenues for the resource are derived from PJM markets.[21] With the elimination of the self-supply exemption for clearing the MOPR, these provisions will apply to self-supply resources that would otherwise be subject to the MOPR.[22]

The April 12 Order's determination with respect to review of Sell Offers primarily addressed which entity (PJM, the IMM, or FERC) would make such review, not the significant issue of what the review should entail. In a two-sentence paragraph, the Commission summarily determined that a Sell Offer below the benchmark value is permissible if the LSE can demonstrate to the IMM (with recourse to PJM in the event of an adverse determination) that the Sell Offer "is consistent with the competitive, cost-

[19] *See Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981)("While it is generally true that 'an agency is free to alter its past rulings and practices even in an adjudicatory setting ... it is equally settled that an agency must provide a reasoned explanation for any failure to adhere to its own precedents.'") (citations omitted); 5 U.S.C. § 706(2)(A)(2006)("An agency decision must not be upheld if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.").

[20] April 12 Order at P 43.

[21] *Id.* at P 122.

[22] The MOPR applies only to planned combustion turbine and combined cycle facilities, and only in those locational deliverability areas where a separate Variable Resource Requirement Curve has been established.

based, fixed, nominal levelized, net [CONE] were the resource to rely solely on revenues from PJM-administered markets."[23]

Which cost and revenue elements could be included in that analysis is critically important. On one hand, P3 argued that LSEs should not be able to use their true costs in that demonstration, insisting for example that inclusion of a plant in rate-base or receipt of revenues from bilateral capacity markets are undue subsidies.[24] The IMM has also taken the unconditional position that "out of market revenues cannot be reflected in the offer price."

PJM, on the other hand, acknowledged in its Answer (which the April 12 Order does not recognize) that an LSE's legitimate and true costs should be included in the competitive exemption analysis. PJM recognized the "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"[25] and, therefore, PJM proposed an exemption process that would allow a market participant with a low Sell Offer to justify that its costs are legitimately lower than the asset class net CONE levels. Rather than restrict the cost evaluation to an unrealistic net CONE level, PJM proposed a review of true costs, such as a public power entity showing that its debt financing costs are lower or a party in the process of building a self-supply resource

[23] April 12 Order at P 122.

[24] P3's Complaint and Request for Clarification and Fast Track Processing, filed in Docket No. EL11-20-000 on February 1, 2011, at Attachment A, Section 3(iii).

[25] PJM Answer at 11.

demonstrating that it already has sunk costs for the project which would legitimately reduce its avoidable costs and Sell Offer.[26]

In its Protest, NRECA recommended that if the Commission does not reject the P3 and PJM proposals to eliminate the self-supply clearing exemption, then rather than adopt a guilty-until-proven innocent test which puts the burden on LSEs to prove the negative that their Sell Offers are not an exercise of monopsony power to artificially depress clearing prices, the Commission should instead adopt a rebuttable presumption whereby self-supply Sell Offers shall be presumed competitive and economic unless the IMM or PJM demonstrates otherwise to the Commission prior to the relevant BRA.[27] NRECA repeats its request here (which was not at all addressed in the April 12 Order) as an alternative that would allow the Commission to step back somewhat from the precipice on rehearing and preserve some opportunity for legitimate self-supply to be committed in the RPM auction.

Alternatively, if the Commission does not adopt the rebuttable presumption test, then NRECA requests that the Commission clarify, or in the alternative grant rehearing and direct that the "consistent with" test in paragraph 122 in fact incorporates the true costs incurred and all revenues reasonably expected to be received by the LSE investing in the new resource over the long term. For example, the Commission must clarify, or in the alternative grant rehearing, that LSE's costs of capital will not be artificially increased to make them more "competitive" with those available to independent power producers and that the revenues LSEs anticipate receiving from a new resource will not take a

[26] *Id.*

[27] NRECA Protest at 40-41.

haircut to discount revenues that will be received in the bilateral markets. All costs and revenues that are legitimate (*i.e.,* actual costs and revenues which are not based on an intent to artificially depress clearing prices) should be included in the competitive analysis set forth in Paragraph 122. These should include, among others, the following: (1) project-specific capital costs; (2) project-specific capital structure (debt/equity level, long-term debt cost/return requirements, and amortization period); (3) project-specific tax status, rate and any related credits or benefits; (4) deductions for already-sunk costs; (5) favorable financing such as tax-exempt bonds or other local, state or federal laws or regulations that provide for reduced financing costs; and (6) revenues from arms' length bilateral contracts, such as member guarantees provided to rural electric cooperatives.

The LSE business model has consistently included cost recovery through traditional regulated rate structures, and many LSEs such as electric cooperatives have agreements for cost recovery from the members they serve as a core element of their business model. As NRECA explained in its Protest, these types of longstanding cost recovery mechanisms will continue to be the core source of financing for many LSEs.[28] The availability of such rate recovery for LSEs results in lower financing costs, which can translate to lower costs to consumers than those of IPPs whose business models might not provide them the opportunity for such favorable financing. For cooperative utilities, the ability to obtain favorable financing is one of the foundations upon which they exist.[29] Without clarification or, in the alternative, rehearing, the April 12 Order's directive that the cost determination must be limited to the generic levelized net CONE

[28] NRECA Protest at 25.

[29] *Id.* at 38. On May 11, 1935, President Roosevelt signed Executive Order No. 7037 establishing the Rural Electrification Administration (REA). A year later, the REA lending program which provided low-cost loans to build transmission and generation facilities was funded and authorized by act of Congress.

amount would arbitrary and capricious because it ignores the fact that LSEs' true costs, including capital costs, may be lower than the generic amount, and fails to address record demonstrations and proposals to the contrary.

Excluding from the competitive analysis an LSE's true costs such as lower capital costs that result from traditional rate recovery mechanisms, particularly in the absence of any exercise of monopsony power, is an unexplained reversal from the Commission's past policy and recognition that competitive market outcomes are best for consumers.[30] Moreover, the unrealistic levelized net CONE and overly narrow revenue parameters of the competitive standard adopted in the April 12 Order will result in unjust and unreasonable rates to consumers. In addition to discouraging non-RPM transactions as discussed above, the uncertainty and risk of not clearing for self-supply resources may undercut the availability of favorable financing for LSE new resources, which would increase costs to consumers. While increased costs and exclusion of self-supply resources will help keep non-LSE incumbent generators financially propped up and insulated from fair competition, the April 12 Order unreasonably and unlawfully penalizes consumers through higher rates as a result of the determination that legitimate costs should be disregarded.

[30] *See Wholesale Competition in Regions with Organized Electric Markets*, Advance Notice of Proposed Rulemaking, FERC Statutes and Regulations, Proposed Regulations 2004-2007. ¶ 32,617 (2007) at 5, citing *National Association for the Advancement of Colored People v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976)("The Commission's core responsibility is to 'guard the consumer from exploitation by non-competitive electric power companies.' The Commission has always used two general approaches to meet this responsibility—regulation and competition. The first was the primary approach for most of the last century and remains the primary approach for wholesale transmission service, and the second has been the primary approach in recent years for wholesale generation service."); *see also* note 17, supra.

Similarly, the Commission must clarify, or in the alternative grant rehearing that revenues from long-term contracts and traditional cost recovery mechanisms available to regulated utilities will not be treated as out-of-market subsidies which cannot be taken into account in justifying an individual Sell Offer. The determination, even if implicit, that all revenues except those derived from PJM markets are inherently uneconomic or anti-market subsidies is arbitrary and capricious because it ignores arguments and affidavit testimony from NRECA that the core sources for cost recovery for many LSEs are these traditional arrangements, not revenues from the short-term RPM construct, and that these arrangements do not represent uneconomic subsidies.[31]

The Kirsch/Morey Affidavit demonstrated that LSEs generally cover the vast majority of their load obligations with owned capacity resources and long-term bilateral contracts.[32] It is widely considered irresponsible for an LSE to rely upon an RTO's centralized markets for more than a fraction of their electricity needs, and this source of most of the generators' compensation is not inherently suspect, uneconomic, or the result of subsidization.[33] To the contrary, consistent with the IMM's explanation that "[t]he primary purpose of the [MOPR] in the PJM tariff is to prevent market participants from submitting uneconomic offers based on the receipt of out of market payments *to artificially depress clearing prices*"[34], there is no justification for excluding from the

[31] *Id.*

[32] Kirsch/Morey Affidavit at 17. According to a report from the PJM IMM, self-supply and bilateral contracts accounted for over 80% of the energy cleared through PJM's day-ahead and real-time markets in 2009. *Id.* (citations omitted).

[33] *Id.*

[34] Letter from Andrew L. Ott, Senior Vice President, Markets, PJM Interconnection and Dr. Joseph E. Bowring, President, Monitoring Analytics to Lee A. Solomon, President, New Jersey Board of Public Utilities (Dec. 3, 2010) ("Bowring Letter"), cited in the P3 Complaint in these proceedings at 20, and available at http://www.monitoringanalytics.com/reports/

Market_Messages/Messages/PJM-MMU_Letter_to_NJ_BPU_20101203.pdf.

competitive analysis these legitimate arrangements and sources of revenue that occur outside of the RPM auctions but do not *artificially* depress RPM auction prices. The Commission did not provide any record evidence in support of its blanket directive that all out-of-market revenues must be treated as such, nor did it address NRECA's demonstration to the contrary.[35] Here again, the April 12 Order failed to engage in reasoned decision-making.

E. Without rehearing, the order unlawfully alters the RPM market from a residual market into the sole acceptable source for new capacity in PJM.

As discussed in NRECA's Protest, the RPM construct was specifically designed as a limited three-year forward residual auction mechanism for the purpose of procuring capacity needed after taking into account an LSE's self-supplied resources. Hence the primary auction in RPM is the Base Residual Auction. This core, fundamental and limited function of the RPM mechanism has been unequivocally recognized by the Commission. For example, in *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 (2006), the Commission stated that " . . . *after LSEs have had an opportunity to procure capacity on their own,* it is reasonable for PJM to procure capacity in an open auction at a time when further delay in procurement could jeopardize reliability. *This, however, should be a last resort*."[36] The Commission further stated that [t]he purpose of the BRAs is "to

[35] *See Northern States Power Co. v FERC*, 30 F.3d. 177, 180 (D.C. Cir. 1994)(citing *Town of Norwood v. FERC*, 962 F.2d. 20, 222 (D.C. Cir. 1992)(FERC is required to be able to demonstrate that it has "made a reasoned decision based upon substantial evidence in the record."); *Noram Gas Transmission Co. v. FERC*, 148 F.3d. 1158, 1165 (D.C. Cir. 1998)(FERC cannot ignore arguments raised before it); *KN Energy Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992)(agency must engage the arguments raised before it).

[36] *Id.* at P 71 (emphasis added).

enable commitment of capacity resources to satisfy remaining capacity needs of LSEs *after taking into account their owned and contracted resources*."[37]

PJM's Tariff also reflects the residual nature of RPM, by stating that RPM provides "support for LSEs in satisfying Daily Unforced Capacity Obligations for future Delivery Years through Self Supply of Capacity Resources"[38] and that the BRA is "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*."[39] The Tariff further provides that self-supply Sell Offers must be committed regardless of price, as follows:

> 'Self-Supply' shall mean Capacity Resources secured by a Load-Serving Entity, by ownership or contract, outside a Reliability Pricing Model Auction, and used to meet obligations under this Attachment or the [RAA] through submission in a Base Residual Auction of a Sell Offer *indicating such Market Seller's intent that such Capacity Resource be committed regardless of clearing price.* An LSE may submit a Sell Offer with a price bid for an owned or contracted Capacity Resource, but such Sell Offer shall not be deemed "Self-Supply," solely as such term is used in this Attachment.[40] . . .

Finally, on this point, the PJM Tariff provides that "[u]pon 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 will treat such Capacity Resources as committed in the clearing process of the [BRA] for such Delivery

[37] *Id.* at P 55 (emphasis added).

[38] PJM Tariff Attachment DD, Introduction Section 1(a).

[39] PJM Tariff Attachment DD, Section 2.5 (emphasis added).

[40] PJM Tariff Attachment DD, Section 5.2, prior to April 12 Order (emphasis added).

Year."[41] Thus, until the April 12 Order, the only condition for self-supply to be committed in the BRA was that it had to be available. There has never been any other condition or test to be passed in order for LSEs to use their self-supply toward satisfying their capacity obligations.

The MOPR also reflected the residual nature of RPM. As the Commission recognized in approving the MOPR provisions, the MOPR was designed for the limited purpose of addressing "the concern that net buyers might have an incentive to depress market clearing prices by offering some self-supply at less than a competitive level."[42] The MOPR as so-limited provided "a reasonable method of assuring that net buyers do not exercise monopsony power by seeking to lower prices through self supply"[43] by providing a mechanism to develop a replacement clearing price based on predetermined thresholds while still honoring the fact that RPM is residual to and must not infringe upon self-supply by LSEs. Specifically, the MOPR provisions required PJM to accept "first, all Sell Offers to provide Capacity Resources in their entirety designated as self-supply."[44] Here again, the requirement to accept all self-supply resources was without condition regarding offer level or any other factor. As explained in NRECA's Protest, while self-supply was assured of clearing, it could nevertheless trigger application of the MOPR in constrained areas so that an offer floor would be established for the area.[45]

The MOPR required that PJM accept first, all self-supply Sell Offers in their entirety; second, zero Sell Offers, prorated as necessary; and third, all remaining Sell

[41] PJM Tariff Attachment DD, Section 5.2.

[42] *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 103 (2006).

[43] *Id.* at P 104.

[44] PJM Tariff Attachment DD, Section 5.14(h)(4).

[45] NRECA Protest at 12.

Offers in order of the lowest price paid.[46] In the April 12 Order, the Commission determined that despite explicit language to the contrary, the PJM tariff language did not exempt self-supply resources from the MOPR.[47] The Commission offered no explanation for what this language could mean if not an assurance of clearing for self-supply; nor did PJM or P3. Moreover, the interpretation that the language does not create any right for self-supply to be accepted regardless of price would render the language meaningless, which is an unexplained departure from the principle of contract interpretation that rate schedules must be interpreted to give meaning to each provision.[48]

The Commission's determination that even if the language does exempt self-supply, it "agrees with PJM that planned generation designated by a [LSE] as self-supply should be classified as a capacity resource and subject to an offer floor based on its entry costs until it clears in the [BRA]" has changed RPM from a residual capacity construct to a mandatory procurement mechanism for all capacity obligations in PJM, except those met through the limited FRR option.[49] This is the case because whereas LSE self-supply prior to the April 12 Order was guaranteed to clear and, therefore, be used toward satisfying an LSE's capacity obligation, the Commission has now directed that all new resources, including self-supply, must be subject to the MOPR offer floor and risk not

[46] PJM's pre-April 12 Order Tariff Attachment DD, Section 5.14(h)(4).

[47] April 12 Order at P 192. The 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. The Commission failed to address these demonstrations in the April 12 Order.

[48] *See Mastrobuono v. Shearson Lehman Hutton. Inc.*, 514 U.S. 52, 63 (1995)("[I]t is a cardinal principle of contract construction []that a document should be read to give effect to all of its provisions and to render them consistent with each other."); *Boston Edison Co. v. Town of Concord*, 50 FERC ¶ 61,199 (1999) at 61,643 (the interpretation of the terms of a rate schedule must be governed by principles of contract construction).

[49] As discussed in various protests and in this request for rehearing, the FRR option is intentionally narrow and not a viable alternative for most LSEs.

clearing.[50] The Order will therefore require LSEs to make investment decisions based on whether an investment will clear the RPM auction subject to the overly restrictive test. LSEs will no longer be able to make rational investment decisions based on the most cost-effective and reliable long-term investment to serve load.

The Commission's duty to engage in reasoned decision-making includes a duty to explain departure from its own policy and precedents.[51] In the April 12 Order, the Commission forced a fundamental change to RPM without so much as an acknowledgement of its past policy and precedent, let alone an explanation for its marked departure. The Commission also failed to acknowledge or address pleadings filed by NRECA, the PJM Load Group, and PJM on the self-supply issue. Specifically, there is no mention of PJM's March 21, 2011 Answer, wherein it stated as follows:

> [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. The MOPR should not eliminate the ability of load-serving entities, including municipal and cooperative utilities, from continuing to utilize owned or contracted resources procured outside of the RPM mechanism to meet their load-serving obligations.

PJM Answer at 4. PJM further recommended that the Commission "should broaden its view to consider also rules and processes that do not penalize or discourage good faith resource investment."[52] NRECA and the PJM Load Group filed responsive pleadings which urged the Commission not to approve the PJM and P3 proposals to eliminate the self-supply clearing exception from the MOPR.[53] None of these pleadings were

[50] The MOPR applies to combined cycle and combustion turbine facilities in areas where a separate Variable Resource Requirement Curve has been established.

[51] *See* note 17, supra.

[52] *Id.* at 10, note 16.

[53] NRECA Answer at 9; PJM Load Group Answer at 10.

mentioned in the April 12 Order. The April 12 Order thus failed to satisfy the Commission's obligation to engage the arguments put before it.[54] Moreover, by departing without explanation from its own precedent regarding the residual nature of RPM without explaining why it is reasonable to eliminate the mandated acceptance of self-supply to satisfy an LSE's capacity obligations, the April 12 Order is arbitrary and capricious.[55]

The Commission's decision to eliminate the assurance for self-supply to be committed to satisfy an LSE's capacity obligation is arbitrary and capricious. On rehearing, the Commission should remedy this error and direct that PJM reinstate and abide by the tariff provisions that require that self-supply be committed in the RPM auctions regardless of price, subject only to verification that the self-supply resource will be available for the Delivery Year.

F. Without rehearing, the order unlawfully alters the terms of a comprehensive settlement to the benefit of one group of parties to that settlement without any review of the impact of the changes on the overall balance of interests.

As discussed in the pleadings filed in this proceeding by NRECA and others, the RPM construct and MOPR provisions reflected the balance struck in the 2006 settlement negotiations, between the respective interests of suppliers and loads. Relevant to the self-supply issue, because the RPM capacity construct was new and largely untested at the time it was proposed by PJM, load interests could not predict how they would be affected by RPM. Moreover, it was critical to allow LSEs to continue their right to invest in long-term owned or contracted capacity resources and use those investments toward satisfying their capacity obligations, rather than rely on the three-year forward auctions under RPM.

[54] *See* note 33, supra.

[55] *See* note 17, supra.

The April 12 Order's directive that the self-supply clearing assurance be removed from the MOPR, together with the unrealistic levelized net CONE and restrictive test for competitive Sell Offers, has eliminated the balance struck in the RPM settlement which the Commission presumably found to be just and reasonable. The settlement, as reflected in PJM's Tariff, balanced the interests of load and IPPs through a residual capacity construct that accommodated LSEs' right to enter into long-term investments and agreements outside of RPM and use those resources toward meeting their capacity obligations, without condition on the ability of the self-supply to clear the auction. The MOPR provided protection against exercises of monopsony power and ensured against self-supply doing so because while self-supply volumes were assured to clear, the self-supply Sell Offer could nevertheless trigger application of the MOPR offer price floor in the locational deliverability area ("LDA"). This change in the balance struck in the settlement and approved by the Commission is in complete favor of incumbent IPP generators and o the detriment of load interests. The Commission acted unreasonably in making such an unexplained shift in the balance reached in the settlement and reflected in pm's Tariff, without at all addressing the impacts on load. Moreover, given that the MOPR provision is part of an integrated RPM capacity construct that was developed in the settlement, the Commission erred by failing to conduct a holistic review of the MOPR and related provisions, in order to protect against adverse unintended consequences.[56]

[56] *See, e.g.* PJM Load Group Protest at 23 (because the MOPR is part of the overall PJM market design and changes to it could have unintended consequences on other aspects of RPM, the PJM Load Group urged the Commission to at least consider whether in order to maintain the balance struck between load and generator interests, and continue the goals of RPM, changes to other aspects of the RPM model are necessary in light of the proposed changes."). *Electricity Consumers Resources Council v. FERC,* 747 F.2d 1511, 1513-14 (D.C.Cir.1984); *see also City of Charlottesville v. FERC,* 661 F.2d 945, 950 (D.C.Cir.1981) ("What is basic is the requirement that there be support in the public record for what was done.") (citation omitted).

G. Without rehearing, the order unlawfully shifts risks and costs from competitive generators to consumers.

The Commission has consistently recognized that "[c]ompetition in wholesale electricity markets is the best way to protect the public interest and ensure that electricity consumers pay the lowest price possible for reliable service."[57] As the Commission observed in Order No. 719:

> Improving the competitiveness of organized wholesale markets 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. Effective wholesale competition protects consumers by providing more supply options, encouraging new entry and innovation, spurring deployment of new technologies, promoting demand response and energy efficiency, improving operating performance, exerting downward pressure on costs, and shifting risk away from consumers. National policy has been, and continues to be, to foster competition in wholesale electric power markets.[58]

With respect to generation service, the Commission has used competition in order to meet its "core responsibility . .. to 'guard the consumer from exploitation by non-competitive electric power companies"[59]

In a competitive market, new entry should be encouraged where it provides better value to consumers than existing resources, through downward pressure on costs and

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[57] *Regional Transmission Organizations*, Order No. 2000, 89 FERC ¶ 61,285 (1999).

[58] *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Statutes and Regulations ¶ 31,281 (2008); *order on reh'g*, Order No. 719-A, FERC Statutes and Regulations ¶ 31,292 (2009); *order on reh'g*, 129 FERC ¶ 61,252 (2009).

[59] *Wholesale Competition in Regions with Organized Electric Markets*, Advance Notice of Proposed Rulemaking, FERC Statutes and Regulations, Proposed Regulations 2004-2007. ¶ 32,617 (2007) at 5, citing *National Association for the Advancement of Colored People v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976)("The Commission's core responsibility is to 'guard the consumer from exploitation by non-competitive electric power companies.' The Commission has always used two general approaches to meet this responsibility—regulation and competition. The first was the primary approach for most of the last century and remains the primary approach for wholesale transmission service, and the second has been the primary approach in recent years for wholesale generation service.")

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shifting risk away from consumers. As competitive new entry is introduced into the market, prices should decrease, which will inure to the benefit of consumers. In this manner, competitive markets protect consumers from the risk of loss of imprudent generation investments, because new generation investment must provide better value than existing resources in order to be profitable.

The April 12 Order departs without explanation from the Commission's policy of encouraging competitive market outcomes. As discussed above, the combination of subjecting new entry self-supply to the MOPR and the overly restrictive, unrealistic test for an exemption from the MOPR offer floor puts new entry at risk of not clearing even when it is a better value than existing resources based on the true costs and true revenues of the new supply. The result of the April 12 Order will be to discourage new entry, which will block access to competitive new entry and the attendant benefits for consumers. The discouragement of new entry will in turn ensure the RPM revenue stream for incumbent generators, thereby artificially insulating them against competition and providing them with an incentive against any of the above-cited benefits of a competitive market.

The Commission did not address these harmful impacts on competition that will result from its self-supply and exemption test rulings. Instead, the Commission incorrectly determined that "[f]ailure to subject new self-supply to the MOPR, that is, permitting new self-supply to participate in RPM as a price-taker, would significantly impede competition from all types of private investment and shift long-term investment risk from private investors to captive customers."[60] The Commission's reasoning is

[60] April 12 Order at P 195.

wrong on this point, because (1) it ignores the fact that LSEs have an obligation to provide cost-effective service to their customers, which includes a long-term resource planning view that takes into account whether investments in new owned or contracted resources will provide benefits to customers; and (2) it ignores the fact that the MOPR prior to the April 21 Order allowed the self-supply Sell Offer to clear but did not prevent the Sell Offer from triggering an application of the MOPR replacement price to other Sell Offers.

On rehearing, the Commission should remedy the harm caused to competition caused by the April 12 Order, by reinstating the exemption for self-supply Sell Offers to be accepted regardless of price, notwithstanding the MOPR.

H. Without rehearing, the order unlawfully rejects requests for further procedures to address the unintended and harmful impacts on LSEs' right to invest in resources outside the RPM construct.

In initial responsive pleadings to the PJM and P3 filings, parties urged the Commission to convene further procedures to address the complexity and scope of the proposed MOPR revisions.[61] For its part, NRECA requested that if the PJM and P3 filings were not rejected outright, then the Commission establish settlement judge procedures or a stakeholder process to consider at least changes to the MOPR and any related provisions.[62] Such stakeholder process would be consistent with the Commission's policy encouraging stakeholder-driven modifications to RPM.[63]

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[61] *See* PJM Load Group Protest at 43; Motion to Answer and Answer of the Maryland Public Service Commission at 20-21; Protest of the Maryland Public Service Commission at 26; Protest of the New Jersey Rate Counsel at 5.

[62] NRECA Protest at 43.

[63] *See, e.g.*, *PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,015 (2008)(the Commission rejected PJM's proposal to change CONE values just prior to a BRA where PJM had not provided required notice to stakeholders or received Members Committee support. In addition to violating the Tariff notice provisions,

In its Answer, PJM stated that the MOPR should not apply to legitimate resource investment including self-supply that is motivated in good faith, acknowledged legitimate concerns on the self supply-issue,[64] offered to work with stakeholders to address self-supply issues in order to avoid unintended consequences,[65] and recommended that the Commission should "broaden its view to consider also rules and processes that do not penalize or discourage good faith resource investment."[66]

Notwithstanding statements by PJM, the sponsor of MOPR revisions, that the self-supply revisions could have adverse impacts and should be referred to a stakeholder process, the Commission accepted PJM's proposal to eliminate the self-supply clearing exemption without either developing a remedy against the adverse impacts on self-supply or at least directing further procedures to develop one. Instead, the Commission summarily determined that it had a sufficient record upon which to rule,[67] and proceeded to eliminate the self-supply exemption and adopt the restrictive competitive analysis test. The fact that PJM specifically acknowledged the problems with its proposal as related to self-supply and admitted that it had not yet developed a proposal to resolve them, and the fact that the Commission failed to address these concerns prior to accepting the PJM proposal, demonstrates that the Commission did not have sufficient evidence upon which to rule. Therefore, the Commission's decision to eliminate the self-supply clearing exemption without a remedy, or without directing further procedures to address PJM's admission that the MOPR would have unintended and adverse impacts on legitimate self-

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the Commission found that PJM's vague suggestions of a significant reliability concern and conclusory statement regarding increased construction costs were insufficient to justify its proposal.).

[64] PJM Answer at 9.

[65] *Id.*

[66] PJM Answer at 4, 10 note 16.

[67] April 12 Order at P 25.

supply, was arbitrary and capricious. On rehearing, if the Commission neither reinstates the clearing exemption for self-supply nor adopts NRECA's rebuttable presumption standard, then the Commission should direct stakeholder procedures to develop an alternative that will avoid the unintended consequence of having legitimate self-supply at risk of not clearing by operation of the MOPR.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, NRECA requests that the Commission grant rehearing of the April 12 Order and reinstate the assurance for self-supply Sell Offers to be committed in the RPM auction. Alternatively, if the Commission does not grant rehearing as requested, then NRECA requests that the Commission (1) grant rehearing and adopt a rebuttable presumption whereby self-supply Sell Offers shall be presumed competitive and economic unless the IMM or PJM demonstrates otherwise to the Commission prior to the relevant BRA or, (2) in the alternative, establish stakeholder procedures to develop at least a mechanism to protect against the unintended consequence of self-supply being subject to the risk of not clearing because of the MOPR, and at least clarify, or grant rehearing and direct that the "consistent with" test in Paragraph 122 of the April 12 must incorporates the true costs incurred and all revenues reasonably expected to be received by the LSE investing in the new resource

Respectfully submitted,

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Dated: May 12, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have, on this date, caused the foregoing document to be served on each person included on the official service list maintained for this proceeding by the Secretary of the Commission, by electronic mail or by such other means as designated by or for each such person, in accordance with Commission Rule 2010.

Dated this 12th day of May, 2011.

/s/ *Adrienne E. Clair*