

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

) )  
*PJM Interconnection, LLC* ) Docket No. ER21-2582-000  
) )  
) )  
) )

**Motion For Leave to File Answer and  
Answer of the Harvard Electricity Law Initiative<sup>1</sup>**

The so-called “Broad MOPR” ordered by the Commission in December 2019 departs from the Commission’s long-standing efforts to “manage competing policy rationales”<sup>2</sup> in its regulation of RTO capacity auctions. In this answer, we respond to generation companies and trade associations that argue the Federal Power Act (FPA) compels the Commission to reject PJM’s filing in this proceeding and limits the Commission’s discretion as it seeks to “balance competing interests.”<sup>3</sup>

- 1) The legality of the Commission’s market-based rate regime is not contingent on mitigating buyer-side market power.<sup>4</sup> “The entire thrust of Part II [of the FPA] is toward the seller at wholesale, not the buyer,”<sup>5</sup> and courts have endorsed the seller-side focus of the Commission’s market-based rate regime. If the Commission were to adopt buyer-side market power mitigation as an essential element of market-based rates, it would have to investigate whether market-based rates are permissible in non-RTO regions, where monopsony power is pervasive.
- 2) The FPA does not “incorporate principles of horizontal federalism” that demand the Commission “prevent one state from imposing its policy choices and the attendant costs on other states.”<sup>6</sup> This reading of the Act is divorced from precedent, discards the well-understood history of the FPA, and cannot be squared with the FPA’s text. Moreover, this theory is based on a distortion of dormant Commerce Clause cases.
- 3) Market participants have no “reliance interests” tied to RTO market rules.<sup>7</sup> Low capacity prices or dissatisfaction with auction rules do not demonstrate that sellers lack an “opportunity to recover their costs.”<sup>8</sup> Commission orders do not create “legal rights”<sup>9</sup> for market participants that tie the Commission’s hands in this proceeding.

---

<sup>1</sup> The Harvard Electricity Law Initiative is an independent organization based at Harvard Law School’s Environmental & Energy Law Program. These comments do not represent the views of Harvard University or Harvard Law School.

<sup>2</sup> *New England Power Generators Association v. FERC*, 757 F.3d 283, 297 (D.C. Cir. 2014).

<sup>3</sup> *Id.* at 295.

<sup>4</sup> See *Vistra Protest* at pp. 6–9; *PJM Power Providers (P3) Protest* at pp. 12–19.

<sup>5</sup> *Cal. Elec. Power Co. v. FPC*, 199 F.2d 206, 209 (9th Cir. 1952).

<sup>6</sup> *Electric Power Supply Association (EPSA) Protest*, at pp. 16–18; *P3 Protest* at p. 50.

<sup>7</sup> *Carroll County Energy and South Field Energy (CCE/SFE) Joint Protest*; *EPSA Protest* at pp. 64–69; *P3 Protest* at p. 50.

<sup>8</sup> *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311 at PP 29 (2005).

<sup>9</sup> *CCE/SFE Protest* at p. 7.

1. The Commission has never found, and no court has ever held, that the FPA compels the Commission to mitigate monopsony power or to adopt any particular capacity offer mitigation rule.

Generators in this proceeding claim that the FPA “mandates that Commission-Jurisdictional markets must have adequate protections against [ ] buyer-side [ ] market power.”<sup>10</sup> From this premise, they conclude that PJM’s filing is deficient because it would “remove essential protections against [buyer-side] market power.”<sup>11</sup> The Commission has no legal obligation to protect wholesale markets from buyer-side market power, and courts have rejected claims that the Commission must impose particular mitigation measures aimed at supposedly price suppressive capacity offers.

Because “[t]he entire thrust of Part II [of the FPA] is toward the seller at wholesale, not the buyer,”<sup>12</sup> the Commission’s market-based rate regime focuses on wholesale sellers. In Order No. 697, the Commission codified its approach to “assess[ing] whether a *seller* should be granted market-based rate authority.”<sup>13</sup> The Commission summarized that its rules “analyz[e] seller-specific market power.”<sup>14</sup> With regard to monopsony power, the Electric Power Supply Association (EPSA) then urged the Commission to “eliminat[e] the exercise of [buyer-side] market power which directly raises the prices for wholesale sales.”<sup>15</sup> The Commission declined to do so.<sup>16</sup> The result is that while wholesale sellers must obtain Commission permission to sell at market-based rates, buyers remain free to exercise monopsony power.<sup>17</sup> For example, vertically integrated utilities that are not RTO members may withhold demand from wholesale markets by self-supplying. States subsidize any resulting wholesale price suppression through retail rates.

Courts have endorsed the Commission’s seller-side focus.<sup>18</sup> A decade ago, the Ninth Circuit summarized that “if a seller passes the market-power screening [codified in Order No. 697], FERC presumes that the seller’s prices will be just and reasonable.”<sup>19</sup> Generators in this proceeding focus on an isolated statement by the D.C. Circuit in *Tejas Power*, but fail to provide context. The *Tejas Power* court was reviewing Commission approval of a settlement agreement between a pipeline and its local distribution company customers. Admonishing the Commission for failing to examine whether the pipeline has market power vis-à-vis the

---

<sup>10</sup> P3 Protest at p. 12; *id* at p. 13 (asserting that “market-based rates cannot satisfy the just and reasonable standard if the Commission fails to acknowledge or mitigate marker power by sellers or buyers”); Vistra Protest at p. 7.

<sup>11</sup> P3 Protest at pp. 2, 12.

<sup>12</sup> Cal. Elec. Power Co. v. FPC, 199 F.2d 206, 209 (9th Cir. 1952).

<sup>13</sup> Order No. 697, Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Service by Public Utilities, 119 F.E.R.C. ¶ 61,295 at P 7 (2007) (emphasis added).

<sup>14</sup> *Id.* at P 955.

<sup>15</sup> *Id.* at P 462.

<sup>16</sup> *Id.* at P 463.

<sup>17</sup> In this proceeding, EPSA correctly distinguishes “the antitrust laws definition of monopsony power” from what the Commission attempts to achieve with MOPRs. EPSA Protest at p. 4, citing *PJM Interconnection*, 119 FERC ¶ 61,318 at P 169 (2007).

<sup>18</sup> California ex. rel. Lockyer v. FERC, 383 F.3d 1004, 1013 (9th Cir. 2004); Blumenthal v. FERC, 552 F.3d, 875, 882 (D.C. Cir. 2009); Montana Consumer Counsel v. FERC, 659 F.3d 910, 916–17 (9th Cir. 2011).

<sup>19</sup> *Montana Consumer Counsel*, 659 F.3d at 917.

distribution companies, the court observed that “where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable.”<sup>20</sup> Because the Commission failed to account for market power in its approval, the court concluded that the Commission should not have assumed the agreement was just and reasonable. The D.C. Circuit’s unremarkable observation about arms-length negotiations does not impose any requirements on the Commission’s market-based rate regime.

Even if the Commission were to construe the court’s generic statement about bargaining power as creating an additional pre-condition for market-based rates, it would be irrelevant to RTO capacity auctions. In non-RTO regions, utilities exercise monopsony power through self-supply, which reduces wholesale demand and might push down prices. By contrast, self-supply in RTO capacity auctions might theoretically reduce prices through self-suppliers’ *seller-side* offers. Those offers would not constitute an exercise of “market power” as the Commission uses that term in its regulations<sup>21</sup> and as federal courts approving the Commission’s market-based rate regime understand it.<sup>22</sup>

Rather than labelling these seller-side offers as “buyer-side market power,” the Commission could reasonably characterize these offers as “manipulative.” In making an uneconomic capacity offer, the self-supplying seller intentionally loses money on its capacity sale, with the expectation that it will reduce its costs through lower capacity prices. Put differently, the seller-side conduct is “uneconomic, inconsistent with the fundamentals of supply and demand, [and] contrary to the PJM [ ] market design purpose.”<sup>23</sup> This self-supply strategy is akin to “cross-product manipulation, trading in one product with the intent to benefit a second product.”<sup>24</sup> Here, there is only a single capacity product, but the entity is willing to lose money on the sale in order to benefit from its purchase, just as the cross-product manipulator loses money on one product to benefit from the other. In contrast, sellers that are not also buying capacity may have economically rational reasons for offering at below Net CONE, Net ACR, or other thresholds defined in PJM’s tariff, and the Commission need not consider such offers manipulative.

Regardless of how the Commission labels this below-cost offer strategy — assuming it exists in practice — it does not have a statutory duty to address it in any particular fashion. Courts typically “afford great deference to the Commission in its rate decisions,”<sup>25</sup> and all three courts reviewing the substance of Commission orders on MOPRs followed that approach. Responding to dueling claims that the Commission’s mitigation went too far and not far enough, the Third Circuit and D.C. Circuit each upheld the “balance” struck by the Commission.<sup>26</sup> Neither court singled out any unique legal duty related to “buyer-side

---

<sup>20</sup> *Tejas Power v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990).

<sup>21</sup> *See* 18 CFR § 35.37.

<sup>22</sup> *See* note 18.

<sup>23</sup> *Coaltrain Energy, et al.*, 155 FERC ¶ 61,204 at P 115 (2016).

<sup>24</sup> *Deutsche Bank Energy Trading, LLC*, 142 FERC ¶ 61,056 at P 18 (2013).

<sup>25</sup> *Morgan Stanley Capital Group, Inc. v. Public Util. District No. 1 of Snohomish Cty.*, 554 U.S. 527, 532 (2008).

<sup>26</sup> *New England Power Generators Association*, 757 F.3d at 295 (deferring to the Commission’s “proper exercise of its role in balancing competing interests”); *New Jersey Board of Public Utilities v. FERC*, 744 F.3d 74, 109 (3d Cir. 2014) (stating that the Commission “is permitted to weigh the danger of price suppression against the counter-danger of over-mitigation, and determine where it wishes to strike the balance.”). *See also* *Nextera*

market power.” Rather, as the D.C. Circuit put it, the Commission “is best equipped to manage competing policy rationales”<sup>27</sup> and “balanc[e] competing interests”<sup>28</sup> as it determines the just and reasonable rate.

Subsequent MOPR orders reflect Commission efforts to balance competing policy rationales and interests. In 2015, the Commission ordered NYISO to develop MOPR exemption rules for renewable resources to facilitate state policy goals, but specified that NYISO should cap the exemption in order to address generators’ concerns about potential effects on prices.<sup>29</sup> Two years later, the Commission similarly found that a “the narrowly-tailored renewables exemption, in combination with ISO-NE’s sloped demand curves, balances our responsibility to promote economically-efficient prices, while accommodating states’ ability to pursue legitimate policy objectives.”<sup>30</sup> In 2018, the Commission concluded that ISO-NE’s substitution auction would “balance[] an opportunity for Sponsored Policy Resources to receive capacity supply obligations with the FCM’s need to secure private investment in the long term to achieve its primary objective of providing resource adequacy at just and reasonable rates.”<sup>31</sup> In that order, the Commission also approved of ISO-NE’s proposal to phase out that renewable exemption as a “balanced approach,” rejecting arguments that a transition period would render the auction design unjust and unreasonable.<sup>32</sup>

In its 2019 PJM order, the Commission abandoned its efforts to “balance” competing interests. The “Broad MOPR” ordered by the Commission reflects a change in Commission policy about the underlying purpose of RTO capacity auctions. In approving the settlement creating RPM in 2006, the Commission repeatedly tied the new capacity auction to PJM’s responsibility “for ensuring that its system has sufficient generating capacity to meet its reliability obligations.”<sup>33</sup> In December 2019, the Commission discarded any connection between regional resource adequacy and capacity prices,<sup>34</sup> and did not tie MOPR expansion to market power. Instead, the Commission justified imposing the Broad MOPR as a means of providing “incentives for competitive investment,”<sup>35</sup> even though PJM had told the Commission that this investment was not “needed” to maintain resource adequacy.<sup>36</sup>

There is no legal barrier that prevents the Commission from finding a new “balance” among competing policy rationales and interests to achieve a different policy objective. The FPA

---

Energy Resources v. FERC, 898 F.3d 14, 21 (D.C. Cir. 2018) (finding that “the Commission reasonably balanced the potential for limited price suppression against competing interests”); *id.* at 23 (concluding that there is “no reason to disturb the Commission’s balancing just because it came out in favor of the renewable exemption despite the potential for price suppression”).

<sup>27</sup> *New England Power Generators Association*, 757 F.3d at 297.

<sup>28</sup> *Id.* at 295.

<sup>29</sup> *New York Public Service Commission, et al.*, 153 FERC ¶ 61,022 at PP 47–51 (2015).

<sup>30</sup> *ISO New England*, 158 FERC ¶ 61,138 at P 68 (2017).

<sup>31</sup> *ISO New England*, 162 FERC ¶ 61,205 at P 78 (2018).

<sup>32</sup> *Id.* at P 99.

<sup>33</sup> *PJM Interconnection*, 117 FERC ¶ 61,331 at PP 2–4, 6, 44, 45, 68, 78, 80, 147.

<sup>34</sup> *Calpine Corp., et al.*, 169 FERC ¶ 61,239 at P 7 (2019). (“We are aware that the extension of the MOPR may prevent certain existing resources that states have recently chosen to subsidize from clearing PJM’s capacity auctions”).

<sup>35</sup> *Calpine Corp., et al.*, 169 FERC ¶ 61,239 at P 6 (2019).

<sup>36</sup> In its 2018 filing proposing to expand MOPR, PJM told the Commission that “new entry is not ‘needed’ by an administrative determination of target capacity.” Apr. 9 Transmittal Letter in Docket ER18-1314.

does not compel the Commission to adopt any particular mitigation methodology about so-called “buyer-side market power,” state policies, or other factors that may influence sellers’ capacity offers, and it certainly does not demand that the Commission create a market designed for a particular class of investors. As the Ninth Circuit put it in its review of the Commission’s market-based rate regime, “plainly the well-being of consumers, and not regulatory inertia, should be the touchstone”<sup>37</sup> of the Commission’s approach.

2. The FPA does not “incorporate principles of horizontal federalism that prevent one state from encroaching on the sovereign jurisdiction of other states.”

The Electric Power Supply Association (EPSA) invents a new reading of the FPA’s prohibition against undue discrimination that disregards the actual history of the Act and has no support in Commission precedent. EPSA claims that section 206 requires the Commission to “prevent one state from encroaching on the sovereign jurisdiction of other states.”<sup>38</sup> As an initial matter, EPSA’s concern about “state sovereignty” makes little sense in this proceeding. Utilities — and not states — *voluntarily* participate in PJM’s markets. State regulators or legislators dissatisfied with PJM rules may urge the utilities serving ratepayers within that state to leave PJM or withdraw from the capacity auction. EPSA overreaches, equating the externalities of state policies with “state infringement of other states’ sovereign prerogatives.”<sup>39</sup> Myriad state policies have effects outside their borders, but those consequences are not generally evidence of the state invading the sovereignty of its neighbors. To the extent EPSA believes that existing state policies actually “infringe on state sovereignty,” it should bring those claims to federal court, not the Commission.

EPSA’s more concrete complaint is about state policies that might affect out-of-state utilities’ costs. It contends that the FPA requires the Commission “to police and set aside wholesale rate mechanisms that permit a single state to impose its own policy choice in neighboring states.”<sup>40</sup> EPSA derives this understanding of the FPA from a single word in section 206. According to EPSA, the prohibition against unduly discriminatory rates and practices implicitly incorporates dormant Commerce Clause principles into the FPA.<sup>41</sup> EPSA observes that “discrimination is a Commerce Clause term of art”<sup>42</sup> and surmises that Congress understood relevant Commerce Clause cases and incorporated them into the FPA by using the word “discriminatory” in section 206. The linchpin of EPSA’s theory is that in 1927 the Supreme Court held in *Attleboro* that state regulation of interstate wholesale power sales “place[d] a direct burden upon interstate commerce” and was therefore invalid under the Commerce Clause.<sup>43</sup> The Court advised that regulation of such interstate sales “can only be attained by the exercise of the power vested in Congress.”<sup>44</sup> EPSA then infers that because Congress passed the FPA eight years later to “fill a regulatory gap created by

---

<sup>37</sup> *Montana Consumer Counsel*, 659 F.3d at 922.

<sup>38</sup> EPSA Protest at p. 16.

<sup>39</sup> EPSA Protest at p. 16.

<sup>40</sup> EPSA Protest at p. 18.

<sup>41</sup> EPSA Protest at pp. 16–18.

<sup>42</sup> EPSA Protest at p. 17.

<sup>43</sup> *Public Utilities Comm’n of Rhode Island v. Attleboro Steam Co.*, 273 U.S. 83, 89 (1927).

<sup>44</sup> *Id.* at 90.

the decision . . . the textual prohibition on ‘discriminatory’ interstate rates and practices in the FPA must include those that allow *state actors* to discriminate against interstate commerce.”<sup>45</sup>

EPSA’s reading of the FPA cannot be squared with the text of the Act and plays fast and loose with the dormant Commerce Clause doctrine. The FPA does not, as EPSA seems to suggest, directly or indirectly regulate “state actors.” Rather, the FPA requires Public Utilities to file jurisdictional tariffs and instructs the Commission to ensure that filed rates, terms, and conditions are “just and reasonable” and do not grant any “undue preference or advantage.” The Act also allows the Commission to investigate jurisdictional filings and remedy any tariff it finds unjust and unreasonable or “unduly discriminatory or preferential.” The structure of the Act and its ratemaking standards — just and reasonable; undue preference or advantage; and unduly discriminatory or preferential — are copied from earlier federal and state laws.

Congress used nearly identical ratemaking standards in the Interstate Commerce Act (ICA) of 1887.<sup>46</sup> Subsequent amendments to the ICA, including the Elkins Act of 1903, Hepburn Act of 1906, Mann-Elkins Act of 1910, and the Transportation Act of 1920, all include the same or similar standards. The Elkins Act bars any “rebate, concession, or *discrimination* in respect of the transportation of any property” and provides for criminal penalties for any person who gives or receives any such “rebate, concession, or *discrimination*.”<sup>47</sup> Section 15 of the Hepburn Act is a template for FPA section 206.<sup>48</sup> It empowers the Interstate Commerce Commission to investigate whether jurisdictional rates or practices are “unjust or unreasonable, or *unjustly discriminatory*, or unduly preferential or prejudicial” and authorizes the Commission to remedy any such rate or practice.<sup>49</sup> The Mann-Elkins Act similarly authorizes investigation of jurisdictional rates to determine if they are “*unjustly discriminatory*, or unduly preferential or prejudicial,”<sup>50</sup> and provides criminal penalties for “*unjust discrimination*.”<sup>51</sup> The Transportation Act also prohibits “*unjust discrimination*.”<sup>52</sup>

Summarizing the vast scholarly literature on these statutes and the Congressional Record, Professor Joel Eisen finds that unlawful discrimination “was understood at the time to include excessive rate differences and other preferences — railroad pooling, secret rebates,

---

<sup>45</sup> EPSA Protest at p. 18 (emphasis added).

<sup>46</sup> An Act to Regulate Commerce, 24 Stat. 379, Feb. 4, 1887:

“All charges made for any service . . . shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.”

. . .

Sec. 3: That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage . . . Every common carrier subject to the provisions of this Act shall . . . afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines . . . and shall not *discriminate* in their rates and charges between such connecting lines . . .

<sup>47</sup> 32 Stat. 847.

<sup>48</sup> Joel Eisen, *FERC’s Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1800 (2017).

<sup>49</sup> 34 Stat. 589.

<sup>50</sup> 36 Stat. 551.

<sup>51</sup> 36 Stat. 550.

<sup>52</sup> 41 Stat. 462, 479, 484, 485.

and drawbacks.”<sup>53</sup> Eisen reviews Supreme Court cases about Section 15 of the Hepburn Act and finds that these cases “settled important principles later enshrined in the FPA and that are still vital today: regulators have broad authority to remedy discrimination [and] discrimination refers to unlawful preferences or advantages” provided by regulated transportation providers.<sup>54</sup> The text of these laws and Supreme Court cases are unmistakably clear on this point — “discrimination” in these statutes refers to conduct by regulated companies. There is no evidence of any connection to the Commerce Clause.

Eisen’s careful research shows that “[t]he law developed under the Interstate Commerce Act created the foundation for the FPA.”<sup>55</sup> Eisen further explains that “Congress modeled the FPA on the ICA, carrying its language forward almost verbatim to form the core of FERC’s authority to regulate wholesale transactions. The FPA copied the ICA’s rate-setting provisions, just and reasonable standard for wholesale rates, and prohibitions on discrimination or granting any ‘undue prejudice or disadvantage.’”<sup>56</sup> He notes that at least one federal appeals court has similarly observed that “[t]he plan or scheme of the Federal Power Act is analogous to that of the Interstate Commerce Act.”<sup>57</sup>

State public utility laws also include identical ratemaking standards. In 1907, Wisconsin became the first state to place electric utilities under public utility commission regulation. Its law prohibited rates that were “unjust, unreasonable, *discriminatory*, or preferential.”<sup>58</sup> By 1914, twenty-seven states had enacted similar laws.<sup>59</sup> Just like the federal statutes, the state prohibitions on discrimination regulate utility conduct.

EPSA’s claim that with the word “discriminatory” in FPA section 206 Congress intended to incorporate dormant Commerce Clause case law is simply not credible. The ICA and its subsequent amendments, as well as dozens of state utility laws that prohibit discrimination were all enacted prior to the Supreme Court’s *Attleboro* decision. There is absolutely no basis for linking the word discriminatory in section 206 to the Supreme Court’s 1927 decision.<sup>60</sup> Supreme Court cases, the Congressional record, scholarly research, and a plain reading of the texts of these laws all confirm that the term “discrimination” in these statutes refers to the conduct of regulated entities and the service they provide to their customers pursuant to their filed tariffs.

This straightforward understanding of “discrimination” applies to the FPA. The Supreme Court has found that Congress passed the Public Utility Act of 1935, which included the FPA and the Public Utility Holding Company Act, “in the context of, and in response to, great concentrations of economic and even political power vested in” interstate utility

---

<sup>53</sup> Joel Eisen, *FERC’s Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1799 (2017).

<sup>54</sup> *Id.* at 1802.

<sup>55</sup> *Id.* at 1806.

<sup>56</sup> *Id.* at 1806.

<sup>57</sup> *Id.* at 1806, n. 116 (citing *Nw. Pub. Serv. Co. v. Mont. Dakota Util. Co.*, 181 F.2d 19, 22 (8th Cir. 1950), *aff’d*, 341 U.S. 246 (1951)).

<sup>58</sup> George B. Hudnall, *The Public Service Commission Law of Wisconsin*, PROC. AM. POL. SCI. ASS’N, Vol. 4, Fourth Annual Meeting 316, 320 (1907).

<sup>59</sup> Robert L. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*, 32 NAT. RESOURCES J. 289, 301 (1992).

<sup>60</sup> The *Attleboro* opinion does not include the word “discrimination.”

holding companies.<sup>61</sup> The “primary purposes” of the FPA, according to the Commission, “are to curb abusive practices by public utilities and to protect customers from excessive rates and charges.”<sup>62</sup> The Commission’s authority to remedy unduly discriminatory tariffs is central to these missions.<sup>63</sup> The Commission’s entire Open-Access regime is premised on its findings about “unduly discriminatory utility practices,”<sup>64</sup> “opportunities and incentives transmission providers have to unduly discriminate,”<sup>65</sup> and transmission providers’ “opportunities to engage in undue discrimination.”<sup>66</sup> The FPA’s ban on undue discrimination addresses filed tariffs that set, terms, and conditions for service to market participants and does not impliedly target state actors or spillover effects of state policies.<sup>67</sup> EPSA does not cite a single Commission order that connects section 206 to the dormant Commerce Clause.

---

<sup>61</sup> *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758 (1973); *North Am. Co. v. SEC*, 327 U.S. 686, 703 n.13 (1946) (quoting Report of the National Power Policy Committee on Public-Utility Holding Companies, H.Doc. 137, 74th Cong., 1st Sess., p. 5) (power trusts were motivated “by a desire for size and the power inherent in size”); *Re Dairyland Co-Op*, 37 FPC 12, at p. 15 (1967) (“The purpose of that legislation was most clear: it was designed to prevent the notorious investment and profit abuses which had developed in the industry under the domination of the holding companies.”).

<sup>62</sup> *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, Notice of Proposed Rulemaking, 67 Fed. Reg. 55,452 at P 100 (Aug. 29, 2002).

<sup>63</sup> *See, e.g., FPC v. Conway Corp.*, 426 U.S. 271, 279 (1976) (“The Commission must arrive at a rate level deemed by it to be just and reasonable, but in doing so it must consider the tendered allegations that the proposed rates are discriminatory and anticompetitive in effect.”); *Re Missouri Power & Light Co.*, 5 FERC ¶ 61,086, at p. 61,140–41(1978) (“[W]e must emphasize, however, that a determination that a price squeeze exists does not end the Commission’s inquiry into whether the proposed wholesale rates are *unduly* discriminatory, as mandated under our statutes. Other factual or public policy considerations must be evaluated in determining whether the discrimination is undue.”).

<sup>64</sup> FERC, Proposed Rule, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities, 60 Fed. Reg. 17,662, 17,665 (Apr. 7, 1995); *id.* at 17,675–77 (cataloging Public Utilities’ discriminatory transmission practices); Order No. 888, 61 Fed. Reg. 21,540, 21,593 (May 10, 1996) (finding that functional unbundling “not enough to cure undue discrimination in transmission if those public utilities can continue to trade with a selective group within a power pool that discriminatorily excludes others”).

<sup>65</sup> Order No. 890, 72 Fed. Reg. 12,266 at P 26 (2007).

<sup>66</sup> Order No. 1000, 136 FERC ¶ 61,051 at PP 59, 78, 147 (2011). *See also* Order No. 764, 139 FERC ¶ 61,246 at P 46 (2012) (finding reforms are necessary “in part to remedy OATT provisions that may allow public utility transmission providers to treat some customers in an unduly discriminatory manner”); Order No. 784, 144 FERC ¶ 61,056 at PP 4, 112–113 (2013) (finding it “necessary to address the potential for undue discrimination against transmission customers choosing to self-supply” certain ancillary services”).

<sup>67</sup> By providing Public Utilities with retail service territories and administratively set rates, state utility laws enabled Public Utilities to monopolize local transmission, which in turn facilitated their abilities to exercise market power in interstate markets. The Commission’s “authority generally rests on the public interest in constraining exercises of market power.” *National Ass’n of Regulatory Utility Comm’rs. v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007). Because “the inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others,” Order No. 888, 61 Fed. Reg. 21,540, 21,567 (May 10, 1996), Congress granted the Commission “broad authority to remedy [Public Utilities’] unduly discriminatory behavior.” *Transmission Access Policy Grp. v. FERC*, 225 F.3d 667, 687 (D.C. Cir. 2000). EPSA’s reading of section 206 is detached from this precedent. EPSA asks the Commission to target effects of state laws that have no connection to Public Utilities’ market power or their “incentives and opportunities” to unduly discriminate against wholesale market participants. Order No. 890 at P 26. Its equates policing inevitable and lawful consequences of state regulation with “eliminating or modifying rate provisions . . . which would [ ] facilitate price control or exclusion of competitors.” *Re Florida Power & Light Co.*, 8 FERC ¶ 61,121, at p. 61,457 (1979). As discussed above, there is no textual, historic, or precedential basis for this equivalency.



Moreover, the legislative history shows that Congress was particularly sensitive to existing state authority. A House committee report on the bill summarizes that the provisions in the FPA were written “so as to be a complement to and in no sense a usurpation of State regulatory authority.”<sup>68</sup> In 1945, the Court observed that “progress of the bill through various stages shows constant purpose to protect, rather than to supervise authority of the states.”<sup>69</sup> Given this context, it’s hard to imagine that the drafters silently directed the Commission to “police” the effects of state policies.

Of course, jurisdictional transactions and services are not “hermetically sealed”<sup>70</sup> from matters under state regulation. Commission orders may affect retail rates and other state-regulated matters.<sup>71</sup> But the permissible consequences of Commission orders on state authorities is a far cry from EPSA’s claim that the Commission has duty to “to police and set aside wholesale rate mechanisms that permit a single State to impose its own policy choice on neighboring States.”<sup>72</sup> Nothing in the Act’s history or text remotely suggests any connection between unduly discriminatory tariffs, the dormant Commerce Clause, and lawful state policies.

Even assuming EPSA’s premise that the word “discrimination” actually imports dormant Commerce Clause principles into the FPA, EPSA fails to justify why the Commission’s mandate to “police” state policies ought to be far wider than federal courts have under the dormant Commerce Clause. EPSA manufactures a broad mandate for the Commission by jumbling dicta from dormant Commerce Clause cases with quotes from non-Commerce Clause cases.<sup>73</sup> Its effort to associate the Broad MOPR with the dormant Commerce Clause flouts the case law and far overstates the reach of the doctrine.

All but one federal appeals court has adopted a three-prong approach to analyzing state laws under the dormant Commerce Clause doctrine.<sup>74</sup> A “statute may violate the dormant Commerce Clause in one of three ways: (1) the statute clearly *discriminates* against interstate commerce in favor of in-state commerce; (2) it imposes a *burden* on interstate commerce that outweighs any benefits received; or (3) it has the practical effect of *extraterritorial* control of interstate commerce.”<sup>75</sup> In 2018, the Second and Seventh Circuits rejected EPSA’s claims that New York and Illinois nuclear support policies were invalid

---

<sup>68</sup> *Conn. Light & Power Co. v. Fed. Power Comm’n*, 324 U.S. 515, 526 (1945) (quoting H.R. Rep. No. 1318, at 7 (1935)).

<sup>69</sup> *Conn. Light & Power Co.*, 319 U.S. at 525–36 (citing S.Rep. No. 621, 74th Cong., 1st Sess., p. 50 and noting that a progenitor of section 201(a) declared that the FPA does not “impair or diminish the powers of any State commission.”)

<sup>70</sup> *FERC v. Electric Power Supply Association*, 577 U.S. 260, 281 (2016)

<sup>71</sup> *See, e.g., NARUC v. FERC*, 964 F.3d 1177, 1187 (D.C. Cir. 2020) (“There is little doubt that favorable [storage] participation models will lure local ESRs to the federal marketplace, which will require use of States’ distribution systems, but that is the type of permissible effect of direct regulation of federal wholesale sales that the FPA allows.”).

<sup>72</sup> EPSA Protest at p. 18.

<sup>73</sup> The cases EPSA cites in footnotes 79, 80, 83, 89, and 117 are not dormant Commerce Clause cases.

<sup>74</sup> *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 645–46 (6th Cir. 2010) (collecting cases from all circuits but the Fifth).

<sup>75</sup> *Grand River Enters. Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 942 (8th Cir.2009) (emphases added).

under tests 1 and 2.<sup>76</sup> In 2015, the Tenth Circuit dismissed claims that Colorado’s renewable portfolio standard (RPS) is invalid under test 3.<sup>77</sup> EPSA has not identified any state policies relevant to this proceeding that might violate the dormant Commerce Clause.

Although EPSA’s theory is difficult to decipher, it does not appear to be advocating for the Commission to apply the actual dormant Commerce Clause tests via PJM’s capacity auction rules. Instead, EPSA attempts to evoke dormant Commerce Clause themes as part of its argument that only a Broad MOPR can “prevent[] one state from imposing its policy choices and the attendant costs on other states.”<sup>78</sup> EPSA gestures at the case law, arguing that the Commission should take action with regard to state policies that have an “extraterritorial effect” by “exporting the impact of the subsidy to other states.”<sup>79</sup>

But the only court to examine this argument rejected it. Writing for a unanimous Tenth Circuit panel, now-Justice Neil Gorsuch explained that at most the Supreme Court had relied on the extraterritoriality prong of the doctrine in three cases.<sup>80</sup> In each case, “the Court [ ] faced (1) a price control or price affirmation regulation, (2) linking in-state prices to those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses.”<sup>81</sup> Because Colorado’s RPS did not match these three criteria, the Tenth Circuit dismissed the plaintiffs’ extraterritoriality argument. Judge Gorsuch’s opinion echoes EPSA’s concern about a state imposing costs on other states.<sup>82</sup> He explained that while Colorado’s RPS “surely regulates the quality of a good sold to in-state residents, it doesn’t directly regulate price in-state or anywhere for that matter.”<sup>83</sup> Nonetheless, he recognized that “in today’s interconnected national marketplace,” non-price regulations can “often have ripple effects, including price effects, both in-state and elsewhere.” But he flatly rejected the argument championed by EPSA in this proceeding that these out-of-state price impacts are grounds for striking down state laws under the dormant Commerce Clause.<sup>84</sup> EPSA fails to explain why the Commission, purporting to apply dormant Commerce Clause principles, ought to go further than the Tenth Circuit.

Having failed to connect dormant Commerce Clause case law to the Broad MOPR, EPSA falls back to generic “principles of federalism”<sup>85</sup> to support its desire that the Commission mitigate potential effects of state policies. This vague contention amounts to more of a wish

---

<sup>76</sup> *Electric Power Supply Association v. Star*, 904 F.3d 518 (7th Cir. 2018); *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41 (2d Cir. 2018).

<sup>77</sup> *Energy and Environment Legal Institute v. Epel*, 793 F.3d 1169 (10th Cir. 2015)

<sup>78</sup> EPSA Protest at p. 19.

<sup>79</sup> EPSA Protest at p. 24.

<sup>80</sup> *Energy and Environment Legal Institute*, 793 F.3d at 1172 (noting that test 3 is “the most dormant” aspect of the dormant Commerce Clause doctrine); *see also* *American Beverage Ass’n v. Snyder*, 735 F.3d 362, 377 (6th Cir. 2013) (Sutton, J., concurring) (“I am not aware of a single Supreme Court dormant Commerce Clause holding that relied exclusively on the extraterritoriality doctrine to invalidate a state law.”); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1101 (9th Cir. 2013) (“In the modern era the Supreme Court has rarely held that statutes violate the extraterritoriality doctrine.”).

<sup>81</sup> *Energy and Environment Legal Institute*, 793 F.3d at 1173.

<sup>82</sup> EPSA Protest at p. 19 (arguing that the Commission must “prevent[] one state from imposing its policy choices and the attendant costs on other states.”).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1173–1175.

<sup>85</sup> EPSA Protest at p. 25.

than a legal theory. EPSA provides no support for importing dormant Commerce Clause principles into the FPA and does not show how the dormant Commerce Clause would compel a Broad MOPR. The Commission must reject EPSA's outlandish ideas.

3. Market participants do not have reliance or expectation interests tied to RTO market rules, and Commission approval of PJM's proposal would not be unconstitutional under *Hope*.

The Commission must dismiss generators' arguments that evoke contract law remedies. The owner of two Ohio power plants claims that Commission orders approving various iterations of PJM's MOPR have "created significant reliance interests in the PJM tariff."<sup>86</sup> It also claims that merchant investors "invested with the reasonable expectation that the MOPR or some workable alternative protection against capacity market price suppression would remain in place for the long term."<sup>87</sup> EPSA claims that "suppliers did not accept the risk [ ] that having very deliberately induced billions of dollars in investment, PJM and the Commission would abruptly reverse course long before the suppliers could recover their investment."<sup>88</sup> While the Commission may have a duty under the Administrative Procedure Act to respond to such comments, the FPA and the Constitution demand nothing more.

Expectation and reliance interests are relevant to remedies for breach of contract. Under black letter contract law, a contracting party's "expectation interest is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed."<sup>89</sup> A party's "reliance interest is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made."<sup>90</sup> In the absence of an enforceable agreement, generators have no cognizable expectation or reliance interests.

Allusions to contract remedies carry no equitable weight. Just and reasonable rates must balance consumer and investor interests.<sup>91</sup> As applied to an RTO market, this standard does not mean that rates must ensure the profitability of every investor.<sup>92</sup> Rates may harm particular market participants or even disadvantage a class of investors. Such ordinary disparities in market outcomes cannot be a basis for any legal claims.

Generators cannot possibly have expectation or reliance interests relating to RTO rules. Their demands for "protection"<sup>93</sup> from certain types of capacity offers erroneously equate the FPA's requirement that rates be just and reasonable with their own wishes for a particular notion of "competitive" market outcomes. Addressing a challenge to the

---

<sup>86</sup> CFE/SFE Protest at p. 6.

<sup>87</sup> *Id.* at p. 2.

<sup>88</sup> EPSA Protest at p. 69.

<sup>89</sup> Restatement (Second) of Contracts § 344 (1981).

<sup>90</sup> *Id.*

<sup>91</sup> *FPC v. Hope*, 320 U.S. 591, 603 (1944).

<sup>92</sup> See notes 102–112 and associated text.

<sup>93</sup> CFE/SFE Protest at p. 2.

Commission’s market-based rate authority, the Ninth Circuit “reject[ed] [the] contention that FERC has an additional obligation, beyond screening individual sellers for market power, to assess the overall competitiveness of the market.”<sup>94</sup> The court held that the Commission’s market-based ratemaking regime is not premised on “whether the market as a whole is structurally competitive.”<sup>95</sup> Generators’ demands for particular market rules that they believe will deliver specific outcomes are inconsistent with the law.

Moreover, their demands are factually inconsistent. The Ohio generators state that their investors committed in 2011 to the projects and they did so “in reliance on the MOPR provisions for protection from capacity price suppression caused by state subsidies of renewable and nuclear facilities.”<sup>96</sup> But the MOPR in effect then applied only to natural gas plants.<sup>97</sup> In 2011, with nuclear plants already exempt from the MOPR, the Commission approved PJM’s proposal to add exemptions for wind and solar resources.<sup>98</sup> The claim that PJM’s proposal in this proceeding “ignores the reasonable expectations and assumptions of the[ir] investors”<sup>99</sup> presumes that in 2011 those investors actually predicted — and in fact relied upon — the Commission’s December 2019 order that for the first time included renewable and nuclear resources in the MOPR.

Summoning *Hope*,<sup>100</sup> generators also claim that accepting PJM’s proposal would upset the “the statutory and constitutional rights of unsubsidized suppliers and their investors . . . to earn a reasonable return on their investment.”<sup>101</sup> As the Commission has explained, *Hope* “reflects a ‘superseded cost of service paradigm’ that ‘envisioned neither competition among service providers nor any opportunity for them to earn market-based rates.’”<sup>102</sup> In RTO markets,

regardless of what ‘investment-backed expectations’ a resource may have had at the time it chose to enter the [ ] markets, each entrant was aware of the possibility that at some times, it might earn substantially more than a traditional cost-based rate, but at other times, it might earn less than its costs. The Commission has made clear that ‘in a competitive market the Commission is responsible only for assuring that [a resource] is provided the *opportunity* to recover its costs, not ‘a guarantee of cost recovery.’<sup>103</sup>

Low capacity prices and dissatisfaction with auction rules do not demonstrate that sellers lack this opportunity. In a proceeding about New England’s capacity auction, the

---

<sup>94</sup> *Montana Consumer Counsel*, 659 F.3d at 916 (citing three D.C. Circuit opinions); *see also* Order No. 697, 119 FERC ¶ 61,295 at PP 943–955 (2007), *order on reh’g*, Order 697-A, 123 FERC ¶ 61,055 at P 409 (2008); *PJM Interconnection*, 121 FERC ¶ 61,173 at PP 21–33 (2007).

<sup>95</sup> *Id.*

<sup>96</sup> CFE/SFE Protest at pp. 2, 3.

<sup>97</sup> *PJM Interconnection*, 135 FERC ¶ 61,022 at PP 144, 153 (2011), *reh’g denied*, 137 FERC ¶ 61,145 at PP 110–111 (2011).

<sup>98</sup> *Id.*

<sup>99</sup> CFE/SFE Protest at p. 3.

<sup>100</sup> *FPC v. Hope*, 320 U.S. 591 (1944)

<sup>101</sup> CFE/SFE Protest at p. 8.

<sup>102</sup> *ISO New England*, 130 FERC ¶ 61,108 at P 32 (2010) (quoting *Pacific Gas & Electric Co.*, 91 FERC ¶ 63,008 at 65,111 (2000)).

<sup>103</sup> *ISO New England and NEPOOL*, 135 FERC ¶ 61,029 at P 254 (2011) (citations omitted).

Commission dismissed generators' arguments that the auction rules provided only an "illusory" opportunity to recover costs and were therefore confiscatory.<sup>104</sup> The Commission rejected this line of reasoning in part because it would result in "grant[ing] resources an actual property right to continue providing capacity even when that would not be the most economic solution for customers."<sup>105</sup> The Commission held that it does "not construe the phrase 'reasonable opportunity' [in *Hope*] to include situations in which a resource seeks to remain in the market even when the market price is signaling that it is not needed" for reliability.<sup>106</sup> The Commission has repeatedly connected those market price signals to reliability and resource adequacy, and not to unneeded merchant investment.<sup>107</sup>

More recently, the Commission similarly held that its decision to approve a market design that generators disfavored does not violate *Hope*'s standards. Responding to New England generators' claims about price suppression due to state policies, the Commission "disagree[d] with Generators' assertion that the only way to evaluate the justness and reasonableness of the renewables exemption [under *Hope*] is to quantify the potential price impact that the Commission's policy decision has on suppliers."<sup>108</sup> The Commission concluded that the renewables exemption was consistent with *Hope*'s mandate to balance investor and consumer interests.<sup>109</sup> The D.C. Circuit upheld the Commission's order, concluding that "the Commission reasonably balanced the potential for limited price suppression against competing interests in concluding that the renewable exemption to the minimum offer price rule is consistent with the purpose of the forward capacity market."<sup>110</sup>

These Commission orders flatly contradict generators' attempts to use *Hope* as a shield from market rules they deem unfavorable. The Commission has explicitly stated that "a change to the rules of a Commission-regulated market does not constitute a taking of property" under *Hope*.<sup>111</sup> "All participants in Commission-regulated markets are subject to just and reasonable changes in rates and market rules."<sup>112</sup>

---

<sup>104</sup> *Id.* at PP 248–250, *reh'g denied*, 138 FERC ¶ 61,027 at P 150 (2012).

<sup>105</sup> *Id.* (rehearing order).

<sup>106</sup> *Id.* at P 146.

<sup>107</sup> *See, e.g., PJM Interconnection*, 117 FERC ¶ 61,331 at P 146 (2006) (finding that RPM "creat[es] financial incentives within the context of a market system to encourage investment in additional infrastructure in the locations where they are needed"); *id.* at P 68 (concluding that "locational . . . price signals . . . [will] provide incentives to construct facilities necessary for regional reliability"); *PJM Interconnection*, 126 FERC ¶ 61,275 at P 150 (2009) ("RPM was designed to provide long-term forward price signals and not necessarily long-term revenue assurance for developers."); *PJM Interconnection*, 128 FERC ¶ 61,157 at P 102 (2009) "In order to assure reliability, PJM needs to attract new entry when needed, but also to assure that prices are sufficient to retain existing efficient capacity. Both new entry and retention of existing efficient capacity are necessary to ensure reliability and both should receive the same price so that the price signals are not skewed in favor of new entry"); *ISO New England and NEPOOL*, Remand Order, 155 FERC ¶ 61,023 at P 35 (2016) (stating that "the FCM's primary function [is] ensuring that the region has sufficient capacity to meet reliability needs").

<sup>108</sup> *ISO New England and NEPOOL*, Remand Order, 155 FERC ¶ 61,023 at PP 31–36 (2016), *reh'g denied*, 158 FERC ¶ 61,138 at PP 41–43 (2017).

<sup>109</sup> *Id.* at P 42 (rehearing order).

<sup>110</sup> *Nextera Energy Resources v. FERC*, 898 F.3d 14, 21 (D.C. Cir. 2018).

<sup>111</sup> *ISO New England and NEPOOL*, 138 FERC ¶ 61,027 at P 151 (citing *PJM Interconnection*, 136 FERC ¶ 61,190 at P 80 (2011)).

<sup>112</sup> *PJM Interconnection*, 136 FERC ¶ 61,190 at P 80 (2011).

## **Motion for Leave to File Answer**

The Commission's Rules do not automatically allow for answers to protests, but the Commission routinely permits such answers when the answer assists the Commission in its decision-making process.<sup>113</sup> This answer does not prejudice any party, since we do not add any new evidence to the record about PJM's filing. To the extent we include any evidence whatsoever, it relates to the history of the Federal Power Act. We do so now (and not on August 20) because we could not possibly have predicted that EPSA would propose a radically new theory about the Act's development. We request that the Commission accept this answer because it will clarify relevant legal issues.

Respectfully Submitted,

/s/ Ari Peskoe  
Ari Peskoe  
Harvard Electricity Law Initiative  
6 Everett St., Suite 4119  
Cambridge, MA 02138  
617.495.4425  
apeskoe@law.harvard.edu

September 3, 2021

---

<sup>113</sup> See, e.g., *Minonk Stewardship Wind*, 176 FERC ¶ 61,135 at P 40 (2021).

**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.

/s/ Ari Peskoe

Ari Peskoe  
Harvard Electricity Law Initiative  
6 Everett St., Suite 4133  
Cambridge, MA 02138  
617.495.4425  
apeskoe@law.harvard.edu

September 3, 2021