

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

PJM Interconnection, L.L.C.)	Docket Nos. ER05-1410-012
)	EL05-148-012
PJM Interconnection, L.L.C.)	Docket No. ER09-412-001

**COMMENTS OF THE
ELECTRIC POWER SUPPLY ASSOCIATION**

Pursuant to Rule 602(f) of the Federal Energy Regulatory Commission's (FERC or Commission) Rules of Practice and Procedure, 18 C.F.R. Section 385.602(f) (2008), and the Notice of Filing issued in the above-captioned proceedings on February 11, 2009, the Electric Power Supply Association (EPSA)¹ submits comments on the Settlement Agreement and Offer of Settlement filed by PJM Interconnection, L.L.C. (PJM) on February 9, 2009, (Settlement Offer) regarding proposed changes to the Reliability Pricing Model (RPM).² PJM filed the Settlement Offer on behalf of itself and a limited group of eleven stakeholders representing load interests. This group includes only one of the thirteen states within the PJM region. Fourteen entities, including the utility commissions of four states and the District of Columbia, committed that they

¹ EPSA is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities serving global 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.

² On December 12, 2008, PJM filed amendments to the PJM Open Access Transmission Tariff and Reliability Assurance Agreement Among Load-Serving Entities in the PJM Region in this proceeding. See PJM Interconnection, L.L.C., Docket No. ER09-412-000 (filed Dec. 12, 2008). The Settlement Offer purports to resolve all issues regarding the December 12 Tariff Filing.

would not oppose the Settlement Offer as filed. Of significance and as explained in the comments of the PJM Supplier Caucus (Supplier Caucus),³ none of its members were given notice of or included in the informal negotiations leading to the Settlement Offer, and none of its members has formally agreed to support, or not to oppose, the Settlement Offer.

EPSA asserts the proper course of action for the Commission is to move forward with a decision on the relative merits of the December 12 Tariff Filing as there is sufficient record in this proceeding for the Commission to do so.⁴ Given the lack of broad support for the Settlement Offer, EPSA strongly urges the Commission to evaluate the Settlement Offer as another alternative proposal or set of joint comments filed in the course of this proceeding to refine the RPM construct, rather than giving deferential weight to this filing as a settlement reflecting agreement across a range of affected stakeholders and interests. Specifically, EPSA believes the Commission should not elevate this filing as a consensus resolution of contested issues in this proceeding; rather, it should review the Settlement Offer and subsequent comments filed in response on an equal footing to parties' comments on elements of the December 12 Tariff Filing

³ See generally *Comments of the PJM Supplier Caucus Contesting Settlement Process*, Docket No. ER09-412-000, *et al.* (filed February 17, 2009). The Supplier Caucus comments state that this *ad hoc* group collectively owns over 97% of the transmission assets and over 95% of the generating capacity within PJM, and serves approximately 16 million retail customers, or "load" within PJM.

⁴ PJM's Report on the Stakeholder Process filed concurrently on December 12, 2008, with the Section 205 Tariff Filing included outlines of the proposals considered in the Capacity Market Evolution Committee (CMEC) process from PJM (Attachment 1), RPM Buyers and RPM Load Group (Attachment 2), and, the Suppliers (Attachment 3), Docket Nos. ER05-1410-000 and EL05-148-000 (Report). In addition, numerous stakeholders have filed comments on the December 12 Tariff Filing, including supporting affidavits of expert witnesses as well as answers to the initial comment filings. The proceeding is ripe for a decision on the merits.

in rendering its decision. In this regard, EPSA supports the comments filed by the Supplier Caucus contesting the settlement process.

I. BACKGROUND

On December 9, 2009, the Commission's Chief Administrative Law Judge (CALJ) established settlement proceedings, at PJM's request, to address PJM's forthcoming report and tariff filing responding to the Commission's September 19, 2008 order⁵ in the PJM RPM dockets. On December 12, 2008, PJM filed its Section 205 Tariff Filing (December 12 Tariff Filing) and a report on the efforts of PJM and its stakeholders, via the newly formed Capacity Markets Evolution Committee (CMEC), to address changes to the RPM.

Comments and protests on the December 12 Tariff Filing were submitted on or around January 9, 2009. The formal settlement discussions were scheduled through January 2009, but were terminated by mutual consent in these proceedings on January 15, 2009. However, PJM and members of the Buyer Caucus continued to negotiate without notice to other stakeholders and agreed to a proposal resulting in the Settlement Offer filed on February 9, 2009. Several members in the Buyer Caucus, including several of the parties to the Settlement Offer, have opposed RPM since its inception.⁶

⁵ *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,272 at P 52 (2008) (September 19 Order).

⁶ Several of these entities currently have an appeal pending at the Court of Appeals for the D.C. Circuit seeking to overturn the Commission's orders approving the original RPM settlement and to eliminate RPM. *PJM Interconnection L.L.C.*, 117 FERC ¶ 61,331 (2006), *appeal pending*, PSEG v. FERC, D.C. Circuit No. 07-1336 (consolidated cases, oral argument scheduled March 6, 2009). *See also PJM Interconnection, L.L.C.*, 124 FERC ¶ 61, 276 (2008) (Order Dismissing RPM Buyers Complaint).

II. COMMENTS

A. FERC Should Rule On The Merits Of The December 12 Tariff Filing

In considering the merits of any proposed changes to the RPM construct, EPSA believes the proper course of action for the Commission is to rule on the pending December 12 Tariff Filing because it has a full record in the proceeding on all provisions reflected in that filing. PJM's Answer to Protests and Comments on the December 12 Tariff Filing itself supports such action by the Commission.⁷ EPSA further urges the Commission to consider the Settlement Offer as simply another of several proposals offered by joint parties through comments and protests in the course of this proceeding, and not give deferential weight to the filing as a settlement of contested issues among diverse interests or parties. While many concerns were raised in comments and protests regarding certain provisions of the December 12 Tariff Filing, elements of the filing reflect input from across the stakeholder sectors.⁸ The Settlement Offer represents a further step away from any reflection of the work of the full range of market participants during the PJM CMEC stakeholder process. This Settlement Offer is not a compromise of any sort, but rather the lopsided position of a group of market participants that are fundamentally opposed to RPM in general.

Accordingly, the December 12 Tariff Filing should be the focus for consideration of possible RPM refinements and should be evaluated on its merits

⁷ See *Answer of PJM Interconnection, L.L.C., to Protests and Comments*, Docket No. ER09-412-000 (filed Feb. 2, 2009) (PJM Answer).

⁸ EPSA does not want to suggest that the Commission should approve a filing simply because it was part of the stakeholder process. The December 12 Tariff filing must live and die on the merits of the tariff changes as a just and reasonable proposal measured against the existing RPM provisions of the PJM Tariff.

in light of market participant comments on each element. The Settlement Offer should be viewed simply as another set of joint comments or a proposed alternative in this regard as the Commission makes its decision on any possible changes.

B. Support For The PJM Supplier Caucus Comments Contesting The Settlement Process

As stated, EPSA supports the comments of the PJM Supplier Caucus contesting the negotiating process used by PJM (following termination of formal settlement talks) resulting in the Settlement Offer. EPSA has articulated its view regarding the approach the Commission should utilize in considering the Settlement Offer. In the event the Commission does not choose this approach, EPSA asserts that the Commission must recognize the Settlement Offer is not representative of the majority of PJM market participants and stakeholder interests. In such an event, the Commission must review the issues raised in protests or comments by the non-settling parties very carefully in its decision-making process.

It should be noted that the non-settling parties are in essence those stakeholders and market participants who have the responsibility to maintain and build the facilities needed to ensure – and have the ultimate obligation to deliver – reliable electric service. It stands to reason that the input, views and support of these non-settling parties is critical to any meaningful consensus resolution of issues. Because this has not occurred in this instance, the Commission must carefully evaluate the comments and positions of the Supplier Caucus,

collectively and individually, in its decision-making process on the merits of the December 12 Tariff Filing.

In the event that the Commission disregards the fact that the Settlement Offer does not reflect stakeholder consensus and treats it as a contested settlement, EPSA respectfully submits that the Commission must evaluate the Settlement Offer under the first of the four prongs set forth in *Trailblazer Pipeline Company*.⁹ Consequently, the Commission would have to address the contentions of the contesting parties for each contested issue on the merits. This approach is appropriate because the substantial record developed on the issues in this proceeding (in particular, the values for the gross and net cost of new entry (CONE)) provides more than sufficient evidence for the Commission to reach a decision on the merits.

The other approaches under *Trailblazer* would not be applicable. The Commission could not approve the Settlement Offer under the second prong, *i.e.*, based on a finding that the package taken as a whole is just and reasonable, because there is no evidence in the record indicating that the suppliers

⁹ 85 FERC ¶ 61,345 (1998) (“*Trailblazer*”), *on reh’g*, 87 FERC ¶ 61,110, *reh’g denied*, 88 FERC ¶ 61,168 (1999). Under the Commission’s *Trailblazer* analysis, the Commission may take one of the following four approaches with respect to a contested settlement offer. First, if the record contains sufficient evidence, the Commission may reach a decision on the merits of each contested issue. *Trailblazer* at 62,342. Second, the Commission may approve the contested settlement as a package based upon a finding that the overall offer of settlement is just and reasonable, even if some of the individual elements are problematic and would not warrant approval outside of the settlement, provided that the Commission finds that the contesting parties would not be in a worse position than if the case were litigated. *Id.* at 62,342-43. Third, if the Commission has not found that the settlement as a whole satisfies the just and reasonable standard, the Commission may approve the settlement if (1) the settlement benefits the settling parties and (2) the contesting parties’ interests are sufficiently attenuated that the Commission may approve the contested settlement under the “fair and reasonable” standard applicable to uncontested settlements and the contesting parties would have another forum in which to raise their contentions. *Id.* at 62,343-44. Fourth, the Commission may sever the contesting parties and allow them to litigate the contested issues. *Id.* at 62,344-45.

contesting the Settlement Offer would be in no worse position under the terms of the Settlement Offer than if they litigated the contested issues. Similarly, the third prong is inapposite because the contesting suppliers have a direct interest in the outcome of this proceeding, as the Base Residual Auctions (BRAs) will determine the jurisdictional rates that they will receive for their capacity.¹⁰ Finally, the fourth prong, severing the contesting parties, in this instance, the suppliers, would not be a viable alternative. The RPM market rules must apply to all market participants, so it would not be feasible to adopt one set of rules for the buyers, and a different, inconsistent set of rules for the sellers.

C. Stability Of The Capacity Markets Is Essential

As the Commission has recently heard,¹¹ it is critical for the Commission, where possible, to implement policy that facilitates long-term revenue streams for new and existing facilities to ensure sustainability of the forward capacity markets. Among other things, the stability of these newly implemented markets, including RPM, hinges on certainty regarding the market rules and process utilized to consider changes or issues as the need arises. While these markets should be (and are being) improved and refined over time, there must be certainty, at a minimum, around the process undertaken to consider changes to

¹⁰ In *Trailblazer*, the Commission explained that the third prong is applicable where the contesting party is an indirect customer or a non-severable, non-ratepayer. See *Trailblazer* at 62,343-44.

¹¹ On January 13, 2009, the Commission held a conference concerning credit and capital issues affecting the electric power industry in Docket No. AD09-2-000. The conference consisted of two panels – one discussed long-term credit and capital issues and the other discussed short-term credit requirements in organized markets. Among other things, the long-term panel yielded consensus on the need for regulatory certainty and stability, especially in the recently implemented capacity markets. See generally the *Post-Conference Comments of the Electric Power Supply Association*, Docket No. AD09-2-000 (filed Jan 30, 2009, available at: <http://www.epsa.org/forms/documents/DocumentFormPublic/>).

the construct. EPSCA urges the Commission to act within its statutory authority, as well as its oversight role, to provide the greatest possible degree of regulatory certainty to electric markets and to assure market participants that underlying market rules will not change without a robust, reasoned stakeholder process which includes the full range of affected stakeholders.

In this uncertain time, with a variety of challenges facing the overall economy and all segments of the electricity industry, it is more important than ever for the Commission to adopt stable, predictable long-term policies that support a competitive environment for the maintenance of existing and development of future resource needs. These policies must be underpinned by a fair and transparent process that allows for consideration by all affected entities of any proposed changes to the market construct.

D. RPM Must Achieve Its Core Goal of Reliability

If processes underpinning RPM result in last-minute, un-vetted proposals formulated to address political concerns, the construct starts to move “off center” from the intent of the original RPM settlement. The intended purpose of the capacity market – to ensure reliability – is at risk under a framework that is subject to change based on political pressure and will not achieve its desired results. Such an unstable capacity market is likely to result in prices that require substantial payments by load, but which have not been correctly calibrated based on the needs of the market. Capacity market prices must achieve the level necessary to support reliable capacity, or such payments will fall short of what is in the best interests of both suppliers and consumers.

The Brattle Report clearly demonstrates that consumer payments under the RPM auctions to date have produced commensurate reliability and other consumer benefits. Specifically, the Brattle Report's overarching finding reflected that RPM has worked as intended, with RPM auctions of capacity for 2007 through 2012 producing considerably enhanced reliability for customers through additional electricity generation, the realization of substantially increased demand response, and a continued trend in the reversal of planned retirement of existing generating facilities. Specifically, while proposing certain changes to enhance the construct, the Brattle Report determined that the first five BRAs have been successful in achieving the reliability and economic objectives of RPM as defined in the September 2006 RPM settlement.¹²

If the Commission were to approve the Settlement Offer, however, it would not only diminish the ability of RPM to attract the substantial investments in new and existing capacity necessary to ensure reliability in PJM, it would also undermine the viability of capacity markets nationwide. The most direct effect of approving the Settlement Offer would be to reduce investment incentives by adopting CONE values that are substantially below the actual costs of constructing a marginal peaking unit, as determined by PJM in the December 12 Tariff Filing and the comments of parties to this proceeding that actually have experience building these units.¹³ Moreover, Commission approval of the

¹² See The Brattle Group *Review of PJM's Reliability Pricing Model (RPM)* at 2 (June 30, 2008) (Brattle Report).

¹³ Additionally, PJM's Answer provides extensive support for CONE values above those included in the Settlement Offer, and in fact begs the question of why PJM agreed to the instant Settlement Offer that proposes changes that contradicts its own prior filings. See PJM Answer at 5 – 19 and Attachment A.

Settlement Offer could undermine confidence in capacity markets more generally. The development of the nation's nascent capacity markets requires stable and predictable market rules to attract long-term investments in new generation and maintenance or expansion of existing generation. Commission approval of the Settlement Offer would indicate that the Commission is willing to upend capacity market rules on a year-to-year basis. Investors would be discouraged from making long-term commitments in capacity markets where prices are determined based on short-term political calculations.

Of equal or greater importance is the fact that approving the Settlement Offer would in fact ill serve capacity *buyers*. Load would be required to pay higher prices for capacity due to the (albeit insufficient) increases in the CONE values proposed in the Settlement Offer, but they would not necessarily receive the full benefit of these higher prices in terms of increased reliability because RPM (modified as proposed in the Settlement Offer) would likely fail to attract adequate investment for the reasons discussed above.

The Commission must allow the RPM construct to stay on course to achieve its intended objective of reliability over the long-term – and it is already showing tangible signs of doing so. EPSC has supported the stakeholder process as the proper forum for considering issues within regions to develop solutions tailored to the unique circumstances of a particular region and its stakeholders. However, a process that can be side-tracked due to short term pressures and result in arbitrary changes that bow to one set of interests or regional politics cannot result in the best overall outcomes that ensure the

viability and reliability of these markets to deliver the full benefits consumers deserve.

E. Elimination Of The Minimum Offer Price Rule Is Not Warranted And This Settlement Offer Provision, As Well As Any Other New Provisions Not Considered In the CMEC Or Included in the December 12 Tariff Filing, Should Be Rejected

EPSA is also concerned about new elements added to the Settlement Offer that were not contemplated as part of the CMEC stakeholder process on RPM refinements or included as part of the December 12 Tariff Filing. EPSA asserts that any such provisions should be rejected by the Commission as unjust and unreasonable as such provisions are not supported by the record in this proceeding. For example, the Settlement Offer includes a provision to eliminate the minimum offer price rule (MOPR) and replace the rule with a new auction review procedure.¹⁴ Neither the Settlement Offer nor the accompanying affidavit of PJM's Independent Market Monitor (IMM) Joseph Bowring provides detailed explanation regarding the impetus for this proposed change, which was not considered by the CMEC, other than to state that "the current minimum offer price rule has not been triggered to date, is complex, and it does not ensure either that attempts to exercise market power will be correctly identified or that appropriate conduct will not be incorrectly characterized as an attempt to exercise market power."¹⁵

The mere fact that a market rule that stems from the original RPM settlement has not been triggered does not indicate that a seemingly unilateral

¹⁴ Settlement Offer, Explanatory Statement at 15-17 and Attachment E, Affidavit of Joseph E. Bowring (Bowring Affidavit).

¹⁵ Bowring Affidavit at 1.

change is required, particularly in a newly implemented market. Such a change is not warranted and should be rejected as unjust and unreasonable as it is not supported by the record in this proceeding.

F. Future Stakeholder Processes On Long-Term RPM Issues Should Not Be Prejudiced By FERC Action On Proposed Changes for the May 2009 Auction

PJM has identified a number of longer-term RPM issues that require further evaluation within the stakeholder process prior to any proposed changes being filed.¹⁶ EPSA requests that the future stakeholder processes not be prejudiced by Commission action on the December 12 Tariff Filing and subsequently filed comments or alternative proposals, including the Settlement Offer, that encompass proposed changes to be implemented in time for the May 2009 forward capacity auction covering the 2012-2013 Delivery Year. In other words, such an order should not endorse the automated CONE design principles (proposed as a framework to replace the current Empirical CONE mechanism)¹⁷ or predetermine any outcome with regard to possible changes to Locational Deliverability Area (LDA) criteria or rules or any other RPM elements which have been reserved for consideration in the upcoming stakeholder review process.

III. CONCLUSION

EPSA asserts the proper course of action for the Commission is to move forward with a decision on the merits of the December 12 Tariff Filing as there is a sufficient record in this proceeding on which to do so. Given the lack of broad

¹⁶ December 12 Tariff Filing at Footnote 11 and more generally the Settlement Offer where numerous issues are reserved for further consideration in a stakeholder process.

¹⁷ Settlement Offer at Attachment D, "Design Principles for Automated Net CONE Adjustment."

support for the Settlement Offer, EPSA strongly urges the Commission to consider the Settlement Offer as one of the many sets of comments filed in response to the December 12 Tariff Filing, rather than viewing the filing as a consensus resolution of contested issues.

Further, EPSA requests that new provisions in the Settlement Offer, such as elimination of the Minimum Offer Price Rule, that were not considered in the CMEC process or included in the December 12 Tariff Filing, be rejected as unjust and unreasonable as such provisions are not supported by the record in this proceeding. Finally, the issues to be considered in future stakeholder processes should not be prejudiced by FERC action on the proposed changes to be implemented in time for the May 2009 auction for the 2012-2013 Delivery Year. EPSA appreciates the opportunity to comment and the Commission's consideration of these comments in rendering its decision in this proceeding.

Respectfully Submitted,



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February 23, 2009

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C. this 23rd day of February, 2009.

A handwritten signature in cursive script that reads "Nancy Bagot".

Nancy Bagot