

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

**Calpine Corporation, Dynegy Inc., Eastern  
Generation, LLC, Homer City Generation,  
L.P., NRG Power Marketing LLC, GenOn  
Energy Management, LLC, Carroll County  
Energy LLC, C.P. Crane LLC, Essential  
Power, LLC, Essential Power OPP, LLC,  
Essential Power Rock Springs, LLC,  
Lakewood Cogeneration, L.P., GDF SUEZ  
Energy Marketing NA, Inc., Oregon Clean  
Energy, LLC and Panda Power Generation  
Infrastructure Fund, LLC,**

**Complainants,**

**v.**

**PJM Interconnection, L.L.C.,**

**Respondent.**

**Docket No. EL16-49-000**

**PROTEST OF DOMINION RESOURCES SERVICES, INC.,  
AMERICAN MUNICIPAL POWER, INC., AMERICAN PUBLIC POWER  
ASSOCIATION, OLD DOMINION ELECTRIC COOPERATIVE, PJM  
INDUSTRIAL CUSTOMER COALITION, NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION AND PUBLIC POWER ASSOCIATION OF  
NEW JERSEY**

On January 9, 2017, pursuant to sections 206 and 306 of the Federal Power Act<sup>1</sup> and Rules 206, 212 and 215 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure,<sup>2</sup> the Electric Power Supply Association (“EPSA”) and a group of competitive generators (“Indicated

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<sup>1</sup> 16 USC §§ 824e and 825e (2012).

<sup>2</sup> 18 CFR § 385.206, 385.212, 385.215 (2016).

Complainants”)<sup>3</sup>, collectively, “Movants” filed a request to leave to amend, and amend, the March 21, 2016 complaint (“March 21 Complaint”) in the above-captioned proceeding (“Amended Complaint”). The Movants seek to substantially revise the March 21 Complaint through an inappropriate amendment, to now address certain legislation and different generating facilities, and continue their request that the Commission require PJM Interconnection, L.L.C. (“PJM”) “to adopt mitigation measures in time for the 2020/2021 BRA [Base Residual Auction] to ensure that State-approved subsidies to favored existing resources do not artificially suppress prices in that auction. Movants state that such measures could take the form of those proposed in the Complaint for the Base Residual Auction for the 2019/2020 Delivery Year (the “2019/2020 BRA”) or other just and reasonable revisions to the MOPR that will ensure that subsidized existing resources are not allowed to artificially suppress clearing prices in the 2020/2021 BRA.”<sup>4</sup>

## **I Introduction**

The Amended Complaint seeks to build on the near-term relief requested in the March 21 Complaint – for PJM to expand its current Minimum Offer Price Rule (“MOPR”) from the limited application to new gas-fired generating resources (that are not otherwise exempt) to “subsidized existing resources.” In the March 21 complaint, such subsidized resources were subject to the proposed affiliate power purchase agreements (“PPAs”) by FirstEnergy Corporation (“FirstEnergy”) and American Electric

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<sup>3</sup> Indicated Complainants include Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, Homer City Generation, L.P., NRG Power Marketing LLC, GenOn Energy Management, LLC, Carroll County Energy LLC, C.P. Crane LLC, Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean Energy, LLC and Panda Power Generation Infrastructure Fund, LLC.

<sup>4</sup> Amended Complaint at 3.

Power (“AEP”). Now the Movants seek to expand the MOPR to existing nuclear resources that would be subject to ten-year contracts for “zero emission credits” (ZECs) under the recently enacted legislation by the State of Illinois, known as the “Future Energy Jobs Bill.”

The Movants also request a longer-term solution, asking that the Commission direct PJM to “conduct a stakeholder process and to propose a longer-term remedy that can be put in place beginning with the following Base Residual Auction,”<sup>5</sup> the 2021/2022 BRA.

Pursuant to Rules 211 and 214 of the Commission’s Rules of Practice and Procedure,<sup>6</sup> Dominion Resource Services, Inc. (on behalf of Dominion Virginia Power), American Municipal Power, Inc., American Public Power Association, Old Dominion Electric Cooperative, PJM Industrial Customer Coalition, National Rural Electric Cooperative Association and Public Power Association of New Jersey (collectively, the “Load Group”) respectfully submit this Protest to the Amended Complaint. In short, the Commission should reject the attempt to circumvent the requirements of Rule 206<sup>7</sup> through an “amended” complaint, and should in any event reject the Complaint on the merits, as discussed below.

## **II Background**

In both the March 21 Complaint and the Amended Complaint, the Movants seek to require PJM to expand the MOPR to existing resources that would receive revenues under a long-term contract sanctioned by the state. The March 21 complaint would have

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<sup>5</sup> Ibid.

<sup>6</sup> 18 C.F.R. §§ 385.211 and 385.214 (2016).

<sup>7</sup> 18 C.F.R. § 385.206 (2016).

applied the MOPR to resources subject to FirstEnergy and AEP's proposed affiliate contracts. The Load Group filed a protest on April 11, 2016 ("April 11 Protest") to the March 21 Complaint, opposing such an expansion of the MOPR. On May 6, 2016, the Load Group filed a Motion to Dismiss following the Commission's order to rescind the previously approved waivers of the affiliate power sales restrictions for AEP and FirstEnergy, which rendered the March 21 Complaint moot.<sup>8</sup>

On December 1, Illinois Governor Rauner signed SB 2814, the "Future Energy Jobs Bill," that will, among other provisions, require the Illinois Power Authority to purchase ZECs from the Quad Cities Generating Station and Clinton Power Station. The Movants state that the "ZECs Legislation threatens to artificially suppress prices in RPM Auctions, because the out-of-market subsidies under that legislation will create incentives for below-cost offers for certain existing resources."<sup>9</sup> Thus, the Movants seek to prevent such price suppression through the application of the proposed expanded MOPR to the Quad Cities Generating Station, specifically by specifying that this facility would be defined as an Existing MOPR Screened Generation Resource, whose offer may be adjusted upwards in the next Base Residual Auction to be held in May 2017.<sup>10</sup>

### **III Protest**

#### **A. The Movants' Amendment to the Complaint Amounts to an Entirely New Complaint that Should Be Dismissed**

In addition to the substantive infirmities described below, the Amended Complaint should be dismissed on procedural grounds. While Movants style their pleading as an

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<sup>8</sup> Load Group Joint Motion to Dismiss at 2-3.

<sup>9</sup> Amended Complaint at 10.

<sup>10</sup> Amended Complaint at 16-17.

“amendment” to the initial Complaint, the amendment actually amounts to an entirely new complaint that should be dismissed by the Commission.

The Commission will reject an amendment to a complaint where “[i]t has not been shown that [the] claim arises out of the same transaction or occurrence as the complaint . . . The Commission has also rejected supplements to complaints where the amended complaint broadens a proceeding beyond its initial narrow scope and where an “amendment makes no claim of a specific violation . . . and appears to lack a meritorious basis.”<sup>11</sup>

Here, the Amended Complaint raised substantively new and different issues from the March 21 Complaint. The March 21 Complaint dealt with a specific issue – ratepayer-funded subsidies for existing resources owned by unregulated subsidiaries of Ohio utilities AEP and FirstEnergy – while the Amended Complaint raises a much broader issue – Illinois legislation that creates contracts for the purchase of ZECs by load serving entities.<sup>12</sup> The new issue raised in the complaint goes well beyond the initial focus of the complaint, the PPAs between AEP, FirstEnergy, and their subsidiaries. It is only appropriate to file these new issues in a new complaint, rather than trying to pigeonhole them into a complaint that is focused on only a narrow issue. Thus, the subject matter of the Amended Complaint is substantively different than, and adds an entirely new and broader issue to, the March 21 Complaint.

Likewise, the March 21 Complaint and the Amended Complaint seek different relief. As described by the Movants, the March 21 Complaint “proposed specific revisions

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<sup>11</sup> *McCulloch Interstate Gas Corp.*, 10 FERC ¶ 61,283, at 61,561 (1980).

<sup>12</sup> Amended Complaint at 16-18.

to the MOPR that were designed *to address the immediate threat* to the 2019/2020 BRA from the AEP and FirstEnergy proposals.”<sup>13</sup> This relief was “narrowly tailored to [the] threat posed by the AEP and FirstEnergy proposals.”<sup>14</sup> The Amended Complaint, on the other hand, requests much broader relief that would impact all contracts arising under the ZECs Legislation, even those that have “not yet actually been awarded or executed” – contracts that are unrelated to the AEP/FirstEnergy PPAs.<sup>15</sup>

The proper vehicle for raising these issues would be in a new, properly pleaded complaint that complies with Federal Power Act (“FPA”) Section 206 and FERC Rule 206 requirements, rather than in an “amendment” to an earlier, tangentially related and differently focused complaint. The Commission should reject the proposed amendment because it focuses on a different and broader issue that does not arise from the same circumstances underlying the March 21 Complaint, and it requests relief beyond the relief sought through that complaint.<sup>16</sup>

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<sup>13</sup> Amended Complaint at 16 (emphasis supplied).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 16-17.

<sup>16</sup> The Commission will also reject pleadings that, while styled as one type of pleading, prove to be another type entirely. Indeed, how the Commission must treat a document is not necessarily dictated by the style in which it is framed. *See Northern Natural Gas Co., Div. of Internorth, Inc.*, 27 FERC ¶ 61,001, at 61,002 n.3 (1984). The Commission has dismissed an amended complaint where it was not, in substance, actually an amendment to the initial complaint. *J. William Foley Inc. v. United Illuminating Co.*, 142 FERC ¶ 61,125, at P 18 (2013). Further, the Commission does not, as a matter of policy, permit parties to embed complaints within other types of pleadings. *See, e.g., Midwest Independent Transmission System Operator, Inc. and PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,248, at P 5 (2004) (dismissing a portion of a filing because “[t]he Commission has consistently rejected efforts to combine complaints with other types of filings”). Here, as explained above, Complainants have included a substantively different complaint in a motion to amend their initial complaint, thus styling a complaint as an amendment to an entirely different complaint. This attempt to include a complaint in a separate type of pleading should be rejected.

**B. The Amended Complaint Fails to meet the Burden of Proof to Show that the Current MOPR is Not Just and Reasonable**

In order to prevail on a complaint filed under FPA Section 206, the Movants must demonstrate (1) that the current MOPR provisions in the PJM tariff are unjust and unreasonable, and (2) that their proposed remedy is just and reasonable.<sup>17</sup> Because they have not met this dual burden in the March 21 Complaint or their Amended Complaint, the Complaints must be rejected.

As explained in the April 11 Protest, the use of a MOPR to mitigate offers from existing units is a dramatic departure from the rationale of the current MOPR. Nevertheless, the Movants continue to seek an expansion of the MOPR beyond its intended purpose and to an unreasonable end. The MOPR was adopted in order “to address the concern that load may have buyer-side market power, i.e., an incentive to suppress market clearing prices by offering supply at less than a competitive level.”<sup>18</sup> As the Commission has explained, “PJM’s MOPR is designed to protect against buyer-side market power by setting a price floor, i.e., a minimum bid, and by requiring that all new, non-exempted resources bid at that floor, or higher, absent a demonstration, through a unit-specific review process, that a lower bid is justified based on the resource’s operational economics.”<sup>19</sup>

The theoretical basis for the current MOPR is to prevent the exercise of buyer-side market power through the entry of new generation that could lower prices. Movants have not demonstrated that state-sanctioned payments to existing nuclear units are a means to exercise buyer-market power. Rather, the payments are, by all appearances, a

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<sup>17</sup> See *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009).

<sup>18</sup> *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,066 (2015) at P 2 (citation omitted).

<sup>19</sup> *Id.* at P 3.

response to concerns regarding environmental policy, resource diversity and other state public policies that go far beyond that of price formation in a resource adequacy construct. The payment of revenue to a generator under any contract may affect the offer that the generator makes into the capacity market. A low or zero offer is simply an indicator that the generator is indifferent to the auction price because it has revenue from other sources. In other words, the offer is sending a proper price signal that additional capacity is not needed. As stated in the April 11 Protest, again the central question is whether the existence of such bilateral contracts requires the Commission to step in and *raise prices* with a new mitigation scheme that does not stem from any threat of buyer-side market power.

The Movants have failed to show that the existing RPM rules are unjust and unreasonable and the Commission should find the request made in the Amended Complaint to be unjust and unreasonable because it lacks any basis in mitigating potential market power.

**C. The Amended Complaint Fails to Propose a Just and Reasonable Remedy**

As discussed above, the Movants have a dual burden under FPA Section 206 to demonstrate (1) that the current MOPR is unjust, unreasonable, unduly discriminatory or preferential, and (2) that their proposed remedy is just and reasonable.<sup>20</sup> For the reasons discussed above, Movants have failed to show that the existing MOPR is unjust and unreasonable because it does not impose artificial price increases on existing generation resources. Even if the Commission finds that the Movants have demonstrated that the

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<sup>20</sup> See *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009).

existing MOPR is unjust and unreasonable for applying only to new entry, they have failed to propose a just and reasonable alternative.

As was the case with the March 21 Complaint, the Amended Complaint is not about buyer-side market power. There is neither reference nor discussion of any buyer-side market power in the Amended Complaint. Instead, the Amended Complaint continues an attempt to use the MOPR as a tool to ensure higher revenues for generators. The Commission should not expand the MOPR to prop up an artificial construct and higher-than-reasonable prices paid by load. With this slippery slope, at what point can any legitimate actions survive without additional changes to the tariffs to artificially increase prices?

The Movants have not shown that the ZECs legislation is about a state seeking to artificially depress clearing prices, nor is it certain to have that effect. Taken to its logical conclusion, the reasoning of the March 21 Complaint and Amended Complaint means that each and every state action that might have the effect of reducing prices, no matter whether for a legitimate state policy, will be cause for a change in the MOPR in order to guarantee the higher prices that other generators expect from this artificial capacity construct. Such an outcome is an unreasonable expansion of the MOPR, and more analogous to a heavily regulated than a competitive market.

#### **D. The PJM Self-Supply Exemption Must Be Retained**

Even if the Commission agrees that there is merit to the Amended Complaint and the Movants have demonstrated that the MOPR is unjust and unreasonable unless it applies to existing resources, the Commission should not adopt the Complainants' remedy without directing that the Self-Supply Exemption must not be adversely impacted or changed as a

result of yet another expansion of the MOPR. Moreover, under no circumstances should a MOPR on existing units ever be applied to resources used by a load-serving entity (“LSE”) for self-supply. The Amended Complaint requests the relief that was requested in the March 21 Complaint – specific Tariff revisions that would immediately apply the MOPR to existing resources for the upcoming BRA and a directive to PJM to conduct a stakeholder process for a longer-term remedy. Movants add that they would not oppose an alternative immediate remedy, provided it (1) can be implemented for the 2020/2021 BRA; and (2) “will prevent existing resources receiving subsidies under the ZECs legislation from submitting below-cost bids.”<sup>21</sup>

The Movants do not adequately address the Self-Supply Exemption from the MOPR. As detailed in the Load Group’s April 11 Protest to the March 21 Complaint, the Self-Supply Exemption is critical to ensuring that LSEs eligible for the exemption can continue their legitimate, long-standing business models of self-supplying their capacity needs outside of the RPM construct.<sup>22</sup> The Self-Supply Exemption accommodates self-supply by LSEs who meet the eligibility requirements, including net-short and net-long thresholds, in order to prevent these legitimate business models from being threatened by the MOPR. As the Commission recognized, “the MOPR was not intended to change the long-standing business models parties use to support investment in specific capacity procurement projects.”<sup>23</sup>

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<sup>21</sup> Amended Complaint at 18.

<sup>22</sup> See Load Group Protest at 14.

<sup>23</sup> 137 FERC ¶ 61,145 at P 242 (2011).

As with the Ohio PUC decisions at issue in the March 21 Complaint, the ZECs legislation does not implicate the Self-Supply Exemption. The “targets” of the amended Complaint are nuclear generating facilities owned by Exelon. Exelon does not qualify for the Self-Supply Exemption because, among other things, the exemption is limited to LSEs who are cooperative and municipal utilities, vertically integrated utilities, and single customer LSEs serving at retail only customers that are under the LSEs’ common control.<sup>24</sup> The Movants apparently recognize this is the case because the Amended Complaint proposes to maintain the Self-Supply Exemption as did the March 21 Complaint. However, the Amended Complaint leaves the Self-Supply Exemption exposed because the exemption is only certain for the “immediate” relief, not the long-term stakeholder process and revisions requested in the March 21 Complaint and Amended Complaint. Moreover, in the event the Commission takes the Movants up on their agreement to an alternative remedy than the one proposed in the Amended Complaint, there is no certainty that the Self-Supply Exemption will be maintained as-is.

In order to protect against legitimate self-supply by LSEs again becoming collateral damage from overbroad attempts by generators to guarantee their revenue stream, if the Commission does not reject the Complaints in this proceeding, then it must protect the Self-Supply Exemption from adverse impact or modification as part of this proceeding. Specifically, the Load Group requests that the Commission direct that any modifications to the MOPR must retain the Self-Supply Exemption as it is currently set forth in the PJM Tariff, protecting self-supply arrangements entered into by cooperative and municipal

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<sup>24</sup> PJM Tariff Attachment DD, Section 5.14(h)(6)(vi).

utilities, vertically integrated utilities, and single customer LSEs serving at retail only customers that are under the LSEs' common control.

**E. Payments to Existing Resources Are Not an Imminent Threat to either RPM or the Nation's Wholesale Markets**

The Movants request that the immediate mitigation measures be put in place “in time for the 2020/2021 BRA to ensure that State-approved subsidies to favored existing resources do not artificially suppress prices.”<sup>25</sup> But the Movants also make a bigger case for their requested action, stating that “[p]rompt and decisive action on the Complaint will not only address the very real and growing threat to the RPM market but will also send a desperately needed message about the Commission’s commitment to protecting the nation’s organized markets from the threat of subsidized existing resources. Leaving this threat unaddressed will lead to the further tilting of the playing field and thereby undermine the investor confidence that is essential to a truly competitive wholesale marketplace.”<sup>26</sup>

Ironically, what the Movants are stating is that in the absence of such protective measures to prop up their earnings, true competition will suffer. But the Load Group argues that instead, the actual threat to these markets is an expansion of anti-competitive measures, such as a MOPR, that prevent suppliers from having the ability to offer at an amount that they choose, raising the risk that resources may fail to clear the auctions. There is the very real threat that an expansion of a MOPR could adversely impact

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<sup>25</sup> Amended Complaint at 2.

<sup>26</sup> Amended Complaint at 13.

resources under contract to or owned by LSEs with an obligation to serve their customers.

While the Movants are claiming that the markets are doomed, the RTOs themselves are seeking to address the increased role of the states in generation resource selection without simply expanding the MOPR. In August 2016, PJM released a discussion paper, stating that “regulators and lawmakers may wish to pursue valid public policy objectives through out-of-market subsidies to generation resources.”<sup>27</sup> PJM recognized that while these subsidies “have the potential to suppress wholesale market prices,” an “application of the current MOPR to existing resources has the likely downside of resulting in the commitment of more resources than are necessary to maintain reliability,” and instead PJM recommended seeking an “alternative solution.”<sup>28</sup> In its Answer to the March 21 Complaint, PJM advised that “[i]mportantly, the long-term harm to the accuracy of the price signal must be balanced with the harm resulting from a hurried, disruptive and chaotic effort to revise existing rules through the complex proposal offered by the Complaint, none of its elements having undergone any semblance of stakeholder review.”<sup>29</sup> The Load Group shares PJM’s concern that “the potential for creating *other* unintended harmful consequences in the process is real and militates against making quick and untested changes”<sup>30</sup> for the 2017 BRA. While this discussion in PJM is far from resolved, this discussion paper and PJM’s response both indicate a

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<sup>27</sup> “Potential Alternative Approach to Expanding the Minimum Offer Price Rule to Existing Resources,” by Stu Bresler, Senior Vice President – Operations and Markets, PJM Interconnection, August 11, 2016 at 1.

<sup>28</sup> *Ibid.*

<sup>29</sup> PJM’s Answer filed in this proceeding on April 11, 2016, at 8.

<sup>30</sup> *Id.*

recognition that simply expanding the MOPR is not a beneficial option from PJM's perspective.

Finally, the substance of this complaint will be subject to a stakeholder process established at the January 26 Markets and Reliability Committee (MRC) meeting. The MRC approved a Problem/Opportunity Statement and Issue Charge to "assess state public policy initiatives and the PJM capacity construct." A new task force, the Capacity Construct/Public Policy Senior Task Force (CCPPSTF) will be tasked with identifying the objectives and characteristics of a well-functioning capacity construct; the current and potential public policy initiatives states could take regarding resource adequacy, fuel diversity, public, and environmental policies; and areas where state actions and the current RPM capacity construct may not be aligned. Based on the results of this effort, the CCPPSTF will then "brainstorm and develop modifications to RPM that could accommodate/address both capacity construct objectives and state actions. This could include, but not be limited to such things as, impacts to consumer costs, market entry and exit, reserve margins."<sup>31</sup> Given this new effort, there is no justification for any changes to the MOPR at this time.

Once again, the Movants are seeking to force the Commission to endorse an ill-conceived and potentially harmful market design change by manufacturing their own emergency.

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<sup>31</sup> The Issue Charge for the task force - to, "Assess state public policy initiatives and the PJM capacity construct"- was approved by PJM's Markets and Reliability Committee, January 26, 2017.

#### IV. CONCLUSION

For the reasons discussed above, the Load Group urges the Commission to reject the Amended Complaint.

Sincerely,

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**CERTIFICATE OF SERVICE**

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

Dated at Arlington, Virginia, this 30th day of January 2017.

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