

("MOPR") in the forthcoming PJM Base Residual Auction ("BRA") for the 2022/2023 Delivery Year as a consequence of being granted local property tax relief pursuant to the Virginia Certified Pollution Control Equipment and Facilities Section of the Virginia Code on Taxation ("Virginia Pollution Control Statute")." Hollow Road argues (at 11–13) that Virginia Pollution Control Statute should be treated in a manner analogous to the exclusion from the definition of State Subsidy "payments, concessions, rebates, subsidies, or incentives designed to incent, or participation in a program, contract or other arrangement that utilizes criteria designed to incent or promote, general industrial development in an area or designed to incent siting facilities in that county or locality rather than another county or locality" ("Siting Incentive Exclusion").⁴ Hollow Road does not argue that the Siting Incentive Exclusion applies to the Virginia Pollution Control Statute, only that the reasoning supporting the Siting Incentive Exclusion would also support creating an additional exclusion that would cover subsidies received under the Virginia Pollution Control Statute.⁵

Hollow Road fails to show any uncertainty about the application of the existing rules that need clarification. Hollow Road seeks to add a new rule of exclusion that would exclude the Virginia Pollution Control Statute. The relief requested cannot be granted in this proceeding.⁶

Hollow Road's arguments in support of adding a new rule exempting subsidies received under the Virginia Pollution Control Statute from the definition of a State Subsidy has no merit. Even if this were the proper proceeding to obtain the requested relief, the

⁴ OATT § 1.

⁵ See December 22nd Petition at 9 ("At issue here is whether the Virginia Pollution Control Statute, which meets the definition of State Subsidy on its face like general industrial development and local siting statutes, falls within the type of state-sponsored financial assistance that nevertheless should be exempted from the definition of State Subsidy.").

⁶ See 18 CFR § 385.207.

arguments should be rejected. Excluding subsidies received under the Virginia Pollution Control Statute impacts would harm competition in the manner that the MOPR rules are designed to prevent. Excluding programs simply because they may provide subsidies to nongeneration resources in addition to preferred generation resources would create a loophole that would undermine the effectiveness of the MOPR.

The petition should be denied.

I. COMMENTS

The current MOPR was approved in response to the Commission’s finding “that out-of-market payments provided, or required to be provided, by states to support the entry or continued operation of preferred generation resources threaten the competitiveness of the capacity market administered by PJM Interconnection, L.L.C. (PJM).”⁷

PJM and the Market Monitor review state programs to determine whether they provide a State Subsidy and the MOPR applies.⁸

⁷ *PJM Interconnection, L.L.C., et al.*, 169 FERC ¶ 61,239 (2019), citing *PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 at P 1 n.1 (2018).

⁸ Section 1 of the OATT states:

‘State Subsidy’ shall mean a direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is as 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 in any PJM capacity auction.

Notwithstanding the foregoing, State Subsidy shall not include (a) payments, concessions, rebates, subsidies, or incentives designed to incent, or participation in a program, contract

or other arrangement that utilizes criteria designed to incent or promote, general industrial development in an area or designed to incent siting facilities in that county or locality rather than another county or locality; (b) state action that imposes a tax or assesses a charge utilizing the parameters of a regional program on a given set of resources notwithstanding the tax or cost having indirect benefits on resources not subject to the tax or cost (e.g., Regional Greenhouse Gas Initiative); (c) any indirect benefits to a Capacity Resource as a result of any transmission project approved as part of the Regional Transmission Expansion Plan; (d) any contract, legally enforceable obligation, or rate pursuant to the Public Utility Regulatory Policies Act or any other state-administered federal regulatory program (e.g., the Cross-State Air Pollution Rule); (e) any revenues from the sale or allocation, either direct or indirect, to an Entity Providing Supply Services to Default Retail Service Provider where such entity's obligations was awarded through a state default procurement 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, subject to the below condition, and provided further that nothing herein would exempt a Capacity Resource that would otherwise be subject to the minimum offer price rule pursuant to this Tariff; (f) any revenues for providing capacity as part of an FRR Capacity Plan or through bilateral transactions with FRR Entities; or (g) any voluntary and arm's length bilateral transaction (including but not limited to those reported pursuant to Tariff, Attachment DD, section 4.6), such as a power purchase agreement or other similar contract where the buyer is a Self-Supply Entity and the transaction is (1) a short term transaction (one-year or less) or (2) a long-term transaction that is the result of a competitive process that was not fuel-specific and is not used for the purpose of supporting uneconomic construction, development, or operation of the subject Capacity Resource, provided however that if the Self-Supply Entity is responsible for offering the Capacity Resource into an RPM Auction, the specified amount of installed capacity purchased by such Self-Supply Entity shall be considered to receive a State Subsidy in the same manner, under the same conditions, and to the same extent as any other Capacity Resource of a Self-Supply Entity. For purposes of subsection (e) of this definition, 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

PJM and the Market Monitor have determined that the benefits received under the Virginia Pollution Control Statute meet the definition of a State Subsidy. Hollow Road does not dispute that determination. Specifically, Hollow Road does not claim that the Siting Incentive Exclusion or any other exclusion applies to the Virginia Pollution Control Statute or that it needs to make any such showing.⁹

Hollow Road argues that there should be an additional exclusion in the definition of State Subsidy covering the Virginia Pollution Control Statute.¹⁰

Hollow Road argues that the reasoning supporting the Siting Incentive Exclusion would also support including an additional exclusion covering the Virginia Pollution Control Statute and other programs that make those engaged in industrial activities other than power production eligible to receive the subsidy.

PJM, in its answer filed January 12, 2021, refutes the claim that the subsidies are not tied to power production. PJM cites to portions of the statute (at 6) that explicitly apply to stand alone solar facilities. Hollow Road responds that the provisions applicable to solar power production reduce the subsidy.¹¹ The portion of the Virginia Pollution Control

(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.

⁹ See Hollow Road Answer at 4 (“Hollow Road does not need to demonstrate that the Virginia Pollution Control Statute is a “general industrial development” statute as PJM suggests. Hollow Road needs to demonstrate that the Virginia Pollution Control Statute meets the same analytical standard set forth above. Hollow Road has made this demonstration.”)

¹⁰ *Id.*; December 22nd Petition at 13 (“...it is impermissible for the Commission to use the FPA to treat the Virginia Pollution Control Statute, which clearly is directed at pollution control, differently from one that is directed at industrial development or local siting preferences...”).

¹¹ Hollow Road Answer at 2-4.

Statute relied upon by Hollow Road (at 9) states, in defining the type of property eligible for a tax exemption:

‘Certified pollution control equipment and facilities’ shall mean any property, including real or personal property, equipment, facilities, or devices, used primarily for the purpose of abating or preventing pollution of the atmosphere or waters of the Commonwealth and which the state certifying authority having jurisdiction with respect to such property has certified to the Department of Taxation as having been constructed, reconstructed, erected, or acquired in conformity with the state program or requirements for abatement or control of water or atmospheric pollution or contamination. Such property shall include, but is not limited to, any equipment used to grind, chip, or mulch trees, tree stumps, underbrush, and other vegetative cover for reuse as mulch, compost, landfill gas, synthetic or natural gas recovered from waste or other fuel, and equipment used in collecting, processing, and distributing, or generating electricity from, landfill gas or synthetic or natural gas recovered from waste, whether or not such property has been certified to the Department of Taxation by a state certifying authority.¹² Such property shall also include solar energy equipment, facilities, or devices owned or operated by a business that collect, generate, transfer, or store thermal or electric energy whether or not such property has been certified to the Department of Taxation by a state certifying authority. All such property as described in this definition shall not include the land on which such equipment or facilities are located.

It is undisputed that the Virginia Pollution Control Statute includes subsidies for solar power production facilities. It is undisputed that there are competing forms of power production not included in the Virginia Pollution Control Statute that are not eligible for the subsidy.

That some nonpower production entities may be eligible for a subsidy under the Virginia Pollution Control Statute is not relevant to competition in the PJM wholesale

¹² Va. Code Ann. § 58.1-3660.

markets, is irrelevant to the purposes of the MOPR and does not qualify as a Siting Incentive Exclusion under MOPR. The intent of the Siting Incentive Exclusion is to avoid requiring energy producers to forgo generally applicable incentives for industrial development and the location of siting and operation do not create preferences for certain generation resources and influence their relative competitiveness. The Virginia Pollution Control Statute does not create such a broad siting incentive.

The December 22nd Petition (at 7–8) and the Hollow Road Answer (at 6–7) refer to language from the preemption standard applied in *Hughes* and some other preemption cases.¹³ The Courts apply the preemption standards to determine whether all or part of a state program is preempted under the Constitution and nullified. The standard has no applicability to MOPR determinations, and there is no reason to believe that the Commission intended language from *Hughes* concerning the application of preemption doctrine to guide determinations on State Subsidies and competitive offers.¹⁴ MOPR does not determine whether a state program is permitted under the Constitution, nor does it evaluate such programs on their merits. The determination is limited to whether subsidies received under such programs should be excluded from the calculation of offers in the PJM capacity market in order to protect competition.

The addition of the exclusion advocated by Hollow Road would create a loophole undermining implementation of the Commission’s MOPR decision. If the inclusion of

¹³ See *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016).

¹⁴ See December 22nd Petition at 6–7, 169 FERC ¶ 61,239 at P 68 (“those forms of ‘out-of-market payments provided or required by certain states’ that, even in the absence of facial preemption under the FPA, squarely impact the production of electricity or supply-side participation in PJM’s capacity market by ‘supporting the entry or continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market.’”). The quoted language properly focuses on whether there are subsidies to preferred generation resources and properly does not consider the purposes of the subsidy or whether there are subsidies to non generation resources.

nongeneration resources in a state subsidy program creates an exclusion for subsidies received by preferred generation resources under such program, the MOPR could not be implemented and would not serve its purpose. Any subsidy program for which a nongeneration resource is eligible would be excluded from the definition of a State Subsidy. State subsidy programs could be designed to avoid application of the MOPR to preferred generation resources.

A petition for declaratory order is for resolving uncertainty about the application of the existing rules, not for requiring the addition of new rules.¹⁵ To obtain the relief it seeks, Hollow Road would need to file a complaint under Section 206 of the Federal Power Act.

The arguments raised in the December 22nd Petition have no merit. The arguments do not apply to the Virginia Pollution Control Statute. The arguments, if accepted, would undermine the application of the MOPR.

The December 22nd Petition should be denied.

II. MOTION FOR LEAVE TO ANSWER

The Commission's Rules of Practice and Procedure, 18 CFR § 385.213(a)(2), do not permit answers to answers or protests unless otherwise ordered by the decisional authority. The Commission has made exceptions, however, where an answer clarifies the issues or assists in creating a complete record.¹⁶ In this answer, the Market Monitor provides the Commission with information useful to the Commission's decision making process and

¹⁵ See 18 CFR § 385.207.

¹⁶ See, e.g., *PJM Interconnection, L.L.C.*, 119 FERC ¶61,318 at P 36 (2007) (accepted answer to answer that "provided information that assisted ... decision-making process"); *California Independent System Operator Corporation*, 110 FERC ¶ 61,007 (2005) (answer to answer permitted to assist Commission in decision-making process); *New Power Company v. PJM Interconnection, L.L.C.*, 98 FERC ¶ 61,208 (2002) (answer accepted to provide new factual and legal material to assist the Commission in decision-making process); *N.Y. Independent System Operator, Inc.*, 121 FERC ¶61,112 at P 4 (2007) (answer to protest accepted because it provided information that assisted the Commission in its decision-making process).

which provides a more complete record. Accordingly, the Market Monitor respectfully requests that this answer be permitted.

III. CONCLUSION

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

Respectfully submitted,



Jeffrey W. Mayes

Joseph E. Bowring
Independent Market Monitor for PJM
President
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Eagleville, Pennsylvania 19403
(610) 271-8051
joseph.bowring@monitoringanalytics.com

General Counsel
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Eagleville, Pennsylvania 19403
(610) 271-8053
jeffrey.mayes@monitoringanalytics.com

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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 15th day of January, 2021.



Jeffrey W. Mayes

General Counsel

Monitoring Analytics, LLC

2621 Van Buren Avenue, Suite 160

Eagleville, Pennsylvania 19403

(610) 271-8053

jeffrey.mayes@monitoringanalytics.com