

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

|   |   |                         |
|---|---|-------------------------|
| Calpine Corporation, Dynegy Inc., Eastern | ) | Docket Nos. EL16-49-000 |
| Generation, LLC, Homer City Generation,   | ) | EL18-178-000            |
| L.P., NRG Power Marketing LLC, GenOn      | ) | (Consolidated)          |
| 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                  | ) |                         |
|   | ) |                         |
| v.  | ) |                         |
|   | ) |                         |
| PJM Interconnection, L.L.C.               | ) |                         |
|   | ) |                         |

**MOTION FOR CLARIFICATION, OR IN THE ALTERNATIVE, REHEARING, OF  
ADVANCED ENERGY BUYERS GROUP**

Pursuant to Section 313 of the Federal Power Act, 16 U.S.C. § 8251(a), and Rules 212 and 713 of the Federal Energy Regulatory Commission (“Commission” or “FERC”) Rules of Practice and Procedure,<sup>1</sup> the Advanced Energy Buyers Group (“AEBG” or “Buyers Group”) respectfully submits this motion for clarification, or in the alternative, rehearing,<sup>2</sup> of the Commission’s December 19, 2019 order in the above-captioned dockets, which directs PJM Interconnection

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<sup>1</sup> 18 C.F.R. §§ 385.212 and 385.713 (2018).

<sup>2</sup> These comments represent the consensus view of the Advanced Energy Buyers Group (<https://www.advancedenergybuyersgroup.org/>). However, this document does not necessarily reflect the position of any specific member of the AE Buyers Group, and these comments should not be attributed to any individual company or companies participating in the AE Buyers Group.

(“PJM”) to establishment a replacement rate that significantly expands the existing Minimum Offer Price Rule (“MOPR”) in the PJM capacity market.<sup>3</sup>

At the outset, we note that this request for clarification or, in the alternative, rehearing, should not be read to suggest that the Buyers Group and its members agree with the Commission’s decision to adopt a sweeping replacement MOPR that applies broadly to renewables and other advanced energy technologies. On the contrary, we have significant concerns with the expanded MOPR, its implications for deployment of advanced energy technologies within PJM, and its impact on consumer costs. We expect that several entities will seek rehearing of those decisions. Here, we are seeking clarifications, or in the alternative, rehearing, to protect the important and growing market for voluntary purchases of renewable energy in the PJM region.

The Commission’s June 29, 2018 order in these dockets found the existing MOPR unjust and unreasonable due to the alleged suppressive impact of out-of-market revenues provided by state policy initiatives on capacity market clearing prices, determined that the MOPR must be expanded to address this price suppression, and established a paper hearing to gather evidence regarding the appropriate scope of an expanded MOPR.<sup>4</sup> In the paper hearing, the Buyers Group explained that renewable energy developed as a result of voluntary purchases by companies such as members of the Buyers Group is a significant and growing segment of the renewable energy market, and urged the Commission to ensure that any expanded MOPR clearly and completely excludes renewable energy projects engaging in these voluntary transactions.<sup>5</sup> The Buyers Group also sought to explain the various ways that voluntary buyers purchase renewable energy, and

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<sup>3</sup> *Calpine Corporation, et al. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) (“December Order”).

<sup>4</sup> *Calpine Corporation, et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018), *reh’g pending* (“June 2018 Order”).

<sup>5</sup> *See* Initial Testimony of Advanced Energy Buyers Group, Docket No. EL16-49 et al. (October 2, 2018).

emphasized that *all* such transactions must be exempted from the MOPR to avoid harmful and unjust over-mitigation of private activity conducted outside of any state mandate.

In the December Order, the Commission correctly concludes that “private, voluntary bilateral transactions” should not be subject to the MOPR “at this time.”<sup>6</sup> With respect to voluntary renewable energy credit (“REC”) transactions, however, the Commission states that “it is not possible, at this time, to distinguish resources receiving privately funded voluntary RECs from state-funded or state-mandated RECs.”<sup>7</sup> This latter statement has led to significant confusion and concern that the December Order may not fully exempt renewable energy purchased by voluntary buyers from the MOPR, creating significant uncertainty that is already chilling the market for private voluntary purchases.

To resolve this concern and ensure that the Commission’s apparent intent to ensure that voluntary bilateral transactions conducted apart from any state mandate do not subject the renewable resource involved to the MOPR, the Buyers Group requests that the Commission provide clarification on several issues. First, to provide the most clarity to PJM, voluntary buyers of clean energy, and the PJM marketplace, the Commission should clarify that the MOPR will only be applied to renewable energy projects developed with the clear intent of satisfying compliance with one or more state-mandated or state-sponsored processes like the Renewable Portfolio Standards (“RPS”) it pointed to when it initiated changes to the MOPR in the June 2018 Order. This clarification would best accommodate how REC markets and voluntary private contracting for voluntary renewable energy purchases work, and best ensure against unjust and unreasonable over-mitigation of purely voluntary purchases.

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<sup>6</sup> December Order at P 70.

<sup>7</sup> *Id.* at P 176.

At a minimum, however, to reconcile the statements in the December Order regarding voluntary transactions, the Commission must clarify that a renewable energy project selling its output to a voluntary off-taker who will retire and not resell the RECs created by the project will be exempt from the expanded MOPR. In addition, the Commission should confirm that PJM may develop its own systems to distinguish between voluntary RECs and compliance RECs, or rely on systems developed by others.

In the event the Commission does not adopt sufficient clarifications that allow voluntary private purchases of renewable energy to proceed without interference from the MOPR, the Buyers Group requests rehearing. Applying the expanded MOPR to voluntary RECs would render meaningless the Commission's ruling that the MOPR should not be applied to voluntary, private, arms-length transactions. In addition, allowing the expanded MOPR to apply to transactions that do not involve any "State Subsidies" as defined in the December Order would result in a replacement rate that applies well beyond the alleged market problem that the Commission seeks to resolve in this FPA Section 206 proceeding, and would therefore result in unjust and unreasonable over-mitigation.

### **I. About the Advanced Energy Buyers Group**

The Advanced Energy Buyers Group is a business-led coalition of large energy users engaging on policies to expand opportunities to procure energy that is secure, clean, and affordable. Members of the Buyers Group are market leaders and major employers spanning different industry segments, including technology, retail, and manufacturing. Our companies are among the 71% of Fortune 100 companies and 43% of Fortune 500 companies that have established renewable and/or climate targets as part of our corporate sustainability commitments. We share a common interest in expanding our use of advanced energy, such as renewable energy

like wind, solar, geothermal, and hydropower; demand-side resources like energy efficiency, demand response, and energy storage; and onsite generation from solar photovoltaics, advanced natural gas turbines, and fuel cells.

In 2017, members of the AE Buyers Group totaled over \$1 trillion in revenue and collectively consumed over 18 terawatt hours (“TWh”) of electricity, including over 11 TWh of renewable electricity—equivalent to the electricity sales for the states of North Dakota and Delaware, respectively. This collective electricity use includes a significant footprint in the PJM region.

The Buyers Group has been an active party in this proceeding, filing Initial Testimony and Reply Testimony<sup>8</sup> in response to the June 2018 Order, which the Commission acknowledged and sought to address in the December Order.

## **II. The Voluntary Renewable Energy Market is an Important and Growing Segment of the PJM Market**

We remind the Commission that voluntary renewable energy procurement by commercial and industrial (C&I) customers, including members of the Advanced Energy Buyers Group, is an increasingly important market driver of new renewable energy development. Since 2013, voluntary C&I buyers have purchased over 22 GW of renewable energy across the country to date, including more than 7 GW in 2019 alone.<sup>9</sup> Much of the market activity to date has occurred in regions with a regional transmission organization or independent system operator (“RTO/ISO”) due to the market liquidity and diversity of procurement options in such regions. Analysis from

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<sup>8</sup> See Reply Testimony of Advanced Energy Buyers Group, Docket No. EL16-49 et al. (November 6, 2018).

<sup>9</sup> Renewable Energy Buyers Group, “Corporate renewable energy buyers set new record in 2019,” Renewable Energy World Editors (October 2019), <https://www.renewableenergyworld.com/2019/10/29/reba-corporate-renewable-energy-buyers-set-new-record-in-2019/#gref>

Wood Mackenzie projects that demand for renewable energy among the Fortune 1000 could reach 85 GW across the United States over the next decade.<sup>10</sup>

While the Buyers Group is not aware of a PJM-specific forecast of C&I renewable energy demand, the region has seen significant C&I renewable energy procurement to date, and, in the absence of FERC's Order, we would expect this growth to continue due to a combination of high C&I demand and favorable resource availability. This prediction is consistent with a recent market report by LevelTen Energy, which identifies PJM and ERCOT as the two biggest growth markets for renewable energy in 2020; a plurality of developers indicated that corporate demand, and not utility purchases, would be the primary driver of growth in the North American market in the coming year.<sup>11</sup> Just a few of the notable projects in PJM in recent years include a total of 280 MW of wind and solar jointly purchased by Apple, Akamai, Etsy, and Swiss Re in Virginia and Illinois in 2018;<sup>12</sup> 215 MW of solar purchased by Amazon in Virginia and North Carolina in 2019;<sup>13</sup> and 74 MW of solar power and 125 MW of wind power purchased by Microsoft in North Carolina and Ohio, respectively, in 2019.<sup>14</sup> In addition to C&I customers, institutional, municipal, and residential customers are also important voluntary renewable energy buyers, and contribute

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<sup>10</sup> Wood Mackenzie, on behalf of the American Wind Energy Association, “*Analysis of Commercial and Industrial Wind Energy Demand in the United States*,” (2019), <https://www.awea.org/resources/publications-and-reports/analysis-of-commercial-and-industrial-wind-energy>.

<sup>11</sup> See Utility Dive, “As PPA price drops slow for wind and solar, developers see PJM, ERCOT as top markets” (Oct. 17, 2019), <https://www.utilitydive.com/news/as-ppa-price-drops-slow-for-wind-and-solar-developers-see-pjm-ercot-as-to/565208/>.

<sup>12</sup> Solar Reviews, “Apple Increases Renewable Energy in PJM Market Benefitting Multiple Companies” (Aug. 16, 2018), <https://www.solarreviews.com/news/apple-increases-renewables-pjm-benefitting-multiple-companies-081618/>.

<sup>13</sup> Power, “Amazon Announces Three New Renewable Energy Projects in the U.S. and UK” (Oct. 29, 2019), <https://www.powermag.com/press-releases/amazon-announces-three-new-renewable-energy-projects-in-the-u-s-and-uk/>.

<sup>14</sup> Microsoft News Center, “Microsoft strengthens global energy portfolio with 74 megawatts of North Carolina solar power from Invenergy's Wilkinson Solar Energy Center” (Mar. 6, 2019), <https://news.microsoft.com/2019/03/06/microsoft-strengthens-global-energy-portfolio-with-74-megawatts-of-north-carolina-solar-power-from-invenergys-wilkinson-solar-energy-center/>; “EDP Renewables, Microsoft execute wind energy agreement in Ohio” (Mar. 7, 2019), <https://news.microsoft.com/2019/03/07/edp-renewables-microsoft-execute-wind-energy-agreement-in-ohio/>.

significantly to market demand for renewable energy. Voluntary buyers may once have represented a small, marginal portion of the overall market demand for renewable energy, but this is clearly no longer the case in PJM or elsewhere.

Voluntary purchases of renewable and advanced energy are also an important economic development driver for the states in the PJM region. Companies like those in the Buyers Group seek to locate their operations and facilities in states and regions where they can readily access supplies of clean energy to meet their corporate sustainability goals. This results in direct job creation and economic development not only from those operations and facilities but also from the renewable and advanced energy projects constructed to meet their needs. When these companies can't readily obtain clean energy, they go elsewhere, and state and local economies suffer.

### **III. Voluntary Renewable Energy Buyers have Diverse Needs that Result in Diverse Purchasing Approaches**

As explained in the initial and reply testimony submitted by the Buyers Group in this docket, voluntary renewable energy buyers pursue a range of different approaches to renewable energy procurement. These pathways include, but are not limited to, renewable energy and/or renewable energy certificates (RECs) acquired through power purchase agreements (PPAs), virtual or financial PPAs (vPPAs), market REC purchases, utility REC programs, and utility green tariff programs.<sup>15</sup> The diversity of purchasing pathways is a function of the diverse needs of voluntary renewable energy buyers, who vary in size, sophistication, purchasing power, appetite for risk, cost sensitivity, desired term length, location, and other factors. Maintaining a competitive voluntary renewable energy market requires preserving the full range of purchasing options currently available.

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<sup>15</sup> See Initial Testimony of Buyers Group at 8-9.

Importantly, unbundled REC purchases remain an important segment of the voluntary market, including for customers that are also pursuing PPAs, vPPAs, utility renewable energy tariffs, and other long-term, bilateral procurement pathways. According to data from the National Renewable Energy Laboratory (“NREL”), unbundled REC sales accounted for nearly half (46%) of all voluntary market MWh sales of renewable energy in 2017 (the most recent year for which NREL has published data), with a total of over 51.7 million MWh of renewable energy purchased via unbundled RECs.<sup>16</sup>

In addition, it is critical to take into account the fact that RECs are bought and sold in a fluid and competitive national marketplace.<sup>17</sup> The testimony submitted by Advanced Energy Economy (“AEE”) in these proceedings included a primer that explains this marketplace and how it operates.<sup>18</sup> This is important because, as explained in our initial comments, purchase of unbundled RECs from brokers or intermediaries is important to voluntary purchasers for several reasons. First, in some cases, unbundled RECs are still the only option available without a long-term commitment (as required under a PPA, vPPA, and many utility programs), which for many companies is cost prohibitive or otherwise incompatible with company practices. Second, even for companies pursuing PPAs or other direct purchases, unbundled RECs can provide an important interim solution to meet ambitious clean energy targets. Executing long-term, bilateral contracts and/or making the decision to participate in a utility renewable energy program is a long and complex process, and unbundled RECs can be used in the meantime to keep on track with clean energy targets. Third, intermediaries often play an important role in long-term, bilateral contracts.

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<sup>16</sup> See National Renewable Energy Laboratory, “Status and Trends in the U.S. Voluntary Green Power Market (2017 Data)” (October 2018), available at <https://www.nrel.gov/docs/fy19osti/72204.pdf> (“NREL Report”), at 4.

<sup>17</sup> We note that this marketplace is largely outside of FERC’s jurisdiction; see <https://www.troutmansandersenergyreport.com/2012/04/ferc-determines-renewable-energy-certificates-are-jurisdictional-when-bundled-with-energy-sales/>.

<sup>18</sup> See Initial Testimony of AEE at Attachment A.



In particular, some voluntary buyers seeking to satisfy renewable energy goals may sell (directly or indirectly) the RECs obtained through a bilateral arrangement for use by an entity with compliance obligations, and then purchase unbundled voluntary RECs for their own purposes.<sup>19</sup> The liquidity of the REC market enables companies to take such flexible approaches to pursue projects that might not exist without their involvement, and that they may not otherwise be able to pursue from a cost perspective. Fourth, as a relatively low-cost and low-risk means to procure renewable energy, unbundled RECs remain an important component of many companies' diversified renewable energy portfolios. It is important to note that voluntary renewable energy buyers do not benefit financially from the RECs they purchase and retire to meet their renewable energy and sustainability goals, as emphasized in testimony filed previously in this docket by Microsoft.<sup>20</sup>

Therefore, to maintain a healthy, robust voluntary renewable energy market and to avoid harming current or future renewable energy projects serving voluntary buyers, the expanded MOPR must provide a clear and unambiguous pathway to avoid its application to all voluntary renewable energy purchases, including but not limited to PPAs, vPPAs, market REC purchases, utility REC programs, and utility green tariff programs.

**IV. The Commission should clarify the application of the expanded MOPR to ensure that it does not mitigate private, voluntary bi-lateral transactions**

Subjecting voluntary renewable energy purchases to the expanded MOPR would be wholly inconsistent with the Commission's premise for concluding that the existing MOPR had become

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<sup>19</sup> Center for Resource Solutions, *Two Markets, Overlapping Goals: Exploring the Intersection of RPS and Voluntary Markets for Renewable Energy in the U.S.* (July 2017), available at <https://resource-solutions.org/wp-content/uploads/2017/08/RPS-and-Voluntary-Markets.pdf>, at 12.

<sup>20</sup> Initial Testimony of Microsoft Corporation at 4-5.

unjust and unreasonable due the impact of state supported resources and with the stated intent of the replacement rate adopted in the December Order, and would directly and adversely impact voluntary renewable energy buyers, including members of the Advanced Energy Buyers Group.

In the December Order, the Commission states that “voluntary, arms-length bilateral transactions” should not be subject to the MOPR.<sup>21</sup> Standing alone, this conclusion correctly shields from the expanded MOPR renewable energy projects engaging in voluntary transactions that do not involve any State Subsidies or state mandates. However, the Commission goes on to state that it cannot “distinguish resources receiving privately funded voluntary RECs from state-funded or state-mandated RECs.”<sup>22</sup> This contradiction in logic needs to be clarified so that unintended harm to the REC market does not occur.

While the Commission does not state that voluntary RECs must trigger application of the MOPR, the Commission’s statement that it cannot distinguish between voluntary RECs and state-funded or state-mandated RECs leaves ambiguity that is creating significant market uncertainty and that risks slowing the growth of a healthy and competitive voluntary renewable energy market in PJM. Indeed, the Buyers Group can confirm that the risk and uncertainty introduced by the December Order is already adversely impacting prices in the voluntary renewable energy market in PJM, delaying the completion of deals, and even causing some developers and buyers to shift their attention to other markets and regions. Such an outcome is surely not the Commission’s intent. Accordingly, the Buyers Group requests clarification, or in the alternative, rehearing, of the December Order as it pertains to treatment of voluntary renewable energy procurement.

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<sup>21</sup> December Order at P 70.

<sup>22</sup> *Id.* at P 176.

To address this uncertainty and avoid harmful and costly over-mitigation of renewable energy projects serving voluntary purchasers rather than state mandates, the Buyers Group asks that the Commission clarify (or in the alternative grant rehearing to provide) that the expanded MOPR must only be applied to capacity resources developed with the express purpose and intent of satisfying the off-taker's compliance with a state-mandated or state-sponsored procurement process, such as a Renewable Portfolio Standard (“RPS”). This approach would best recognize the circumstances of renewable energy projects, which create RECs regardless of their intended use, and the fluid nature of REC markets over the long-term. When a renewable energy developer decides to construct a project, it typically has contracts in place with off-takers, providing a clear indication of the initial intent for constructing the project (*e.g.*, serving voluntary off-takers or off-takers complying with a state mandate). In this regard, the Commission is mistaken when it asserts that resource developers “typically do not know at the time of the auction qualification process how the REC will *eventually* be used;”<sup>23</sup> the project developer typically knows based on its off-taker how the RECs will *initially* be used. However, the fluidity of REC markets certainly do not always afford renewable project developers a clear line of site as to where the RECs they create will *ultimately* be used over the long life of their project—*i.e.*, whether RECs will in future years will be used for compliance or by a voluntary buyer such as a C&I or residential customer.

Moreover, to the extent a renewable energy project moves forward to participate in the capacity market without known off-takers or with off-takers for only part of the project (which is likely very rare), it would then be expected to sell the RECs it creates into the open market. And in that case, its RECs could be purchased for a voluntary purpose, a compliance purpose, or both,

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<sup>23</sup> *Id* (emphasis added). The Commission may be confusing this point with the point made by AEE and others that, given the fluid nature of REC markets, a project developer is unlikely to know *the value* of its RECs when it constructs a capacity market offer three-years in advance. *See, e.g.*, Initial Testimony of AEE at 10-14.

and in that case the Commission is certainly correct that it won't know the ultimate use for its RECs. But as the record here shows, REC prices are relatively low, uncertain, and difficult to quantify years in advance, meaning that projects selling RECs into the market do not meaningfully incorporate revenue from future REC sales into their capacity bids. Additional explanation and evidence of the fact that REC sales have little to no impact on capacity offers was provided by AEE in its October 2, 2018 Initial Testimony, which included a detailed discussion of the impact of REC revenues on capacity offers and a detailed primer from a REC marketer explaining how REC markets work.<sup>24</sup> Unfortunately, the Commission did not address or even discuss this evidence in the December Order, and did not offer an explanation for why it disagrees with the analysis of AEE and others showing that REC prices have little or no impact on capacity offers and therefore capacity prices. Failure to address this substantial evidence creates significant legal risk for the Commission that would be ameliorated by the clarifications suggested by the Buyers Group.

For all of these reasons, the Commission should grant clarification and make clear that the expanded MOPR will only apply to projects constructed with the express purpose and intent of helping off-takers achieve compliance with a state mandate and obtaining the resulting revenues from State Subsidies, and that the MOPR will not apply to projects that are developed with the express purpose and intent of serving voluntary purchasers or that will instead sell their future RECs into the open market. This approach would accommodate the variety of transaction structures used by voluntary purchases and shield from the expanded MOPR the projects they develop or purchase energy from, while also ensuring that the Commission does not inadvertently engage in unjust and unreasonable mitigation of transactions that occur wholly outside of state mandated procurement processes, which are the focus of this FPA Section 206 proceeding. In

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<sup>24</sup> Initial Testimony of AEE at 10-14 and Appendix A.

addition, this approach would recognize the fluid and competitive nature of REC markets and the fact that they have limited to no impact on capacity prices. Finally, taking this approach would not undermine the Commission's intent to use the expanded MOPR to address the impact of State Subsidies on capacity market clearing prices, since it would only serve to focus the MOPR on those renewable projects clearly intending to use those State Subsidies.

At a minimum, the Commission must clarify that the expanded MOPR will *not* apply to a renewable capacity resource that demonstrates that it will sell its RECs to an off-taker that will retire those RECs for purposes other than compliance with a state-mandated or state-sponsored procurement process. Clearly exempting from the expanded MOPR those renewable energy resources able to demonstrate that the RECs they create will be used for purposes other than compliance with a state-mandated or state-sponsored procurement process is necessary to avoid mitigating a broad swath of bilateral voluntary renewable energy transactions. It would also ensure that the application of the expanded MOPR in practice is consistent with the Commission's clear intent to leave "voluntary, arm's length bi-lateral transactions" outside of the scope of MOPR mitigation.<sup>25</sup> Interpreting the Commission's determination that it cannot distinguish between voluntary and compliance RECs<sup>26</sup> as a requirement to subject *all* resources creating RECs to the expanded MOPR would conflict with and in fact nullify the Commission's clear statement with regard to voluntary bilateral transactions, leaving an illogical and arbitrary and capricious result. Moreover, since all renewable projects create RECs, this interpretation would result in applying the expanded MOPR to literally every renewable energy project regardless of whether it is developed to meet a state-mandated or state-sponsored procurement process, an equally illogical

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<sup>25</sup> December Order at P 70.

<sup>26</sup> December Order at P 176.

and arbitrary and capricious result. The Commission should clarify that these two sections of the Order are not in conflict and that resources that demonstrate that the RECs they create will not be used for purposes of compliance with a state-mandated or state-sponsored procurement process will not be subject to the expanded MOPR.

Furthermore, to reduce risk and uncertainty for both resource developers and voluntary buyers, FERC should support efforts by PJM and its stakeholders to develop a clear and streamlined pathway for renewable resource developers and voluntary buyers to make this demonstration. While often large and sophisticated entities, voluntary buyers are not in the energy business and are not experts in PJM or RTO/ISO processes and procedures. Forcing these transactions to go through a complex review process that is not easily managed or understood by entities outside the PJM universe will chill development of voluntary transactions and the projects that supply them, harming economic development in the region.

Finally, the Commission should also clarify that PJM may rely on tools developed by it or others that permit it to distinguish between voluntary and compliance RECs. As noted above, the Commission states that “it is not possible, *at this time*, to distinguish resources receiving privately funded voluntary RECs from state-funded or state-mandated RECs because resources typically do not know at the time of the auction qualification process how the REC will be eventually used.”<sup>27</sup> It is unclear why the Commission believes that distinguishing between RECs is not possible; it states that this view is based on “the record in this proceeding,” but does not point to any record evidence purporting to show that different kinds of RECs cannot be distinguished. Putting this aside, however, PJM should be able to demonstrate to the Commission that it is possible to distinguish between voluntary and compliance RECs for purposes of application of the expanded

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<sup>27</sup> December Order at P176 (emphasis added).

MOPR, using either existing tools or new tools that are developed in the future. Granting this clarification would clear the way for PJM to design a compliance mechanism that reduces the risk that MOPR will be inappropriately applied to voluntary transactions, and for PJM and/or private entities to, if necessary, innovate and develop tools that PJM and others can use to clearly delineate between voluntary and compliance RECs. This clarification would also provide a measure of needed certainty to the market for voluntary renewable energy development.

**V. In the absence of clarification, applying the MOPR to voluntary RECs and other voluntary bilateral transactions results in unjust and unreasonable over-mitigation that goes far beyond the Commission's theory of market harm that it seeks to remedy.**

Should the Commission decline to grant the clarifications requested above, the Buyers Group requests rehearing of the December Order. Applying the expanded MOPR to voluntary RECs would sweep into mitigation an entire class of transactions that do not involve revenue from state-mandated or state-sponsored procurement processes, and thus do not fit within the Commission's factual findings that led it to declare the existing MOPR unjust and unreasonable and establish the expanded MOPR as the replacement rate under FPA Section 206.<sup>28</sup> As explained above, subjecting resources producing RECs ultimately retired by voluntary buyers to the expanded MOPR would harm the large and growing voluntary market for renewable energy in PJM, despite the fact that voluntary market revenue earned by renewable energy is clearly not a State Subsidy as defined by the Commission. In short, these transactions are unquestionably

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<sup>28</sup> 16 U.S.C. § 824e(a).

outside the “industry problem” that the Commission ostensibly seeks to ““ameliorat[e]” in this proceeding.<sup>29</sup>

In addition, the Commission lacks a reasoned basis, supported by substantial evidence, to apply the expanded MOPR to voluntary RECs.<sup>30</sup> The only justification the Commission could point to in defense of such an outcome is that it cannot distinguish between voluntary and compliance RECs. As noted above, it is unclear why the Commission concludes that “it is not possible to distinguish” voluntary and compliance RECs. PJM’s own proposed definition of a “material subsidy” proposed to distinguish voluntary RECs,<sup>31</sup> and as noted above, AEE and others provided the Commission with information regarding how RECs are created and bought and sold in mandatory and compliance markets.<sup>32</sup> The Commission states that its determination that it cannot distinguish between voluntary and compliance RECs is based on the record in this proceeding, but it cites no evidence in the record that would support this view, and fails to grapple with PJM’s proposed definition and the evidence in the record suggesting that RECs can be distinguished.<sup>33</sup> This is an altogether unsatisfactory and insufficient basis for a decision to extend market mitigation measures ostensibly intended to address the influence of States Subsidies into the private voluntary market that will seriously harm the competitive market for renewable energy in PJM.

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<sup>29</sup> See, e.g., *Nat’l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm’n*, 468 F.3d 831, 843 (D.C. Cir. 2006) (Commission order that professes to “ameliorat[e] a real industry problem but then cit[es] no evidence demonstrating that there is in fact an industry problem . . . is not reasoned decisionmaking”) (citation omitted).

<sup>30</sup> See, e.g., *S.C. Pub. Serv. Auth. v. Fed. Energy Regulatory Comm’n*, 762 F.3d 41, 54 (D.C. Cir. 2014) (The Commission must support the factual findings underpinning its determination with substantial evidence.)

<sup>31</sup> See Initial Testimony of PJM at 22.

<sup>32</sup> See, e.g., Initial Testimony of AEE at Attachment A.

<sup>33</sup> *K N Energy, Inc. v. Fed. Energy Regulatory Comm’n*, 968 F.2d 1295, 1302–03 (D.C. Cir. 1992) (The Commission must make an “effort to grapple with” alternate theories.)



For the same reasons, applying the expanded MOPR to voluntary RECs would represent unjust and unreasonable over mitigation.<sup>34</sup> Mitigating voluntary transactions, without any basis in the record to suggest that they are causing the market problem that is the focus of the Commission’s efforts here, would “wreak substantial harm” on the private voluntary market for purchases of renewable energy.<sup>35</sup>

Finally, as noted above, the Commission fails to grapple with evidence in the record provided by AEE and others regarding how voluntary renewable energy buyers pursue renewable energy in PJM, how REC markets operate, and the lack of impact RECs have on capacity offers.<sup>36</sup> As a result of this omission, without clarification on the items above, the Commission’s final order cannot be considered just, reasonable, or the product of reasoned decision-making.

## VI. Statement of Issue

In the event that the Commission does not provide adequate clarification as discussed above, In compliance with 18 C.F.R. § 385.713(c)(2), Buyers Group provides the following Statement of Issue:

1. The Commission’s decision to subject voluntary renewable energy credits (“RECs”) to the expanded MOPR, which was adopted as a replacement rate to address the Commission’s determination under FPA Section 206 that the existing MOPR was unjust and unreasonable because it did not address the impact of State Subsidies, fails to meet the Commission’s obligations under FPA Section 206, is not supported by

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<sup>34</sup> See, e.g., *Edison Mission Energy, Inc. v. Fed. Energy Regulatory Comm’n*, 394 F.3d 964, 969 (D.C. Cir. 2005) (“[Mitigation] may well do some good by protecting consumers and utilities against . . . the exercise of market power. But the Commission gave no reason to suppose that it does not also wreak substantial harm . . . .”); *Midwest Independent System Operator, Inc.*, 109 FERC ¶ 61,157, at P 238 (2004) (explaining that assuring just and reasonable rates requires the Commission to “balance under-mitigation and over-mitigation”).

<sup>35</sup> *Edison Mission*, 394 F.3d at 969.

<sup>36</sup> See “Request for Rehearing and Motion for Clarification of the Clean Energy Associations”, Docket No. EL16-49 et al. (Jan. 21, 2020) at 30-34.

substantial evidence, and is arbitrary and capricious and not the product of reasoned decision-making.<sup>37</sup>

## VII. Conclusion

WHEREFORE, for the foregoing reasons, the Commission should grant the clarifications discussed above, or in the alternative, grant rehearing of the December Order.

Respectfully submitted,

/s/ Caitlin Marquis \_\_\_\_\_

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<sup>37</sup> 16 U.S.C. § 824e(a); *see also, e.g., S.C. Pub. Serv. Auth. v. Fed. Energy Regulatory Comm'n*, 762 F.3d 41, 54 (D.C. Cir. 2014) (the Commission must support the factual findings underpinning its determination with substantial evidence); *Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm'n*, 468 F.3d 831, 843 (D.C. Cir. 2006) (Commission order that professes to “ameliorat[e] a real industry problem but then cit[es] no evidence demonstrating that there is in fact an industry problem . . . is not reasoned decisionmaking”) (citation omitted); *Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (The Commission must “examine[] the relevant [considerations] and articulate[] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.” (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))); *K N Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 968 F.2d 1295, 1302–03 (D.C. Cir. 1992) (The Commission must make an “effort to grapple with” alternate theories.); *Edison Mission Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 394 F.3d 964, 969 (D.C. Cir. 2005) (“[Mitigation] may well do some good by protecting consumers and utilities against . . . the exercise of market power. But the Commission gave no reason to suppose that it does not also wreak substantial harm . . . .”); *Midwest Independent System Operator, Inc.*, 109 FERC ¶ 61,157, at P 238 (2004) (explaining that assuring just and reasonable rates requires the Commission to “balance under-mitigation and over-mitigation”).

**CERTIFICATE OF SERVICE**

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

Dated at Boston, MA, this 21<sup>st</sup> day of January 2020.

*/s/ Caitlin Marquis*  
Advanced Energy Economy