

2. Pursuant to *Allegheny Defense Project v. FERC*,² the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the Federal Power Act,³ we are modifying the discussion in the Compliance Order and setting aside the order, in part, by vacating footnote 134.⁴

I. Background

3. In 2018, the Commission acted on a complaint filed by Calpine Corporation and additional generation entities,⁵ and a filing by PJM Interconnection, L.L.C. (PJM) to amend its Open Access Transmission Tariff (Tariff), finding that PJM's Tariff was unjust and unreasonable because it failed to protect the integrity of competition in PJM's wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market support to keep existing uneconomic resources in operation or to support the uneconomic entry of new resources.⁶ Following a paper hearing, the Commission issued an order on December 19, 2019 determining a just and reasonable replacement rate and directing PJM to submit a compliance filing with Tariff revisions to implement the replacement rate.⁷

4. On March 18, 2020 and June 1, 2020, PJM submitted proposed revisions to its Tariff. In the Compliance Order, the Commission accepted PJM's compliance filings, in part, rejected PJM's compliance filings, in part, and directed PJM to submit a further

² 964 F.3d 1 (D.C. Cir. 2020) (en banc).

³ 16 U.S.C. § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

⁴ *Allegheny Def. Project*, 964 F.3d at 16-17.

⁵ Calpine Corporation was joined by 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.

⁶ *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018).

⁷ *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) (December 2019 Order), *order on reh'g*, 171 FERC ¶ 61,035 (2020) (Rehearing Order).

compliance filing.⁸ The New Jersey Board and Joint Consumer Advocates seek clarification and/or rehearing of a discrete issue in the Compliance Order related to state-directed default service auctions.

5. Regarding state-directed default service auctions, the Compliance Order accepted PJM's proposal to exclude from the definition of State Subsidy⁹ any revenues from the sale or allocation to an entity providing default retail supply service where such obligation was awarded through a state-directed default auction that was subject to independent oversight by a consultant or manager who certifies that the auction was conducted through a non-discriminatory and competitive bidding process.¹⁰ Under PJM's Tariff language, for purposes of this exclusion, a state-directed default service auction that has been certified to be a result of a non-discriminatory and competitive bidding process shall:

- (i) have no conditions based on the ownership (except supplier diversity requirements or limits), location (except to meet PJM deliverability requirements), affiliation, fuel type, technology, or emissions of any resources or supply (except state-mandated renewable portfolio standards for which Capacity Resources are separately subject to the minimum offer price rule or eligible for an

⁸ Compliance Order, 173 FERC ¶ 61,061 at P 1. PJM submitted the additional compliance filing on November 13, 2020 and Commission action on that filing is pending.

⁹ The Tariff defines State Subsidy as:

[A] direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that (1) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce; or (2) will support the construction, development, or operation of a new or existing Capacity Resource; or (3) could have the effect of allowing the unit to clear any PJM capacity auction.

PJM Tariff, § 1, OATT Definitions—R-S.

¹⁰ Compliance Order, 173 FERC ¶ 61,061 at P 69.

exemption);

(ii) result in contracts between an Entity Providing Supply Services to Default Retail Service Provider and the electric distribution company for a retail default generation supply product and none of those contracts require that the retail obligation be sourced from any specific Capacity Resource or resource type as set forth in subsection (i) above; and

(iii) establish market-based compensation for a retail default generation supply product that retail customers can avoid paying for by obtaining supply from a competitive retail supplier of their choice.¹¹

II. Discussion

A. Requests for Clarification and Rehearing

6. The New Jersey Board seeks clarification regarding footnote 134 in the Compliance Order.¹² The New Jersey Board asks the Commission to clarify that the

¹¹ PJM Tariff, § 1, OATT Definitions—R-S (State Subsidy definition, § (3)(e)(i)-(iii)); Compliance Order, 173 FERC ¶ 61,061 at P 47 (describing PJM’s proposed Tariff language).

¹² Footnote 134 states:

While this order accepts the exemption that PJM has proposed, it does not constitute a ruling that any particular state-directed default service auction actually meets these requirements. For example, we note that the New Jersey Basic Generation Service (BGS) auction appears to give guidance that conflicts with the proposition it is “non-discriminatory” or “fuel neutral.” Specifically, in the section on frequently asked questions (FAQs), FAQ-24 addresses the question whether Supplier Master Agreements (SMAs) submitted to the state BGS must comply with renewable portfolio requirements. *See* Frequently Asked Questions # 24, New Jersey Statewide Basic Generation Service Electricity Supply Auction, <http://www.bgs-auction.com/bgs.faq.item.asp?faqId=1100> (last visited Sept. 26, 2020). FAQ-24 instructs that “[t]here is no exemption under the SMAs from future increases in RPS requirements.” *Id.* Further, while FAQ-24 acknowledges that “in the past,

Commission did not intend to prejudge whether specific state programs trigger the Minimum Offer Price Rule (MOPR), but instead expects to rely on a detailed, fact-specific analysis by independent auction managers, with guidance and review from PJM and the Independent Market Monitor (IMM), to determine whether the New Jersey BGS program triggers mitigation; and to vacate the footnote.¹³ The New Jersey Board believes that such clarification will resolve uncertainty caused by the footnote as to the process for determining whether state-directed default service auctions meet the Tariff criteria for exemption.¹⁴ The New Jersey Board points out that the Tariff language approved in the Compliance Order states that the MOPR will not apply to any state-directed default service auction that, in relevant part, has “no conditions based on . . . fuel type, technology, or emissions of any resources or supply (except state-mandated renewable portfolio standards for which Capacity Resources are separately subject to the minimum offer price rule or eligible for an exemption).”¹⁵

7. If neither of the New Jersey Board’s clarification requests are granted, the New Jersey Board seeks rehearing. The New Jersey Board asserts that, to the extent the Commission found that the New Jersey BGS program triggered the MOPR, the ruling should be reversed as it is arbitrary and capricious, directly conflicting with the findings made in the Compliance Order in accepting PJM’s proposed Tariff language.¹⁶

the Legislature, when increasing solar requirements, exempted existing BGS Suppliers from the increase,” it continues by stating that “there is no guarantee that future legislation, Board Orders, or other changes would continue to provide such an exemption for BGS Suppliers.” *Id.* This guidance appears to conflict with the notion that the BGS auctions are either non-discriminatory or fuel neutral and may indicate that such auctions may be “for the purpose of supporting the entry . . . of preferred generation resources.” June 2018 Order, 163 FERC ¶ 61,236 at P 1.

Compliance Order, 173 FERC ¶ 61,061 at P 69 n.134.

¹³ New Jersey Board Clarification and Rehearing Request at 3.

¹⁴ *See id.* at 3-6.

¹⁵ *Id.* at 6 (citing PJM Tariff, § 1, OATT Definitions—R-S, §(3)(e)(i)).

¹⁶ *See id.* at 7-9.

8. Joint Consumer Advocates also seek rehearing on this issue, stating that treating state-directed default service auctions as State Subsidies if they require compliance with renewable portfolio standards (RPS) is unjust, unreasonable, unduly discriminatory, and not based on reasoned decision-making.¹⁷ In support, Joint Consumer Advocates argue that treating revenue related to state-directed default service auctions as mitigated if suppliers and participants are required to meet RPS requirements outside the auction ignores the arguments made by Joint Consumer Advocates and other parties in response to PJM's compliance filing that state-directed default service auctions should not be considered a State Subsidy. Joint Consumer Advocates contend that, rather than meaningfully responding to the issues raised by parties, the Compliance Order caused uncertainty, implementation questions and adopted an unworkable regime.¹⁸ Further, Joint Consumer Advocates argue that the Compliance Order departed without explanation from the Commission's policy of preserving states' use of competitive procedures to procure resources to serve retail load.¹⁹

9. Joint Consumer Advocates also argue that footnote 134 implies that a state-directed default service auction cannot be considered fuel-neutral if the auction requires winning bidders to comply with a state-mandated RPS program.²⁰ Joint Consumer Advocates contend this is a misunderstanding of the nature of such auctions and how they relate to resource participation in PJM's capacity auctions.²¹ Joint Consumer Advocates explain that default suppliers may buy and re-sell capacity and energy from any type of resource to meet their default supply obligations, notwithstanding any state-mandated RPS obligation.²² Joint Consumer Advocates argue that adopting a rule that PJM would have to treat revenue that a default supplier pays to a capacity resource for its capacity and energy merely because the state also requires suppliers to separately comply with RPS mandates through other products, such as renewable energy credits, would shrink supply in state-directed default service auctions, raise prices, and not achieve the purposes of the MOPR.²³

¹⁷ Joint Consumer Advocates Rehearing Request at 5.

¹⁸ *See id.* at 7-10.

¹⁹ *Id.* 11-12 (citing 18 C.F.R. § 35.27(b)(1)).

²⁰ *Id.* at 12.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 12-13.

10. Finally, Joint Consumer Advocates contend that the Compliance Order burdens states' achievement of their renewable energy goals, and, in doing so, infringes on the states' authority expressly reserved to them in the Federal Power Act.²⁴ Joint Consumer Advocates state that footnote 134 suggests that the New Jersey's BGS would constitute a State Subsidy based on the possibility that auction winners would have to comply with the state RPS mandates, which Joint Consumer Advocates argue cannot be sustained because the Commission has disclaimed jurisdiction over unbundled renewable energy credits and cannot indirectly regulate renewable energy credits and related RPS compliance by means of the MOPR.²⁵

11. Joint Consumer Advocates ask the Commission to reconsider and make clear that a state-directed default service auction that allows a supplier to meet its default service supply obligations without specifying the resources used to satisfy its obligations is excluded from the definition of State Subsidy, notwithstanding that the load serving entity may be required to satisfy a state RPS obligation imposed outside of the state-directed default service auction.²⁶

B. Procedural Matters

12. On November 25, 2020, PJM filed a motion for leave to answer and answer responding the New Jersey Board's request for clarification. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2020), prohibits answers to rehearing requests. The New Jersey Board submitted its request for clarification pursuant to Rule 713 and, therefore, we deny PJM's request to answer, and the answer is rejected.

C. Determination

13. We modify the Compliance Order to vacate footnote 134. The Compliance Order accepted PJM's proposed Tariff language, which describes the process and criteria necessary to determine whether revenue related to state-directed default service auctions qualifies for exclusion from the definition of State Subsidy. That language provides that "state-mandated renewable portfolio standards for which Capacity Resources are separately subject to the minimum offer price rule or eligible for an exemption" do not

²⁴ *Id.* at 13 (citing 16 U.S.C. § 824(b)(1)).

²⁵ *Id.* at 14-15.

²⁶ *Id.* at 6.

preclude a default service auction from being non-discriminatory and competitive.²⁷ We agree with the New Jersey Board that aspects of footnote 134 are inconsistent with that language, which is now the filed rate.²⁸ Accordingly, we modify the Compliance Order to vacate footnote 134.

The Commission orders:

The Compliance Order is hereby modified and set aside, in part, as discussed in the body of this order.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.
Commissioner Christie is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁷ PJM Tariff, § 1, OATT Definitions—R-S (State Subsidy definition, § (3)(e)(i); Compliance Order, 173 FERC ¶ 61,061 at P 47 (describing PJM’s proposed Tariff language). The Commission’s acceptance of this Tariff language is not subject to rehearing.

²⁸ See *Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951); *Cal. Ex. Rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 853 (9th Cir. 2004) (explaining that “the terms of the filed tariff are considered to be the law”) (internal quotations omitted).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Calpine Corp.; 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

Docket Nos. EL16-49-006

v.

PJM Interconnection, L.L.C.

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ER18-1314-010

PJM Interconnection, L.L.C.

EL18-178-006
(Consolidated)

(Issued February 18, 2021)

DANLY, Commissioner, *dissenting*:

1. I dissent from today's order because, by vacating footnote 134 of the Commission's October 15, 2020 order,¹ the Commission is unwisely removing a limitation on the scope of its decision to permit an exception from the definition of a State Subsidy for state procurement auctions that meet defined characteristics. The Commission's April 16, 2020 rehearing order found that state-directed default service auctions

meet the definition of State Subsidy to the extent they are a payment or other financial benefit that is a result of a state-sponsored or state-mandated process and the payment or financial benefit is derived from or connected to the procurement of electricity or electric generation capacity sold at wholesale, or an attribute of the generation process for electricity or electric

¹ *Calpine Corp. v. PJM Interconnection, L.L.C.*, 173 FERC ¶ 61,061, at P 69 n.134 (2020) (Compliance Order).

generation capacity sold at wholesale, or will support the construction, development, or operation of a capacity resource, or could have the effect of allowing a resource to clear in any PJM auction.²

However, the Commission, persuaded by arguments raised on rehearing, modified and set aside, in part, the April Rehearing Order as it relates to state-directed default service auctions.³ In doing so, the Commission accepted PJM Interconnection, L.L.C.'s (PJM) proposal to exclude from the definition of State Subsidy⁴ any revenues from the sale or allocation to an entity providing default retail supply service where such obligation was awarded through a state-directed default auction that has been certified as being conducted through a non-discriminatory and competitive bidding process.⁵ Specifically, PJM's tariff provides that

a state default procurement auction that has been certified to be a result of a non-discriminatory and competitive bidding process shall:

- (i) have no conditions based on the ownership (except supplier diversity requirements or limits), location (except to meet PJM deliverability requirements), affiliation, fuel type, technology, or emissions of any resources or supply (*except state-mandated renewable portfolio standards for which Capacity Resources are separately subject to the minimum offer price rule or eligible for an exemption*);
- (ii) result in contracts between an Entity Providing Supply Services to Default Retail Service Provider and the electric distribution company for a retail default generation supply product and none of those contracts require that the retail obligation be sourced from any specific Capacity Resource or resource type as set forth in subsection (i) above; and
- (iii) establish market-based compensation for a retail default generation supply product that retail customers can avoid paying for by obtaining

² *Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035, at P 386 (2020) (April Rehearing Order).

³ Compliance Order, 173 FERC ¶ 61,061 at P 69.

⁴ PJM Tariff, § 1, OATT Definitions—R-S (defining “State Subsidy”).

⁵ *See* Compliance Order, 173 FERC ¶ 61,061 at P 69.

supply from a competitive retail supplier of their choice.⁶

2. The New Jersey Board of Public Utilities (New Jersey Board) and the New Jersey Division of Rate Counsel, Office of People’s Counsel for the District of Columbia, Maryland Office of People’s Counsel, and Delaware Division of the Public Advocate (Joint Consumer Advocates) requested clarification and/or rehearing of footnote 134 of the Compliance Order, which delineates the limitation of the Commission’s holding regarding the exclusion of state-directed default service auctions from the definition of State Subsidy.⁷ The New Jersey Board asserts that “[t]he tariff language approved by the Order explicitly states that the MOPR will not apply to any default service auction that, in relevant part, has ‘no conditions based on . . . fuel type, technology, or emissions of any resources or supply (*except state-mandated renewable portfolio standards for which*

⁶ PJM Tariff, § 1, OATT Definitions—R-S (emphasis added).

⁷ Specifically, footnote 134 states,

[w]hile this order accepts the exemption that PJM has proposed, it does not constitute a ruling that any particular state-directed default service auction actually meets these requirements. For example, we note that the New Jersey Basic Generation Service (BGS) auction appears to give guidance that conflicts with the proposition it is “non-discriminatory” or “fuel neutral.” Specifically, in the section on frequently asked questions (FAQs), FAQ-24 addresses the question whether Supplier Master Agreements (SMAs) submitted to the state BGS must comply with renewable portfolio requirements. *See* Frequently Asked Questions # 24, New Jersey Statewide Basic Generation Service Electricity Supply Auction, <http://www.bgs-auction.com/bgs.faq.item.asp?faqId=1100> (last visited Sept. 26, 2020). FAQ-24 instructs that “[t]here is no exemption under the SMAs from future increases in RPS requirements.” *Id.* Further, while FAQ-24 acknowledges that “in the past, the Legislature, when increasing solar requirements, exempted existing BGS Suppliers from the increase,” it continues by stating that “there is no guarantee that future legislation, Board Orders, or other changes would continue to provide such an exemption for BGS Suppliers.” *Id.* This guidance appears to conflict with the notion that the BGS auctions are either non-discriminatory or fuel neutral and may indicate that such auctions may be “for the purpose of supporting the entry . . . of preferred generation resources.” June 2018 Order, 163 FERC ¶ 61,236 at P 1.

Compliance Order, 173 FERC ¶ 61,061 at P 69 n.134.

Capacity Resources are separately subject to the minimum offer price rule or eligible for an exemption).”⁸

3. I begin with whether footnote 134 is dicta: the New Jersey Board asserts that it is; I disagree. Although the majority’s decision to vacate the footnote is not based on a finding that it is dicta, it is worth clarifying the purpose of the footnote. The footnote was an express limitation on the scope of the Commission’s decision to permit an exception from the definition of a State Subsidy for state procurement auctions that meet defined characteristics. Explaining the limits of a holding is often, as with footnote 134, an essential element of a decision. For example, the Commission has recognized the penultimate paragraph of the Supreme Court’s decision in *Hughes v. Talen Energy Marketing, LLC* as explaining the limits of the Court’s preemption holding.⁹

4. The unwise decision to now reverse course eliminates the control in place for circumstances in which a state-directed default service auction is not in fact nondiscriminatory or fuel neutral, but rather is “for the purpose of supporting the entry . . . of preferred generation resources.”¹⁰

5. In today’s order, the majority bases its decision on its finding that the tariff “language provides that ‘state-mandated renewable portfolio standards [(RPS)] for which Capacity Resources are separately subject to the minimum offer price rule or eligible for an exemption’ do not preclude a default service auction from being non-discriminatory and competitive”¹¹ and its “agree[ment] with the New Jersey Board that aspects of

⁸ New Jersey Board Rehearing Request at 6 (citation omitted).

⁹ See *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016); see also, e.g., *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239, at P 68 n.147 (2019) (citing *Hughes*, 136 S. Ct. at 1299 (“Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures ‘untethered to a generator’s wholesale market participation.’”)); cf. April Rehearing Order, 171 FERC ¶ 61,035 (2020) (Glick, Comm’r, dissenting at P 9 n.23) (“The term ‘untethered’ first entered the FPA lexicon in *Hughes*, 136 S. Ct. at 1299, and the specific concept of ‘tethering’ described in that opinion has played an important role in subsequent FPA preemption litigation.”).

¹⁰ *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236, at P 1 (2018).

¹¹ *Calpine Corp. v. PJM Interconnection, L.L.C.*, 174 FERC ¶ 61,109, at P 13 (2021) (citing PJM Tariff, § 1, OATT Definitions—R-S (State Subsidy definition, § (3)(e)(i)); Compliance Order, 173 FERC ¶ 61,061 at P 47 (describing PJM’s proposed Tariff language)).

footnote 134 are inconsistent with that language, which is now the filed rate.”¹² In support of this, the order quotes *California ex rel. Lockyer v. Dynegy, Inc.* to point out that “the terms of the filed tariff are considered to be the law.”¹³ Indeed, the Commission accepted the tariff filing, and the tariff is the law. However, I disagree that footnote 134 is inconsistent with the language of the tariff. Nothing in the footnote conflicts with the tariff. The footnote makes clear that while the Commission “accepts the exemption that PJM has proposed, it *does not constitute a ruling that any particular* state-directed default service auction actually meets these requirements.”¹⁴ The question of whether RPS resources may themselves be subject to the MOPR is relevant in determining whether a state default service auction is competitive and non-discriminatory and, thus, not a State Subsidy.¹⁵ If a state procurement auction authorizes or requires payments for default service to new, non-grandfathered renewable resources that are not otherwise exempt from mitigation, then such payments constitute a State Subsidy. Further, it was within the Commission’s authority to interpret the language of PJM’s tariff and explain the limitation on the scope of the Commission’s decision to permit an exception from the definition of a State Subsidy.¹⁶

¹² *Id.* (citing *Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951); *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 853 (9th Cir. 2004) (explaining that “the terms of the filed tariff are considered to be the law”) (internal quotations omitted)).

¹³ *Id.* P 13 n.28 (quoting *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d at 853).

¹⁴ Compliance Order, 173 FERC ¶ 61,061 at P 69 n.134 (emphasis added).

¹⁵ This is why the Commission’s discussion of attenuation in the Compliance Order, like the distinction drawn in footnote 134, contained the proviso that it was limited to “a state-directed default service auction *that would qualify for exclusion* from the definition of State Subsidy.” *Id.* P 71 (emphasis added).

¹⁶ *See El Paso Elec. Co. v. FERC*, 832 F.3d 495, 503 (5th Cir. 2016) (“FERC’s choices in regulating rates, tariffs, and related practices involve technical issues within its purview that are entitled to great deference. . . . Therefore, when FERC designs rates, we give deference to those designs and defer to FERC’s construction of any ambiguous language in agreements setting rates, ‘so long as [FERC’s construction] is reasonable.’”) (citations omitted); *Pub. Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164, 1168 (D.C. Cir. 2007) (“If the tariff language is unambiguous, we (unsurprisingly) follow it; if not, we defer to reasonable interpretations by the Commission.”) (citation omitted).

For these reasons, I respectfully dissent.

James P. Danly
Commissioner