

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

West Deptford Energy, LLC

)

Docket No. ER11-2936-000

**COMMENTS OF THE ELECTRIC POWER SUPPLY ASSOCIATION
OPPOSING PROPOSED PROCEDURES AND PROPOSING PROTECTIVE ORDER
PREVENTING ACCESS BY COMPETITIVE DUTY PERSONNEL**

Pursuant to the February 23, 2011 notice in the above captioned proceeding,¹ the Electric Power Supply Association (“EPSA”)² requests that the Commission:

- (i) reject the procedures proposed for accessing confidential information – procedures that would prevent EPSA and its members from reviewing that information even with a Commission approved protective order in place; and
- (ii) adopt a protective order that would provide access to EPSA members but prevent persons that qualify as Competitive Duty Personnel (“CDP”) from reviewing this information.

With a protective order that generally prohibits access by CDP, there is no legitimate justification for allowing West Deptford Energy (“WDE”) to prevent EPSA members or other intervenors from reviewing information submitted by WDE in this proceeding.³ A protective order crafted to restrict access to confidential information by CDP strikes the reasonable balance between (i) intervenors accessing the confidential information they need to protect their interests in this important proceeding and (ii) protecting market participants, such as WDE, from the harm that would incur by wider dissemination of commercially sensitive market information.

¹ Notice of Shortened Comment Period and Request for Special Procedures, issued February 23, 2011 in Docket No. ER11-2936-000.

² EPSA intervened in this proceeding on February 24, 2011.

³ *Mojave Pipeline Co.*, 38 FERC ¶ 61,249 at 61,842 (1987) (“*Mojave*”) (generally rejecting claim that confidential business information should not be provided to a competitor, finding that in most instances “a protective order can protect against harmful disclosure”).

The ability of parties to review WDE's data and assumptions in this case is a legal right and a critical concern, particularly here given that WDE's parent company, LS Power, has represented in state proceedings and other public arenas that an out of market contract mandated by the state is necessary to support development of the WDE project.⁴ This representation is seemingly belied or in fact contradicted by the assertion to the Commission that a cost-based capacity Sell Offer would fall below the applicable MOPR benchmark, which may be as low as 80% of Net CONE based on the outcome of the related proceedings to revise the MOPR mechanism. As outlined by both PJM Interconnection, L.L.C. ("PJM") and PJM Power Providers Group ("P3") in recent filings before the Commission,⁵ the New Jersey statutory arrangement instigated by WDE – the guaranteed revenues of which are surprisingly absent from the discussion in the instant request – poses a significant threat to PJM's competitive market. It is unacceptable that WDE seeks preferential and unprecedented confidentiality, requiring intervenors, market participants and ratepayers to simply trust that WDE's costs and revenues are below market levels, despite implications to the contrary made to induce the New Jersey legislature and Governor to enact out of market subsidy legislation. Further, while an available avenue under the PJM MOPR to which EPSA does not object, a Commission-approved determination that market power mitigation should not apply warrants review by all interested intervenors. Therefore, the

⁴ See: *LS Power Associates, L.P. Comments on New Jersey Electric Power and Capacity Needs*, Submitted To State of New Jersey Board of Public Utilities in Docket No. EO 09110920 (July 2, 2010), pp. 21-31. Available here: http://www.state.nj.us/bpu/pdf/energy/LSPower_comments.pdf.

⁵ *Complaint and Request for Clarification Requesting Fast Track Processing*, PJM Power Providers Group v. PJM Interconnection, L.L. C., Docket No. EL 11-20-000 (Filed February 1, 2011)("P3 MOPR Complaint"); and, *PJM Interconnection, L.L.C.*, Docket No. ER11-2875-000 (Filed February 11, 2011)("PJM MOPR Reform Filing").

Commission should reject the procedures proposed and follow precedent by adopting a protective order that restricts access to confidential information by CDP.

I. BACKGROUND

On February 22, 2011, WDE requested a Commission determination that its minimum offer to sell capacity in the PJM May 2011 Base Residual Auction (“BRA”) is consistent with WDE's unit-specific costs and expected revenues from PJM-administered markets.⁶ WDE redacted extensive and material portions of the testimony and exhibits in support of its request it deemed confidential.⁷ WDE requested that the Commission prevent all intervenors, except for PJM and the Independent Market Monitor, from reviewing the redacted information, even if the Commission adopts a protective order to prevent the harmful disclosure of this information.⁸ Only the Commission, PJM and the Independent Market Monitor -- the

⁶ Request of West Deptford Energy, LLC for Commission Determination that its Unit-Specific Minimum Capacity Sell Offer is Justified Pursuant to PJM's Minimum Offer Price Rule, and Requests for Protection of Confidential Bid-Related Information and Expedited Treatment filed February 22, 2011, in Docket No. ER11-2936-000 (“WDE Filing”).

⁷ WDE redacted various portions of the Joint Affidavit of Joseph R. Esteves, Andrew D. Dera and Robert M. Colozza and the following exhibits:

- Exhibit Nos. JA-4-10 – various construction cost information;
- Exhibit No. JA-13 – operation and maintenance expenses;
- Exhibit No. JA-14 – letter from a financial institution;
- Exhibit Nos. JA-17-18 – ATDCF (WDE) both nominal and levelized, and
- Exhibit Nos. JA-19 and 19-A – assumptions and results, as well as the back up data from the net Energy and Ancillary Services Modeling.

⁸ *WDE Filing* at P 15 (“Given the limited, unit specific nature of the Request and the heightened concerns regarding potential disclosure of commercially sensitive bid-related information prior to a competitive auction, WDE asks the Commission to restrict the ability of intervenors [i.e. parties] to access the confidential information submitted with this Request.”)

latter two entities only if they execute a protective order⁹ -- would be able to review the redacted information, an outcome WDE asserts strikes a “reasonable balance” with regard to confidentiality.¹⁰

II. THE COMMISSION SHOULD REJECT THE PROPOSED PROCEDURES AND ADOPT A PROTECTIVE ORDER THAT PRECLUDES ACCESS BY COMPETITIVE DUTY PERSONNEL

A. WDE did not carry its burden to prevent intervenors from accessing the redacted information subject to an appropriately crafted Commission protective order.

1. WDE did not meet its burden under *Mojave*.

WDE’s unorthodox request to prevent all intervenors or participants, including EPSA members, from accessing confidential information subject to an appropriately crafted protective order is directly contrary to almost 25 years of FERC precedent.¹¹ In *Mojave*, the Commission said that before a party such as WDE can prevent parties to a proceeding from accessing confidential information, it must carry the burden to show that:

⁹ *Id.* at 15-16 “WDE acknowledges that PJM and the IMM should have access to this information, provided they execute the Non-Disclosure Certificate under the Protective Order attached hereto as Attachment B”, to the WDE Filing.

¹⁰ *Id.* at 15. “WDE asks the Commission to strike a reasonable balance with regard to confidentiality and, consistent with confidentiality protections afforded to sellers when the market monitor evaluates bid and costs information, restrict access to the confidential information in this proceeding to the Commission, PJM and the IMM.”

¹¹ Twenty years later, the Commission reaffirmed the teachings of *Mojave* in *Westar Energy, Inc. and ONEOK Energy Services Company, L.P.*, 115 FERC ¶ 61,034 (2006) (*Westar*):

We begin by noting that release under a protective order should be adequate protection against harm. The burden is on the party seeking to safeguard the information to show that the protective order does not adequately safeguard its interests. In this case Applicants [*Westar* and *ONEOK*] did not meet that burden. P 7 (citing *Mojave Pipeline Co.*, 38 FERC ¶ 61,249 at p. 61,842 “[s]ince in most instances a protective order can protect against harmful disclosure, a party claiming that confidential material should be withheld entirely will be expected to show that a protective order will not adequately safeguard its interests and that this concern outweighs the need for the material to develop the record.”)

- (1) a protective order will not adequately safeguard its interests; **and**
- (2) if a protective order will not safeguard their interests, then any concern as to the disclosure of information outweighs the need for the other parties to access the information to participate in the proceeding.¹²

WDE has not met either prong of the *Mojave* standard. First, WDE did not carry its burden to show why a Commission approved protective order in this case would not adequately protect its interests. It concedes that intervenors in Commission proceedings are routinely allowed access to confidential information under a protective order after signing a non-disclosure certificate but questions whether a protective order in place prior to an auction would be sufficient.¹³ To the contrary, a protective order as EPSA proposes, *i.e.*, one that restricts access by CDP, should address any such concern,¹⁴ particularly when the Commission could impose significant penalties for violating the protective order.¹⁵

Second, WDE did not carry its burden to show that even if the Commission should find (incorrectly) that a protective order would not protect its interests, its interest in keeping the information confidential outweighs the interest of intervenors including EPSA members in accessing this information, which is vital to their ability to comment in

¹² *Mojave* at 61,842 (emphasis added). See also; *Bradwood Landing LLC*, 116 FERC ¶ 61,125 at P 3 (2006). (The burden is on the party seeking to safeguard this information to show that the protective agreement does not adequately protect its interests and that its concerns outweigh the need for the material by the party seeking it.); *Broadwater Energy LLC*, 116 FERC ¶ 61,032 (2006)(same)(providing access to certain capital cost, cultural resource, carrier route and engineering data, plans, and schematics of the proposed facilities to allow parties to review an application for a liquated natural gas facility).

¹³ *WDE Filing* at P 16.

¹⁴ *Illinois AG* at P 18 (finding that limiting access to CDP should address concerns that confidential information concerning bidding activities would be disseminated.)

¹⁵ *Entergy Services Inc. and EWO Marketing, L.P.*, 116 FERC ¶ 61,296 at P 80-82 (expressing extreme concern with the misuse of confidential data and stating that civil penalties will be considered in the future.)

a meaningful way on the WDE Filing. Parties to a proceeding have the right to review confidential information that affects their interests as parties.¹⁶ In this proceeding, intervenors have a legitimate interest in assessing the validity of WDE's claims that its capacity sell offer is, in fact, cost justified thereby ensuring that WDE's offer into the BRA, at a level below the price set by the Minimum Offer Price Rule ("MOPR"), does not unreasonably depress capacity prices paid to suppliers in PJM, including EPSA members,¹⁷ which would otherwise prevent the capacity market from functioning properly.¹⁸ Given this potential impact, EPSA and its members have the right to review the confidential information in order to determine whether WDE's costs indeed qualify for an exemption from the MOPR.

2. WDE did not otherwise carry its burden under *Mojave* and *Westar*.

In addition to failing to carry its burden under the specific *Mojave* standards, WDE otherwise failed to carry its burden under *Mojave* and *Westar*. For example, WDE

¹⁶ *Illinois AG* at P 17 (finding that parties accused of manipulation by the Illinois Attorney General have the right to review confidential information supporting that claim in order to "assess the legitimacy of the Attorney General's claims."); *Allete v. Midwest Independent Transmission System Operator*, 117 FERC ¶ 61,090 (2006)(Minnesota Power allowed to review confidential information submitted by MISO to accurately evaluate information that directly pertains to its complaint"); *Bradwood Landing LLC*, 116 FERC ¶ 61,125 at P 3 (2006)(granting environmental agencies "and any other party" access to confidential information under a protective order to review impact of liquefied natural gas facility).

¹⁷ *PJM Interconnection L.L.C.*, 117 FERC ¶ 61,331 at P 104 (finding that the Minimum Offer Price assures that net buyers do not exercise monopsony power by seeking to lower prices through self-supply); *Devon Power, L.L.C.* 115 FERC ¶ 61,340 at P 113 (2006)("when load owns new resources, they may have an interest in depressing the auction price, since doing so could reduce the prices they must pay for existing capacity procured in the auction.")

¹⁸ *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318 at P 165 (2007) (the MOPR helps to ensure (i) that capacity prices will reflect the price needed to elicit new entry when new capacity is needed and (ii) the capacity market works efficiently and produces just and reasonable prices that will reliably guide private investment in electric infrastructure); *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157 at P 90 (a capacity market will not be able to produce the needed investment to service load reliably if a subset of suppliers is allowed to bid non-competitively to depress market clearing prices).

never proves the redacted information is confidential¹⁹ – it asks the Commission to presume it is confidential.

Their argument is threefold:

- (1) the information redacted proves that their costs are below the MOPR;
- (2) the amount of these costs will be bid into the BRA; and
- (3) therefore the redacted costs should not be available to all parties with an interest in the outcome of this proceeding.

But because the information has never been subject to any review, the parties to this proceeding (as well as the Commission) have no basis on which to conclude that the redacted information in fact proves that their full and comparable costs are below the MOPR, and thus should be kept confidential because those costs will be bid into the BRA at that level. This lack of review raises serious concerns, particularly in light of the apparent contradiction between the below market costs claimed in the FERC filing and the implications of representations made in New Jersey state proceedings that WDE requires the support of a contract for differences which represents an assurance of at least \$1.9 billion over 15 years of the life of the project.²⁰ Should WDE bid uneconomic supply in to the RPM auctions, interested parties and market participants will be subject to the long term negative impacts to the federally regulated competitive wholesale market and therefore must be given the opportunity to review and assess the data

¹⁹ *Westar Energy Inc. and ONEOK Energy Services Company, L.P.*, 115 FERC ¶ 61,034 (2006) (stating that the first step is to “assess whether the information qualifies as confidential” and then (i) determine whether particular requesters needs access to some or all of the information and (ii) determine what protection is needed for confidential information that will be disclosed under the protective order.)

²⁰ See: *Statement of the PJM Power Providers Group (P3) on New Jersey Senate Bill 2381, p.2, using the formula: Standard Offer Capacity Price (\$232.75) * 1500 MWs * 15 years * 365 days = \$1,911,459,375. Available at: <http://www.p3powergroup.com/siteFiles/News/362B07A343BDD583F6BF013B0E3948B4.pdf>*

underpinning this extraordinary request subject to the protective orders discussed in these comments.

In fact, much of this information may not be confidential. For example, the Energy and Ancillary Services Offset is a key component in determining whether WDE's costs are in fact below the MOPR. Calculating the offset, however, derives from models commonly used in the electric industry. The parties to this proceeding need access to those models, as well as the assumptions plugged into the models, to determine whether the offset has been accurately calculated. The use and application of this market information by WDE is critical to the calculations of its unit specific costs and revenues underpinning the instant request. Verification and analysis of these market inputs and modeling by intervenors is necessary to gauge the accuracy of WDE's estimates. In addition, much of the other information is standard cost data a generator would file in, for example, a reliability must run ("RMR") proceeding, which is routinely available subject to certain protections notwithstanding the sensitive nature of the commercial information. Similarly, while some of WDE's redacted information may be confidential, that does not mean that the information could not be provided under an appropriately crafted protective order.²¹

Having asked (prematurely) for the Commission to presume that all the information is confidential, WDE then asks that the Commission adopt the most restrictive and unorthodox approach in making this presumed confidential information available, *i.e.*, providing the information only to the Commission, PJM and Market Monitor – the latter two only subject to a protective order – and preventing other parties

²¹ *Sithe New Boston, LLC*, 100 FERC ¶ 61,106 (providing for the receipt of confidential information regarding RMR through appropriate protective orders to protect confidentiality).

with an interest in this proceeding from reviewing the necessary information. In making confidential information available, however, the Commission uses the *least* restrictive approach that will protect the harm from disclosure, not the most restrictive approach.²² In addition, when there is a protective order in place, the Commission's practice has been to allow all the parties willing to abide by the protective order to access confidential information.²³

Moreover, the cases cited by WDE are not persuasive because those cases did not carry the burden required under *Mojave* and *Westar*. The various bid and equipment cases cited are of little relevance because in those cases no one was challenging the actual costs – by contrast in this case parties wish to challenge the costs to ensure that a bid below the MOPR is consistent with their costs. In addition, the cases cited generally address the ability of ISOs to release specific, non-aggregated bid and offer data generally to the public. In this case, no one is proposing to release the confidential information publicly but rather to specifically limit review under an appropriate protective order that will prevent the information from being publicly released. Finally, the cases cited by WDE actually support the EPSA proposal that intervenors should be allowed to review this information under an appropriately crafted protective order.²⁴ For example, in *Denver City Energy Associates*, the Commission

²² *Westar* at P 9, “[t]he goal is to issue the least restrictive order that will accomplish the purpose of protecting against the harm of disclosure.” *Illinois AG* at P 18 (rejecting as “too broad” proposed restrictions that would limit the release of privileged information to a party’s outside attorneys and outside consultants with a restriction on future activities.)

²³ *Portland General Electric Company, Enron Power Marketing*, Docket No. EL02-114-000, issued October 16, 2002 at Ps 11-12 (J Massey ALJ)(rejecting utility’s attempt to provide information only to FERC Trial Staff and the California Public Utilities Commission finding that when all participants were willing to sign the protective order, all should be able to review the data.)

²⁴ See *WDE Filing* at fn. 23.

granted access to confidential information so long as the requesting party executed a non-disclosure certificate.²⁵

- B. An appropriately crafted protective order would restrict access to confidential information by Competitive Duty Personnel and the Commission should adopt such a protective order.

While WDE did not meet its burden under *Mojave* and *Westar* to prevent EPSA and its members or other intervenors from reviewing confidential information subject to an appropriate protective order, EPSA shares WDE's concern that commercially sensitive information should not be available to the public. As such, in an effort to balance that concern with the need to review this information, any protective order should restrict access by CDP, which the Commission has previously defined as those persons whose duties include (i) the marketing or sale of electric power at wholesale; (ii) the purchase or sale of electric power at wholesale; (iii) the direct supervision of *any* employee with such responsibilities, or (iv) primary responsibility for negotiating power purchase agreements and transmission service.²⁶

Such an approach would truly strike the "reasonable balance" WDE seeks. This approach is stricter than the Commission's model protective order and has routinely been used when concerns have been raised that the competitive bidding process would be skewed by a wider dissemination of confidential information.²⁷

²⁵ *Denver City Energy Associates, L.P.*, 131 FERC ¶ 61,029 at P 35 cited at fn 23 (granting access to Exhibit I of a Section 203 application under appropriate protective order).

²⁶ Counsel or consultants employed or designated by a party are not Competitive Duty Personnel. See, e.g., P 9 of the Illinois AG Protective Order.

²⁷ *Illinois AG* at P 18 and Protective Order at P 9 (restricting access by competitive duty personnel when concerns expressed that confidential information concerning bidding information could be released);

III. CONCLUSION

Wherefore, the Commission should reject WDE's proposed procedures and adopt a protective order that limits access by competitive duty personnel.

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March 4, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the comments via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., March 4, 2011.



Nancy Bagot, Vice President of Regulatory Affairs