

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

CPV argues that the Commission should approve the CfDs as just and reasonable under the standards set forth in *Allegheny*, which apply to contracts that, like the CfDs, 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 CfDs 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 CfDs 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

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 The RFP was conducted by the Maryland Public Service Commission (PSC). See *In the Matter of Whether New Generating Facilities Are Needed to Meet Long-Term Demand for Standard Offer Service*, Notice of Comment Period on Request for Proposals for New Generating Facilities at 1, Maryland PSC Case No. 9214 (Dec. 29, 2010) (Attachment D).

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 CfDs 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 CfDs should not be approved.

Even if the *Allegheny* principles were somehow satisfied, the CfDs 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 CfDs and PJM's capacity market design. That the CfDs do not, in fact, satisfy the *Allegheny* definition indicates the deeper conflict between the approach represented by the CfDs 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 CfDs were procured was designed to interfere with the pricing in RPM auctions, the principal mechanism for procuring capacity in PJM.¹⁰ The CfDs 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

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 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 CfD. When the market clearing price exceeds the CPV offer, CPV receives capacity market revenues greater than its offer. CPV's offer was represented by CPV as a competitive offer level. CPV will receive revenues for the 2015/2016 and 2016/2017 Delivery Years even though its unit will not exist during those years, and will make no contribution towards reliability during those years.¹¹

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 CfDs are just, reasonable and non-discriminatory. The CfDs should not be approved.

B. By Excluding New Resources, the Solicitation of the CfDs 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 CfDs, which CPV's

¹¹ CPV will provide replacement capacity, but replacement capacity typically does not create additional capacity and provide additional reliability benefits. PJM and the Market Monitor have raised concerns about the use of replacement capacity for speculative purposes. *See, e.g.*, PJM Filing, Docket No. ER14-1461 (March 10, 2014).

counterparties executed pursuant to a state mandate, are another example where *Allegheny* principles apply.

The real issue in this case is whether the CfDs 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 CfDs 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.

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, citing to Section 1 of the RFP, that the “principle objective of the solicitation was ‘to ensure the continued, long-term reliability of the electricity supply to Maryland customers by mitigating key risks faced by the State.’” CPV further states that “the RFP defined the product sought in the solicitation as construction of new gas-fired generation units located inside the Southwest MAAC local delivery area (“LDA”).”¹²

¹² CPV at 8, citing RFP § 2.1.

The exclusion of already constructed and existing resources from the RFP renders the solicitation process non competitive. Existing units can and do provide capacity that meets any reasonable reliability objective. Indeed, units must exist in order to deliver capacity.¹³

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.¹⁴ Generally, the MOPR is intended to prevent the exercise of buyer-side market power in RPM Auctions.¹⁵ 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.¹⁶ Lack of an adequate MOPR would have strongly deterred new entry based on competition.

¹³ Indeed, planned units can create significant reliability concerns. CPV offered and cleared the unit subject to the RFP in the RPM Base Residual Auction for the 2016/2017 Delivery Year, but it will not be delivered and it is expected to be replaced. The unit also cleared for the 2017/2018 Delivery Year, but at this time it remains unclear whether significant steps to move forward with construction will occur in time for CPV to meet that obligation.

¹⁴ See 135 FERC ¶ 61,022; 143 FERC ¶ 61,090.

¹⁵ 143 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.

¹⁶ *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.”)

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.¹⁷

CPV attempts (at 17–18), contrary to the precedent set in the MOPR orders, to justify the RFP’s exclusion of existing resources. CPV states that “These [long-term reliability] risks included sudden increase in load, delays in transmission upgrades, and the risk that RPM would not attract enough new capacity to address these risks effectively, whatever the level of need turned out to be.”

CPV argues further:

The Maryland PSC’s investigation and solicitation were motivated by a 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

¹⁷ 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 import capabilities, unit technology or unit fuel requirements or unit heat-rate requirements, identity or nature of seller requirements, or requirements for new construction.”).

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.¹⁸ 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.¹⁹

The CfDs 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 CfDs by definition cannot increase reliability because they do not change the level of capacity procured to meet the load in SWMAAC. The exclusion of existing resources is fatal to any argument that the CfDs were procured in a competitive solicitation that meets Allegheny's definition principle. Accordingly, the CfDs should not be approved.

C. The CfDs 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 CfDs as just and reasonable. The CfDs 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

¹⁸ PJM calculates its Installed Reserve Margin on the basis of a Loss of Load Expectation (LOLE) of, on average, 1 Day/10 Years. See PJM Manual 20 (PJM Resource Adequacy Analysis) § 1.3 at 13.

¹⁹ See *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.").

in the PJM region. The solicitation in which the CfDs were procured was designed to interfere with the pricing in RPM auctions, the mechanism for procuring capacity in PJM. The CfDs should not be approved because the CfDs 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 CfDs in the first place.²⁰ The only reason why CPV filed the CfDs is that the court found that the Commission has exclusive jurisdiction over the CfDs. CPV continues to argue (at 2–4) that CfDs do not really require Commission review. The court held otherwise because it found the CfDs are fundamentally incompatible with PJM’s capacity market design.²¹ Effectively, CPV requests Commission approval for CfDs in order to promote state policy objectives as CPV represents those objectives. CPV’s argument ignores the Commission’s policy objectives. Accordingly, the CfDs should not be approved as just and reasonable.

²⁰ *See Id.* at 17 (“[T]he Order [pursuant to which the CfDs were 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 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.”).

²¹ *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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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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