UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

	)	
CPV Shore, LLC	)	Docket No. ER14-2105-000
	)	

PROTEST OF THE INDEPENDENT MARKET MONITOR FOR PJM

Pursuant to Rule 211 of the Commission's Rules and Regulations,[1] Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM[2] ("Market Monitor"), submits this protest to the Standard Offer Capacity Agreements ("SOCASOCAs") that CPV Shore, LLC ("CPV") submitted to the Commission for review and approval under section 205 of the Federal Power Act on June 6, 2014. Because the SOCAs are not compatible with PJM's RPM capacity market design, which relies on competitive markets and assigns development risks to investors, the SOCAs are unjust and unreasonable and should not be approved.

CPV has not shown why it should receive above market revenues under the SOCAs that are not available to other market participants. Nor has CPV shown why it should receive revenues above what CPV claimed to be competitive levels which it submitted in the review of its RPM offers under the Minimum Offer Price Rule (MOPR).[3] CPV has not met its burden under section 205 of Federal Power Act to show why it would be just and reasonable for PJM customers to buy power from it at above market levels. CPV has not shown why approval of the SOCAs would not provide discriminatory and uncompetitive

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1 18 CFR § 385.211 (2011).

2 Capitalized terms used herein and not otherwise defined have the meaning used in the PJM Open Access Transmission Tariff ("OATT").

3 OATT Attachment DD § 5.14(h).

treatment to CPV and thus discriminate against other market sellers. The SOCAs should not be approved.

CPV argues that the Commission should approve the SOCAs as just and reasonable under the standards set forth in *Allegheny*, which apply to contracts that, like the SOCAs, are not negotiated at arms length.[4] The Commission may approve such contracts under *Allegheny* if they are found to meet four principles: transparency, definition, evaluation and oversight.[5]

Contrary to CPV's claims, the SOCAs do not meet *Allegheny's* definition principle, the core principle at issue here.[6] As CPV explains, the definition principle requires a competitive, non-discriminatory solicitation to procure products that are precisely defined to meet the objectives of the solicitation. The requests for proposals process ("RFP") pursuant to which the SOCAs were selected was limited to new resources, even though capacity and reliability can be provided by existing resources.[7] In contrast, PJM's Minimum Offer Price Rule (MOPR) includes a Commission-approved competitive entry exemption for a solicitation process, provided that such process includes existing resources.[8] CPV's

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4 CPV at 3, citing *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082 (2004) ("*Allegheny*"). CPV also cites *Boston Edison Co. re: Edgar Electric Energy, Co.*, 55 FERC ¶ 61,382 (1991) ("*Edgar*"), an earlier case that *Allegheny* builds upon.

5 *See Allegheny* at PP 22–35.

6 The Market Monitor takes no position at this time on the whether CPV satisfies in whole or in part the other *Allegheny* principles.

7 *See* CPV at 28. The RFP was conducted by the New Jersey Board of Public Utilities and its agent. See *In the Matter of Long-Term Capacity Agreement Pilot Program*, New Jersey BPU Docket No. EO11010026 (March 29, 2011). The New Jersey Statute is known as the Long-Term Capacity Agreement Pilot Program or "LCAPP Act."

8 *See* OATT Attachment DD § 5.14(h)(7)(ii). The MOPR is a rule designed to prevent the exercise of buyer-side market power in the PJM Capacity Market. *See PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 20 (2013. *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (2011), *order on reh'g etc.*, 137 FERC ¶ 61,145 (2011), *order on reh'g*, 138 FERC ¶ 61,194 (2012), appeal pending, Case No. 11-4245, et al. (3rd Cir.); 143 FERC ¶ 61,090.

failure to justify the exclusion of existing resources is fatal to its argument that the SOCAs were procured in a competitive solicitation that meets *Allegheny's* definition principle.[9] The solicitation was not non-discriminatory and was not competitive because the solicitation was not open to all resources that could have provided capacity under a long term contract. Accordingly, the SOCAs should not be approved.

Even if the *Allegheny* principles were somehow satisfied, the SOCAs would still be unjust and unreasonable because they are not consistent with the regulatory framework that the Commission has established in PJM. Satisfaction of the *Allegheny* principles would not be a reason to ignore the fundamental incompatibility between the SOCAs and PJM's capacity market design. That the SOCAs do not, in fact, satisfy the *Allegheny* definition indicates the deeper conflict between the approach represented by the SOCAs and Commission-approved rules in the PJM tariff that are intended to fully address resource and revenue adequacy in the PJM region. The solicitation in which the SOCAs were procured was designed to interfere with the pricing in RPM auctions, the principal mechanism for procuring capacity in PJM.[10] The SOCAs should not be approved because they are incompatible with RPM.

I. COMMENTS

A. CPV Has Not Shown Why It Should Receive Revenues Above Market Levels That Are Not Available to Other Market Participants Nor Why It Should Receive Revenues Above What CPV Claimed To Be Competitive Levels in Its Submissions for Review of its RPM Offers Under MOPR.

CPV has not shown that it is not already receiving adequate revenues through PJM markets. CPV's unit has cleared RPM auctions for the 2015/2016, 2016/2017 and 2017/2018

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9 *See* CPV at 17–18, 21–22.

10 *See* PPL EnergyPlus, LLC, et al. v. Nazarian, et al., No. 13-2419, slip op. at 17 (June 2, 2014); *see also* U.S. Dist. Ct. for the Dist. of N.J., PPL v Hanna et al., No. 11-745 (October 11, 2013).

Delivery Years. In the 2015/2016 RPM auction, CPV submitted its offer for review by the Market Monitor under the Minimum Offer Price Rule (MOPR) to ensure that the offer was competitive. CPV argued that an offer even lower than the offer they submitted in the RPM auction was competitive and all that was required in order to be fairly compensated. The offer submitted by CPV and cleared in the auction was much lower than the value of the SOCAs. When the market clearing price exceeds the CPV offer, CPV receives capacity market revenues greater than its offer. CPV's offer in the RPM auction was represented by CPV as a competitive offer level.

CPV has not demonstrated the need for compensation at levels above market or explained why it needs compensation on terms not available to other capacity market sellers. To the contrary, CPV has repeatedly indicated that its cleared offers in the PJM capacity markets represented its costs and were competitive. CPV has not met its burden to show that the SOCAs are just, reasonable and non-discriminatory. The SOCAs should not be approved.

B. By Excluding New Resources, the Solicitation of the SOCAs Fails the *Allegheny* Definition Principle.

The *Allegheny* principles are applied in order to evaluate whether a contract resulting from a procurement process is the product of a process conducted on a market or competitive basis, even when the deal cannot be assumed to reflect an arm's length bargain. Interaffiliate transactions are one example. CPV argues (at 13) that the SOCAs, which CPV's counterparties executed pursuant to a state mandate, are another example where *Allegheny* principles apply.

The real issue in this case is whether the SOCAs are the result of a procurement process compatible with the PJM capacity market design. *Allegheny* examines a narrower issue of whether the contract is equivalent to one negotiated at arm's length even when it is not so negotiated. Nevertheless, proper application of the *Allegheny* principles still leads to the conclusion that the SOCAs are unjust and unreasonable and should not be approved.

The *Allegheny* definition principle is particularly relevant to this proceeding. Application of the definition principle involves examination of the terms and conditions of the procurement to ensure that they are consistent with the purpose of the procurement and are not designed to produce an outcome insulated from competition.

Allegheny explains (at PP 27–28) the definition principle:

> The product or products sought through the RFP should be defined in a manner that is clear and nondiscriminatory. The RFP should state all relevant aspects of the product or products sought. At a minimum, these aspects include capacity and term, but other characteristics are usually necessary, among them fuel type, plant technology (*e.g.*, simple cycle gas turbine), and transmission requirements. If there are changes in the product specification, rebids should be allowed.
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> *An RFP should not be written to exclude products that can appropriately fill the issuing company's objectives.* This is particularly important if such exclusions tend to favor affiliates. [Emphasis added.]

CPV states (at 5), citing to New Jersey's LCAPP Act, that the objective of the solicitation was to ensure that sufficient generation actually will be financed and constructed.

CPV further states "existing capacity would not have satisfied the State's requirements for new construction."[11]

The exclusion of already constructed and existing resources from the RFP renders the solicitation process non-competitive. A key provision of the SOCAs required the selected units to clear in PJM's capacity market, which procures capacity on a non-discriminatory basis.[12] Existing units can and do provide capacity that meets any reasonable reliability objective.

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11 CPV at 21.

12 CPV at 9–10, citing SOCA § 4.1.

PJM reformed its Minimum Offer Price Rule (MOPR), first in 2011, and again in 2013, precisely in order to prevent the anti-competitive effects of a solicitation process that is limited to new resources.[13] Generally, the MOPR is intended to prevent the exercise of buyer-side market power in RPM Auctions.[14] The Commission agreed with parties, including the Market Monitor, who argued that a reformed MOPR was necessary to prevent such solicitations being used to suppress prices in RPM auctions.[15] Lack of an adequate MOPR would have strongly deterred new entry based on competition.

The current MOPR specifically includes a competitive entry exception for new resources procured in competitive solicitations, provided that such solicitations do not exclude resources based on whether they are new or existing, or for other non-competitive reasons.[16]

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13 *See* 135 FERC ¶ 61,022; 143 FERC ¶ 61,090.

14 143 FERC ¶ 61,090 at P 20 (2013) ("PJM's MOPR is a mechanism that seeks to prevent the exercise of buyer-side market power in the forward capacity market, which occurs when a large net-buyer—that is, an entity that buys more capacity from the market than it sells into the market—invests in capacity and then offers that capacity into the auction at a reduced price. Given the uniform clearing prices in PJM's markets, such behavior would benefit the net-buyer so long as the reduction in the net-buyer's purchasing costs exceeds its losses from selling the underpriced capacity."). The MOPR rules have been reformed specifically in response to the RFP, which has been recognized as incompatible with the operation of competitive capacity markets.

15 *Id*. at P 143 ("[W]ithout effective mitigation of state-sponsored uneconomic entry, the actions of a single state could have the effect of preventing other states from participating in wholesale markets. Because below-cost entry suppresses capacity prices and because the Commission has exclusive jurisdiction over wholesale rates, the deterrence of uneconomic entry falls within the Commission's jurisdiction, and we are statutorily mandated to protect the RPM against the effects of such entry.")

16 *See* OATT Attachment DD § 5.14(h)(7)(ii)("The Office of the Interconnection and the Market Monitoring Unit may deem a procurement process to be "Competitive and Non-Discriminatory" only if: (A) both new and existing resources may satisfy the requirements of the procurement; (B) the requirements of the procurement are fully objective and transparent; (C) the procurement terms do not restrict the type of capacity resources that may participate in and satisfy the requirements of the procurement; (D) the procurement terms do not include selection criteria that could give preference to new resources; and (E) the procurement terms do not use indirect means to discriminate against existing capacity, such as geographic constraints inconsistent with LDA

CPV attempts (at 20–23), contrary to the precedent set in the MOPR orders, to justify the RFP's exclusion of existing resources. CPV states (at 21): ":

> The LCAPP Act and the NJ BPU's implementing proceeding were motivated by concern that additional new capacity would be required to ensure adequate and reliable electric service for its citizens Accordingly, existing capacity would not have met the State's needs. And the Commission has acknowledged this long-standing reality in stating that PJM's MOPR does not interfere with states' ability to assist new generation believed appropriate for the state.

RPM is designed to ensure resource adequacy over the indefinite long run, not for three years or any other term. RPM's three-year forward procurement feature is designed to accommodate competition from new resources. The current MOPR accommodates state solicitation processes, provided that they do not discriminate against new resources, and thereby operate in an anti-competitive manner that would be incompatible with RPM.

The state RFP process did not set a higher reliability standard, but simply substituted the RFP capacity for existing capacity in clearing the capacity market subject to PJM's defined reliability based capacity requirements.[17] States cannot procure new capacity at above market prices in a process that excludes existing capacity and then offer that capacity into RPM auctions so that it suppresses prices.[18]

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import capabilities, unit technology or unit fuel requirements or unit heat-rate requirements, identity or nature of seller requirements, or requirements for new construction.").

17 PJM calculates its Installed Reserve Margin on the basis of a Los of Load Expectation (LOLE) of, on average, 1 Day/10 Years. See PJM Manual 20 (PJM Resource Adequacy Analysis) § 1.3 at 13.

18 *See* PPL EnergyPlus, LLC, et al. v. Hanna, No. 11-745, slip. op. at 62 (U.S. Dist. Ct. for N.J. Oct. 11, 2013) ("From reviewing the entire scheme of the RPM process, it is clear that the LCAPP Act poses as an obstacle to the Commission's implementation of the RPM. The [plaintiff's witnesses] indicated that their companies rely on the competitive price signals of the RPM Auction to determine future company business plans. Each testified that the SOCA prices undermine their respective company's ability to use those RPM price signals to make sound business decisions. Each also contended that the future expansion of their respective companies would be contingent on whether the SOCA price continues to supplant the RPM Auction price. The effects described by

The SOCAs are designed to apply towards PJM's resource adequacy objectives set in RPM, not to meet separate higher resource adequacy objectives set by the state that exceed PJM's objectives. The SOCAs by definition cannot increase reliability because they do not change the level of capacity procured to meet the load in New Jersey. The exclusion of existing resources is fatal to any argument that the SOCAs were procured in a competitive solicitation that meets *Allegheny's* definition principle. Accordingly, the SOCAs should not be approved.

C. The SOCAs Are Not Just and Reasonable Because They Are Incompatible with the Existing Regulatory Framework for Procurement of Capacity in PJM.

Even if the *Allegheny* standards were met based on a very narrow application of those standards, this would not be grounds to approve the SOCAs as just and reasonable. The SOCAs would still be unjust and unreasonable because they are fundamentally inconsistent with the regulatory framework that the Commission has established in PJM. The PJM tariff includes rules approved by the Commission to fully satisfy resource and revenue adequacy in the PJM region. The solicitation in which the SOCAs were procured was designed to interfere with the pricing in RPM auctions, the mechanism for procuring capacity in PJM. The SOCAs should not be approved because the SOCAs are incompatible with RPM.

The conflict with the federal regulatory paradigm is the reason why the courts found that the Commission has exclusive jurisdiction over the SOCAs in the first place.[19] The only

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the witnesses demonstrate that the SOCA's imposition of a government imposed price creates an obstacle to the Commission's preferred method for the wholesale sale of electricity in interstate commerce."); *see also* PPL EnergyPlus, LLC, et al. v. Nazarian, et al., No. 13-2419, slip op. at 22 (June 2, 2014) ("Although states plainly retain substantial latitude in directly regulating generation facilities, they may not exercise this authority in a way that impinges on FERC's exclusive power to specify wholesale rates.").

19 *See* PPL EnergyPlus, LLC, et al. v. Nazarian at 17 ("[T]he Order [pursuant to which the solicitation process was approved] ensures -- through a system of rebates and subsidies calculated on the basis of the PJM market rate -- that CPV receives a fixed sum for every unit of capacity and energy that it

reason why CPV filed the SOCAs is that the court found that the Commission has exclusive jurisdiction over the SOCAs. CPV continues to argue (at 2–4) that SOCAs do not really require Commission review. The court held otherwise because it found the SOCAs are fundamentally incompatible with PJM's capacity market design.[20] Effectively, CPV requests Commission approval for SOCAs in order to promote state policy objectives as CPV represents those objectives. CPV's argument ignores the Commission's policy objectives. Accordingly, the SOCAs should not be approved as just and reasonable.

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clears (up to a certain ceiling). The scheme thus effectively supplants the rate generated by the auction with an alternative rate preferred by the state. [Citation omitted.] The Order thus compromises the integrity of the federal scheme and intrudes on FERC's jurisdiction.").

20 *Id*.

III. CONCLUSION

The Market Monitor respectfully requests that the Commission afford due consideration to these comments as the Commission resolves the issues raised in this proceeding.

Respectfully submitted,

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Dated: June 27, 2014

CERTIFICATE OF SERVICE

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

Dated at Eagleville, Pennsylvania,
this 27th day of June, 2014.

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