

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

PJM Interconnection, L.L.C.	)	Docket No. ER11-2875-____
	)	
	)	
PJM Power Providers Group	)	Docket No. EL11-20-____
	)	
v.	)	
	)	
PJM Interconnection, L.L.C.	)	
	)	

(not consolidated)

**REQUEST FOR REHEARING  
OF THE INDICATED PARTIES**

Pursuant to Section 313(a) of the Federal Power Act ("FPA"),<sup>1</sup> and Rules 212 and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"),<sup>2</sup> Calpine Corporation, the Electric Power Supply Association ("EPSA"),<sup>3</sup> the GenOn Parties,<sup>4</sup> NextEra Energy Generators ("NextEra"),<sup>5</sup> and the PPL Parties<sup>6</sup> (collectively, the "Indicated

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<sup>1</sup> 16 U.S.C. § 825I(a) (2006).

<sup>2</sup> 18 C.F.R. §§ 385.212 and 385.713 (2011).

<sup>3</sup> EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities serving power markets. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue. EPSA filed a timely motion to intervene in Docket No. EL11-20-000 on Feb. 9, 2011, and in Docket No. ER11-2875-000 on Feb. 14, 2011.

<sup>4</sup> The GenOn Parties are GenOn Energy Management, LLC, GenOn Chalk Point, LLC, GenOn Mid-Atlantic, LLC, GenOn Potomac River, LLC, GenOn REMA, LLC, and GenOn Wholesale Generation, LP.

<sup>5</sup> The NextEra Energy Generators are FPL Energy Marcus Hook, L.P., North Jersey Energy Associates, L.P., Backbone Mountain Windpower LLC, Mill Run

Parties”)<sup>7</sup> respectfully request rehearing of one aspect of the Commission's November 17, 2011 Order on Compliance Filing, Rehearing and Technical Conference (“November 17 Order”).<sup>8</sup> Specifically, the Indicated Parties request rehearing of the Commission’s adoption in the November 17 Order of section 5.14(h)(5)(iii) of the PJM Open Access Transmission Tariff (“Tariff”) as proposed by the PJM Interconnection, L.L.C. (“PJM”) in a May 12, 2011 compliance filing,<sup>9</sup> relating to the review of unit specific cost offers in the implementation of the Minimum Offer Price Rule (“MOPR”) provisions of the Reliability Pricing Model (“RPM”) capacity market.

P3, in which various of the Indicated Parties are members, and other parties protested that aspect of the PJM Compliance Filing. For the reasons stated herein, the Commission should reconsider its decision to accept the PJM Tariff language relating to unit specific cost offer review without modification, and issue an order on rehearing requiring PJM to remove from its Tariff the objectionable language, which was in excess of its compliance obligations

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Windpower LLC, Somerset Windpower LLC, Meyersdale Windpower LLC, Waymart Wind Farm, LP, and Pennsylvania Windfarms, Inc.

<sup>6</sup> The PPL Parties are PPL Electric Utilities Corporation; PPL EnergyPlus, LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; Lower Mount Bethel Energy, LLC; PPL New Jersey Solar, LLC; PPL New Jersey Biogas, LLC; and PPL Renewable Energy, LLC.

<sup>7</sup> The Commission accepted the intervention of each of the Indicated Parties. Order Accepting Proposed Tariff Revisions, Subject to Conditions, and Addressing Related Complaint in *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 13 (2011) (“April 12 Order”).

<sup>8</sup> *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 (2011).

<sup>9</sup> *PJM Interconnection, L.L.C.*, Docket No. ER11-2875-002, PJM Compliance Filing (filed May 12, 2011) (“Compliance Filing”). That filing was submitted in response to an obligation set forth in the April 12.

imposed by the April 12 Order, and is otherwise unjust, unreasonable and unduly discriminatory.

## I. BACKGROUND

In the April 12 Order, at P 122, the Commission stated:

In conducting an individualized generation review, PJM proposes that: a sell offer would be permissible when such offer is consistent with the competitive, cost-based, fixed, nominal levelized, net cost of new entry were the resource to rely solely on revenues from PJM-administered markets. We find that this standard is appropriate for reviewing such cost estimates and that *PJM must include this language in its revised tariff*.<sup>10</sup>

In Section 5.14(h)(5)(iii) of its Compliance Filing made in response to this directive, PJM only included *some of* that language. PJM proposed that Tariff section 5.14(h)(5)(iii) state:

(iii) A Sell Offer evaluated hereunder shall be permitted if the information provided reasonably demonstrates that the Sell Offer's competitive, cost-based, fixed, nominal levelized, net cost of new entry is below the minimum offer level prescribed by subsection (4), based on competitive cost advantages relative to the costs estimated for subsection (4), including, without limitation, competitive cost advantages resulting from the Capacity Market Seller's business model, financial condition, tax status, access to capital or other similar conditions affecting the applicant's costs, or based on net revenues that are reasonably demonstrated hereunder to be higher than estimated for subsection (4). Capacity Market Sellers shall be asked to demonstrate that claimed cost advantages or sources of net revenue that are irregular or anomalous, that do not reflect arm's-length transactions, or that are not in the ordinary course of the Capacity Market Seller's business are consistent with the standards of this subsection. Failure to adequately support such costs or revenues so as to enable the Office of the Interconnection to make the determination required in this section will result in denial of an exception hereunder by the Office of the Interconnection.<sup>11</sup>

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<sup>10</sup> April 12 Order at P 122 (emphasis added).

<sup>11</sup> Compliance Filing, see Tariff Attachment.

P3 protested PJM's proposed section 5.14(h)(5)(iii) Tariff language, indicating that the PJM Compliance Filing contained language that extended well beyond the compliance obligation set forth in the April 12 Order, and the proposal otherwise was unjust, unreasonable and unduly discriminatory because its standards were arbitrary and subjective and thus would require inappropriate implementation discretion by PJM and the Independent Market Monitor ("IMM").<sup>12</sup>

Other parties that protested the same aspect of the Compliance Filing included the IMM<sup>13</sup> and Hess Corporation ("Hess").<sup>14</sup> The IMM indicated that PJM included in section 5.14(h)(5)(iii) additional language that "is not required by and does not fall within the scope of compliance with the April 12th Order."<sup>15</sup> The IMM explained that the proposal lacked merit because:

[s]ome of the additional revisions are obscure, and others appear to directly contradict the Commission-approved standard by permitting consideration of revenues from sources other than PJM-administered markets. This new standard appears to directly contradict the Commission's required standard, appears to directly contradict the purpose of the MOPR and appears to permit the behaviors that PJM opposed in its initial filing (at 20–21). The best possible interpretation is that this additional standard reduces the clarity of the Commission-approved standard and introduces subjective and inconsistent standards of review. Accordingly, this language should be rejected.<sup>16</sup>

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<sup>12</sup> *PJM Power Providers Group v. PJM Interconnection, L.L.C., et al.*, Docket Nos. EL11-20-000, *et al.*, Protest of the PJM Power Providers Group (filed June 3, 2011) ("P3 Protest").

<sup>13</sup> *PJM Interconnection, L.L.C.*, Docket No. ER11-2875-002, Protest of the Independent Market Monitor for PJM (filed June 3, 2011) ("IMM Protest").

<sup>14</sup> *PJM Interconnection, L.L.C.*, Docket No. ER11-2875-002, Protest of Hess Corporation (filed June 3, 2011) ("Hess Protest").

<sup>15</sup> IMM Protest at 4.

<sup>16</sup> *Id.* at 4-5.

In an Attachment to the IMM Protest, the IMM included proposed Tariff language to replace what PJM had proposed in section 5.14(h)(5)(iii) that “captures verbatim the standard established” in the April 12 Order.

Hess’ Protest to the Compliance Filing alleged that “there are several areas that are not compliant with the April 12 Order or inadequate as proposed”<sup>17</sup> and that PJM’s section 5.14(h)(5)(iii) Tariff language would “place too much ill-defined discretion unilaterally in PJM.”<sup>18</sup> Specifically, Hess stated:

Hess strongly supports the use of the reference unit finance structure (capital structure, cost of debt and return on equity) rather than allowing project developers to put forth their individual financing structures. To use developer-submitted project-specific financing structures introduces an extraordinary opportunity for developers to game the unit cost calculation and effect the unit MOPR exemption determination. At the same time, allowing for individual financing terms places PJM and the IMM in the uncomfortable and inappropriate position of judging the economics of bilateral contracts that might be the basis for favorable financing arrangements.

For instance, on the one hand, knowing where the project costs need to be in order to clear the RPM market, a developer can engineer an attractive bilateral (tolling) arrangement with a highly capitalized parent or partner(s) that is priced to attain a very attractive financing package. This engineered, out-of-market bilateral contract, by producing favorable financing costs, would have the effect of lowering the project’s minimum bid offer and greatly enhancing the project’s ability to clear the RPM market. In effect, allowing the individual developers to be creative with bilateral arrangements and with producing favorable financing is tantamount to tailoring the perceived “economic-ness” of a project for the MOPR exemption determination.<sup>19</sup>

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<sup>17</sup> Hess Protest at 1.

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.* at 13.

Notwithstanding these objections, the Commission, in the November 17 Order, approved Tariff section 5.14(h)(5)(iii) as proposed by PJM.<sup>20</sup>

## **II. CONCISE STATEMENT OF GROUNDS UPON WHICH REHEARING IS SOUGHT**

The Commission erred in accepting a PJM compliance filing in which PJM deviated from, and exceeded, its compliance obligations, and proposed unjust, unreasonable and unduly discriminatory Tariff language replete with arbitrary and subjective standards that would permit offers to be accepted even if they are the result of the very behavior the MOPR is designed to thwart.

## **III. STATEMENT OF ISSUES**

The Commission should issue an order on rehearing reversing its decision to accept the Tariff language regarding unit specific offers for the following reasons:

1. The operation of the Minimum Offer Price Rule may be thwarted by a variety of structural or contractual arrangements, the effects of

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<sup>20</sup> November 17 Order at PP 242-251. On November 28, 2011, P3 filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit of the April 12 Order and the November 17 Order, which has been assigned No. 11-1455. The same day, PSEG Energy Resources & Trade LLC also filed a petition for review with the DC Circuit in Case No. 11-1456. Also on November 28, 2011, the New Jersey Board of Public Utilities and New Jersey Division of Rate Counsel filed a petition for review in the Court of Appeals for the Third Circuit in Case No. 11-4245. On December 8, 2011, in MCP No. 107, the United States Judicial Panel on Multidistrict Litigation issued a Consolidation Order consolidating the petitions in the Third Circuit. In addition, on December 16, 2011, the Maryland Public Service Commission filed a petition for review in the Third Circuit assigned Case No. 11-4405. This petition has not yet been consolidated. Because the Commission ruled on PJM's section 5.14(h)(5)(iii) Tariff language as filed in the May 12 Compliance Filing for the first time in the November 17 Order, the Indicated Parties are seeking rehearing at the Commission relating to this issue on a timely basis at this time. Other issues were deemed ripe for appeal as of the November 28, 2011 appellate filings.

which the revised Tariff inappropriately may permit to be reflected in bids.<sup>21</sup>

2. PJM proposed Tariff language that was not appropriate for the Commission to accept through a compliance filing because it exceeded the scope of PJM's compliance obligation.<sup>22</sup>
3. The Tariff provides inappropriate discretion to the IMM and PJM and lacks objective criteria that are needed to promote market transparency.<sup>23</sup>

#### IV. REQUEST FOR REHEARING

##### A. **Despite the Intent of the MOPR, the Commission Accepted a Unit Specific Review Process That Might Permit Favorable Contract Terms to be Considered to Justify Low Offers**

PJM initially proposed, and the Commission in the April 12 Order considered, a proposal that new resources could seek a determination from the Commission that their "Sell Offer is permissible because it is consistent with the competitive, cost-based, fixed, nominal levelized, net cost of new entry were the resource to rely solely on revenues from PJM-administered markets (i.e., were all

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<sup>21</sup> See April 12 Order at P 87 (acknowledging that entities should not be permitted "to evade mitigation by structuring a new entry transaction in such a way that achieves the same price-lowering effect without triggering the MOPR."), at P 88 (gaming may be accomplished through various forms); *ISO New England, Inc. and New England Power Pool Participants Committee*, 135 FERC ¶ 61,029 (2011); *ISO New England, Inc. and New England Power Pool Participants Committee*, 131 FERC ¶ 61,065 (2010); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 (2008).

<sup>22</sup> See *California Power Exchange Corp.*, 101 FERC ¶ 61,330 at p. 62,371 (2002); *E.ON U.S. LLC*, 134 FERC ¶ 61,167 at P 43 (2011); *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,186 at PP 34, 40, 45, 48 (2010); *Cal. Indep. Sys. Operator Corp.*, 134 FERC ¶ 61,070 at PP 77–78 (2011); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006).

<sup>23</sup> See April 12 Order at P 121; *Cal. Indep. Sys. Operator Corp.*, 136 FERC ¶ 61,012 (2011); *Cal. Indep. Sys. Operator Corp.*, 133 FERC ¶ 61,039 (2010), *order on reh'g and compliance filing*, 134 FERC ¶ 61,070 at P 77 (2011); See *Wholesale Competition in Regions with Organized Electric Markets*, Advance Notice of Proposed Rulemaking, FERC Stats. & Regs., Proposed Regulations ¶ 32,617 at P 107 (2007); *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, Policy Statement, 111 FERC ¶ 61,267 (2005); *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 (1997).

output from the unit sold in PJM-administered spot markets, and the resource received no out-of-market payments).<sup>24</sup> The Commission determined that the IMM and PJM, rather than the Commission, should review those requests as an initial matter, and it directed PJM to make a compliance filing including Tariff revisions that allow the IMM and PJM to review such cost justifications.<sup>25</sup> The Commission explained that:

In conducting an individualized generation review, PJM proposes that: a sell offer would be permissible when such offer is consistent with the competitive, cost-based, fixed, nominal levelized, net cost of new entry were the resource to rely solely on revenues from PJM-administered markets.<sup>26</sup>

Continuing on, the Commission held:

We find that this standard is appropriate for reviewing such cost estimates and that PJM *must* include *this language* in its revised tariff.<sup>27</sup>

PJM inexplicably omitted a portion of the text in Section 5(iii),<sup>28</sup> and added additional text that omits any objective criteria by which bidders' demonstrations will be assessed.<sup>29</sup> The Commission erred in the November 17 Order in approving text that deviated from the clear and unambiguous directive to PJM

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<sup>24</sup> April 12 Order at P 110, *citing PJM Interconnection, L.L.C.*, Docket No. ER11-2875-000, Revisions to the PJM Open Access Transmission Tariff at Attachment B, (filed Feb. 11, 2011).

<sup>25</sup> April 12 Order at P 118.

<sup>26</sup> *Id.* at P 122.

<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> The omitted text is: "were the resource to rely solely on revenues from PJM-administered markets."

<sup>29</sup> The added text includes the words from "is below" to "Office of the Interconnection" in Tariff section 5.14(h)(5)(iii) set forth in Section I above.

contained in the April 12 Order.<sup>30</sup> As will be explained herein, it also erred in approving the PJM Tariff language because the text is unjust and unreasonable.

The Commission has acknowledged that the MOPR should be applied to resources that may have incentives to submit bids below their actual entry costs, and that entities should not be permitted “to evade mitigation by structuring a new entry transaction in such a way that achieves the same price-lowering effect without triggering the MOPR.”<sup>31</sup> Indeed, the Commission previously recounted a PJM concern that “a buyer wishing to reduce the clearing price below a competitive level for the benefit of its load could achieve that result through the terms of its power purchase agreement with the new entrant”<sup>32</sup> by use of its bilateral contract. The Commission acknowledged that evasion through gaming might occur through various forms.<sup>33</sup>

Despite the Commission’s understanding expressed in these referenced discussions that a variety of means could be employed in seeking to evade the MOPR, in the November 17 Order, the Commission inappropriately approved Tariff language that may be applied so as to permit various cost advantages negotiated at arm’s-length to be considered in justifying bids below the otherwise

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<sup>30</sup> In the November 17 Order the Commission stated that it had not, in the April 12 Order, precluded the inclusion in a sell offer of revenues outside of the PJM Markets. November 17 Order at P 244. Yet, the April 12 Order did indeed specifically endorse language requiring PJM to consider cost data as if “the resource [were] to rely *solely on revenues from PJM-administered markets.*” April 12 Order at P 122 (emphasis added). The Commission’s deviation from the April 12 Order’s requirements in the November 17 Order should be corrected on rehearing.

<sup>31</sup> April 12 Order at P 87.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at P 88.

prescribed minimum offer level, contrary to the intent of the MOPR. In fact, the Commission seemingly deviated from its earlier views when it expressed sympathy for sellers “that have negotiated contracts that have enabled them to secure favorable credit terms.”<sup>34</sup> Yet contracts with any kind of “favorable” terms not available on a competitive basis are precisely those that should be subject to appropriate review pursuant to the MOPR.<sup>35</sup>

Unfortunately, the Tariff language that the Commission approved merely states that a Capacity Market Seller may demonstrate that irregular or anomalous revenue sources, cost advantages not negotiated at arm’s-length, or that are not available in the ordinary course of the entity’s business, may nonetheless be shown consistent with the standards of the Tariff. No criteria for the demonstration required to prove the benefits are consistent with the Tariff is provided, and thus no criteria to challenge the demonstration as lacking merit is provided. The provision lets the reviewer decide whether the bidder has or has not made the demonstration, while providing no means for others to assess the accuracy of, or otherwise challenge, that determination. In the politically-charged climate that surrounds the PJM capacity market, a Tariff provision without reviewable, objective criteria cannot meet the just and reasonable standard of the Federal Power Act (“FPA”).

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<sup>34</sup> November 17 Order at P 249.

<sup>35</sup> See e.g., April 12 Order at P 6 (“The MOPR was established in the 2006 RPM Settlement in order to address the concern that some market participants might have an incentive to depress market clearing prices by offering supply at less than a competitive level.”); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 104 (2006) (finding that the MOPR is “a reasonable method of assuring that net buyers do not exercise monopsony power by seeking to lower prices through self supply”).

Contracts entered into pursuant to a state solicitation through a Request for Proposals (“RFP”) may be negotiated at arm’s-length, but at the same time may permit the seller to access favorable credit terms or other benefits not available to other parties. Such contracts may provide precisely the subsidies that will depress the RPM capacity market clearing price if the contracts are able to escape application of the MOPR, whether via an exemption or otherwise.<sup>36</sup> Yet, pursuant to the Tariff provisions adopted by the Commission, the IMM or PJM could approve a MOPR exemption for an entity maintaining such a contract.<sup>37</sup>

The Commission had no basis to assume that the only “inappropriate benefits” to be derived from contracts executed as a result of such solicitations would be the price/MWH paid for power. Instead, many of the benefits the

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<sup>36</sup> The Commission has recognized the detrimental results that are likely to occur where “[e]ntities with buyer-side market power can artificially lower the capacity price, sometimes substantially, by subsidizing new investment that is then offered into the market at prices below its full entry costs.” *ISO New England, Inc. and New England Power Pool Participants Committee*, 135 FERC ¶ 61,029 at P 158 (2011) (addressing proposal to adopt buyer-side mitigation to address anti-competitive effects of buyer market power), *reh’g pending*; *See also ISO New England, Inc. and New England Power Pool Participants Committee*, 131 FERC ¶ 61,065 at P 69 (2010) (describing ISO efforts “intended to discourage buyers who have the incentive and ability to suppress market clearing prices below a competitive level from doing so” and noting the Commission has “previously accepted rules to address such uneconomic entry in” several RTO/ISO capacity markets in order “to ensure that the prices in capacity markets reflect the market cost of new entry when new entry is needed”); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 101 (2008) (finding that “[l]arge net buyers may have both the incentive and the ability to depress prices through uneconomic entry”, which would be “inefficient” and result in captive ratepayers “bearing the risk of uneconomic investment”, and adopting buyer-side mitigation to help avoid this result).

<sup>37</sup> It is of little solace that market participants can file a complaint proceeding if this occurs. The uncompetitive bid may have established the market clearing price by the time the complaint process runs its course. Moreover, market participants presumably will not have access to the seller’s cost justification information in order to pursue such a challenge, nor will they have objective criteria they can demonstrate have not been met.

Commission permitted the IMM or PJM to include in assessing the legitimacy of cost advantages could be provided by the state or other participant in a discriminatory RFP solicitation. For example, it is possible that cost estimates that are the direct result of the award of a discriminatory solicitation (such as a solicitation that only allows new generation to compete and prescribes future RPM bidding behavior) may result in a favorable capital cost structure.

Roy J. Shanker, PH.D. testified earlier in this proceeding that:

It does not matter which technology is being used to distort prices. All uncompetitive low offers can distort market prices, regardless how beneficial or benign they may otherwise be. If an unneeded and uneconomic MW is distorting prices, RPM is blind as to where it came from. And as PJM itself notes, RPM cannot present accurate price[ ] signals if uncompetitive low offers are not excluded. The source is irrelevant.<sup>38</sup>

While this testimony was submitted in opposition to efforts to exempt certain resource types from mitigation, it is equally applicable to the issue at hand. An uncompetitive offer that is due to a capital cost structure advantage that is facilitated by a third party is just as objectionable as one that is based on a direct cash payment by a third party. Either equally distorts the accurate price signal that is essential to the appropriate operation of capacity markets.<sup>39</sup> The means by which the cost advantage is structured is not what matters. Rather, the existence of an advantage not available to other competitive bidders should be

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<sup>38</sup> *PJM Power Providers Group v. PJM Interconnection, L.L.C., et al.*, Docket Nos. EL11-20-000, *et al.*, P3's Comments and Protest (filed Mar. 4, 2011), Ex. 4, Testimony of Roy J. Shanker at 4.

<sup>39</sup> See *N.Y. Indep. Sys. Operator*, 122 FERC ¶ 61,211 at PP 100-01, *order on reh'g*, 124 FERC ¶ 61,301 (2008).

the determining factor in the decision to deny the inclusion of such cost advantage in a supplier's bid.

Here, even though the resulting capital structure is anomalous or irregular, the Tariff provision would permit the Capacity Market Seller the opportunity to include these benefits in its bid. The Commission may have closed some buyer side market power MOPR loopholes in its April 12 and November 17 Orders, but has created another one equally large when it accepted this particular Tariff provision. Its decision to do so was error and should be reversed on rehearing.

**B. The Commission Improperly Accepted a PJM Compliance Filing that Exceeded the Requirements of the Order Imposing the Compliance Obligation**

The permissible scope of a compliance filing is limited to complying with the Commission's directive that precipitated the filing. Any other matters should be proposed through an FPA Section 205 or 206 filing as appropriate.<sup>40</sup> In its May 12 Compliance Filing, PJM improperly proposed Tariff changes beyond those required to comply with the April 12 Order, which specified that PJM must include "this language" in its compliance filing, referring to the language the Commission included in P 122 of the April 12 Order. The Commission erred in accepting Tariff changes that did not comply with, and went beyond, the requirements of the April 12 Order.

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<sup>40</sup> See, e.g., *California Power Exchange Corp.*, 101 FERC ¶ 61,330 at p. 62,371 (2002); *E.ON U.S. LLC*, 134 FERC ¶ 61,167 at P 43 (2011); *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,186 at PP 34, 40, 45, 48 (2010); *Cal. Indep. Sys. Operator Corp.*, 134 FERC ¶ 61,070 at PP 77–78 (2011); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006).

In another proceeding in which the Commission directed an Independent System Operator to make a tariff change in a compliance filing and the ISO made changes beyond those required, the Commission rejected the compliance filing.

The Commission stated:

We find that the CAISO's filing does go beyond the scope of the Commission's direction in the April 1 MEEA Compliance Order. The Commission directed the CAISO to submit a compliance filing making a specific change to the last sentence of tariff section 27.5.3.2.2 regarding applying default pricing to transactions that have not been self-certified. The CAISO's April 28 Compliance Filing does not conform to the Commission's direction.<sup>41</sup>

On rehearing in this proceeding, the Commission should do the same. PJM did not conform to the Commission's direction, which was to include the language from P 122 of the April 12 Order verbatim. Thus, the Commission should reject the changes to the Tariff and require PJM to make a new compliance filing to incorporate the text verbatim throughout the portions of PJM's tariff that pertain to buyer market power mitigation.

**C. The Tariff Provision Permits PJM Inappropriate Discretion; Objective Standards Should be Used Instead of Subjective Ones**

In the April 12 Order, the Commission directed PJM to make a compliance filing relating to units' ability to justify unit specific cost offers with the IMM. Specifically, PJM was to file Tariff provisions specifying "*the objective standards* by which such submittals will be evaluated."<sup>42</sup> Notably, the Commission in the April 12 Order also made note of its previous disapproval of a proposal "that would have given the IMM "unfettered discretion" to make such determinations

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<sup>41</sup> *Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,153 at P 13 (2010).

<sup>42</sup> April 12 Order at P 121.

unilaterally through a process that would have lacked the certainty for market participations that more objective MOPR tariff standards could provide.”<sup>43</sup> The Commission erred in the November 17 Order because it approved a standard filed by PJM that is anything but objective.<sup>44</sup>

Pursuant to the Tariff language, PJM or the IMM not only will determine whether cost advantages are “irregular or anomalous” but also would have the latitude to determine that irregular or anomalous costs or those that result from contracts that do not reflect arm’s-length transactions, *may be included in a seller’s cost bid*. There is no objective standard whatsoever specified for what criteria would be used to determine that an otherwise irregular or anomalous cost advantage or one arising from a contract not negotiated arm’s-length can be included in a seller’s cost justification.<sup>45</sup> It is completely unclear how a unit can

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<sup>43</sup> *Id.* at P 120.

<sup>44</sup> *Cal. Indep. Sys. Operator Corp.*, 136 FERC ¶ 61,012 at P 14 (2011) (rejecting proposed tariff language that would have allowed ISO discretion to establish deadlines for market participant responses to information requests, finding that “[s]uch a result is not permissible since it would leave the establishment of these deadlines to [the ISO’s] discretion rather than to an objective standard imposed in or by the tariff”); *Cal. Indep. Sys. Operator Corp.*, 133 FERC ¶ 61,039 at P 218 (2010), *order on reh’g and compliance filing*, 134 FERC ¶ 61,070 at P 77 (2011) (rejecting proposed tariff language as it was “unclear and could be read to provide [the ISO] with too much discretion” and directing ISO to revise language to remove ambiguity).

<sup>45</sup> Objective standards are critical to ensuring independence of market monitors and RTOs and providing transparency for market participants. See *Wholesale Competition in Regions with Organized Electric Markets*, Advance Notice of Proposed Rulemaking, FERC Stats. & Regs., Proposed Regulations ¶ 32,617 at P 107 (2007) (“since the very beginnings of market monitoring, the Commission has emphasized the importance of independence and objectivity on the part of market monitors, . . .”); *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, Policy Statement, 111 FERC ¶ 61,267 at P 5 (2005) (reiterating that ISOs/RTOs may administer compliance with tariff provisions only if they involve objectively identifiable behavior); *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 at 62,282 (1997) (“Most importantly, [PJM’s proposed market

demonstrate to PJM or the IMM that “claimed cost advantages or sources of net revenue that are irregular or anomalous, that do not reflect arm’s-length transactions, or that are not in the ordinary course of the Capacity Market Seller’s business” are consistent with the Tariff standards and may be included in the seller’s bid. It is similarly unclear what criteria PJM will apply in making such determination. The Indicated Parties respectfully suggests that an appropriate and objective standard would be to exclude revenues derived from this category of revenue sources. The Commission was incorrect when it determined that the PJM standard was more objective than evaluating whether a cost or revenue is “competitive”.

## **V. CONCLUSION**

WHEREFORE, for the reasons stated herein, the Indicated Parties respectfully requests that the Commission issue an order on rehearing rejecting the section 5.14(h)(5)(iii) Tariff language filed by PJM in the Compliance Filing and directing PJM to make a compliance filing that conforms with the requirements of P 122 of the April 12 Order.

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monitoring plan] must ensure that the monitoring program will be conducted in an independent and objective manner.”).

Date: December 19, 2011

Nancy Bagot  
Vice President of Regulatory Affairs  
Electric Power Supply Association  
1401 New York Ave. NW  
Suite 1230  
Washington, DC 20005  
Tel: 202-628-8200  
Fax: 202-628-8260  
NancyB@epsa.org

*On behalf of the Electric Power Supply Association*

Sarah Novosel  
Senior VP and Managing Counsel  
Calpine Corporation  
875 15th Street, NW  
Suite 700  
Washington, DC 20005  
Tel: (202) 777-7623  
Fax: (202) 589-0922  
snovosel@calpine.com

*On behalf of Calpine Corporation*

Respectfully submitted,

/s/ Sandra E. Rizzo

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Sandra E. Rizzo  
Bracewell & Giuliani LLP  
2000 K St., NW, Suite 500  
Washington, DC 20006  
Tel: (202) 828-5858  
Fax: (202) 857-4815  
sandra.rizzo@bgllp.com

Jesse A. Dillon  
PPL Services Corporation  
Two North Ninth Street  
Allentown, PA 18101  
Tel: (610) 774-5013  
jadillon@pplweb.com

*On behalf of the PPL Parties*

Carrie Hill Allen  
Assistant General Counsel  
GenOn Energy, Inc.  
601 13<sup>th</sup> St., NW, Suite 850N  
Washington, DC 20005  
Tel: (202) 585-3811  
carrie.allen@genon.com

*On behalf of the GenOn Parties*

Stephen L. Huntoon  
NextEra Energy Resources, LLC  
801 Pennsylvania Ave., N.W.  
Ste. 220  
Washington, D.C. 20004  
Tel: 202-349-3348  
Fax: 202-347-7076  
shuntoon@nextera.com

Christopher Orzel  
NextEra Energy Resources, LLC  
250 West 57th Street, Suite 901  
New York, N.Y. 10107  
Tel: 561-972-0673  
christopher.orzel@nexteraenergy.com

David Applebaum  
NextEra Energy Resources, LLC  
21 Pardee Place  
Ewing, New Jersey 08628  
Tel: 609-771-0894  
david\_applebaum@nextera.com

*On behalf of NextEra Energy  
Generators*

## CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing pleading this 19th day of December 2011, upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Sandra E. Rizzo

Sandra E. Rizzo