UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.	Docket No. ER18-1314-006

PROTEST OF THE JOINT CONSUMER ADVOCATES REGARDING PJM INTERCONNECTION, L.L.C.'S JUNE COMPLIANCE FILING CONCERNING THE MINIMUM OFFER PRICE RULE

Pursuant to Rule 211 of the Federal Energy Regulatory Commission ("FERC" or "Commission") Rules of Practice and Procedure, 18 C.F.R § 385.211, and the Commission's June 2, 2020 Combined Notice of Filing,[1] the New Jersey Division of Rate Counsel ("NJ Rate Counsel"), the Office of the People's Counsel for the District of Columbia ("DC OPC"), the Maryland Office of People's Counsel ("MD OPC"), the Delaware Division of the Public Advocate ("DE DPA"), Citizens Utility Board, and the Pennsylvania Office of Consumer Advocate (together the "Joint Consumer Advocates") protest PJM Interconnection L.L.C.'s ("PJM") June 1, 2020 Second Compliance Filing Concerning the Minimum Offer Price Rule ("MOPR").[2] As the Commission is well aware, review of the applicability of the MOPR to state default service auctions as discussed in paragraph no. 386 of the Rehearing Order,[3] as well as the underlying order

[1] Combined Notice of Filing, eLibrary No. 20200602-3115 (June 2, 2020).

[2] PJM Interconnection, L.L.C., Second Compliance Filing Concerning the Minimum Offer Price Rule, eLibrary No. 20200601-5193 (June 1, 2020) ("June Compliance Filing" or "Compliance Filing").

[3] *Calpine Corp. v. PJM Interconnection*, *L.L.C.*, 171 FERC ¶ 61,035 (2020) ("Rehearing Order").

issued on December 19, 2019[4] (together the "MOPR Orders"), is now pending before the federal courts. Several of the Joint Consumer Advocates[5] have appealed the MOPR Orders as unjustified intrusions on state policy decision making and impermissible breaches of the cooperative federalism envisioned under the Federal Power Act. These offices reiterate their unqualified view that both the December 19 Order and the Rehearing Order are violations of federal statute and Commission precedent and therefore any compliance filing directed by them is not legally sustainable. While the Joint Consumer Advocates appreciate PJM's attempt to make lemonade from lemons, the morass of implementation questions raised by the June Compliance Filing starkly illustrates why compliance with such an unlawful directive is legally impermissible and practically impossible. Rather than consider the merits of PJM's Compliance Filing, the Commission would far better serve PJM, its stakeholders and sixty million customers in thirteen states and the District of Columbia, and ultimately itself, by reconsidering the series of ill-advised decisions that have led all parties to this point.

I. THE EXPANDED MOPR, AS ARTICULATED IN THE MOPR ORDERS, IS UNJUST AND UNREASONABLE.

As NJ Rate Counsel, DC OPC, and MD OPC protest in their joint rehearing request, "the 'replacement rate' announced in the December 19 Order is arbitrary, capricious, and unjustly

[4] *Calpine Corp. v. PJM Interconnection*, *L.L.C.*, 169 FERC ¶ 61,239 (2019) ("December 19 Order").

[5] NJ Rate Counsel, DC OPC, MD OPC, and DE DPA have jointly sought appeal of both the December 19 Order and the Rehearing Order. *See*, *New Jersey Division of Rate Counsel, et al. v. Federal Energy Regulatory Commission*, Case No. 20-1762. This petition had originally been filed in the U.S. Court of Appeals for the District of Columbia and has been subsequently transferred to the U.S. Court of Appels for the 7th Circuit. A separate appeal, similarly styled as *New Jersey Division of Rate Counsel, et al. v. Federal Energy Regulatory Commission*, was filed with the D.C. Circuit following the Commission's issuance of a tolling order concerning applications for rehearing of the December 19 Order. That petition, Case No. 20-1059, has not yet been transferred to the 7th Circuit, and remains pending before the D.C. Circuit.

discriminatory, and will produce unjust and unreasonable wholesale rates."[6] A broadly applied MOPR will "disconnect the auction, and PJM's [capacity market construct] as a whole, from the region's actual reliability needs and from the foundational precept that resources should compete to provide capacity on the basis of their net costs—those not covered by revenues received from any source for providing other products or services."[7] Similarly, the DE DPA finds that the "December 19 Order's Replacement Rate has the potential to artificially inflate capacity prices by subjecting certain state policy decisions to the expanded [MOPR] even if those state policy decisions/subsidies do not interfere with PJM's wholesale capacity market."[8] PJM, in explaining the need to balance accurate price signals while ensuring reliability, finds that the "December 19 Order, however, does not maintain the careful balance followed by prior Commission orders and, in fact, disrupts the balance that has successfully worked to accommodate the interests of states and integrated utilities, with appropriate guardrails, while maintaining the integrity of the market and ensuring a wholesale rate in the zone of reasonableness."[9]

Each of these rehearing requests emphasizes that the December 19 Order was an unjust and unreasonable departure from clear statutory construct and well-established Commission precedent and contravenes the needs and operational reality of PJM's capacity market construct. Compliance activities that are based on such a legally unsustainable underlying order, even when

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[6] Petition for Rehearing of the New Jersey Division of Rate Counsel, the Office of the People's Counsel for the District of Columbia, and the Maryland Office of People's Counsel of the December 19, 2019 Order, eLibrary No. 20200121-5310 (Jan. 21, 2020) ("NJ-DC-MD Rehearing Request"), p. 2.

[7] *Id.*

[8] Request for Rehearing of Delaware Division of the Public Advocate of the December 19, 2019 Order, eLibrary No. 20200121-5278, p. 2.

[9] Request for Rehearing and Clarification of PJM Interconnection, L.L.C. of the December 19, 2019 Order, eLibrary No. 20200121-5096 (Jan. 21, 2020) ("PJM Rehearing Request"), pp. 3-4.

undertaken in good faith, are themselves legally suspect. Thus, in developing its compliance filing, PJM must consider the very real possibility that the underlying directive for the compliance filing will be reversed. A similar air of uncertainty impacts stakeholders too, as they consider not only their legal positions, but, perhaps more importantly, their commercial and regulatory positions, while attempting to mitigate the unjust demands of the underlying order. For these reasons, the Commission would best serve PJM and its stakeholders by reconsidering many of the actions it has taken in this proceeding.

II. PJM, AS BOTH A MATTER OF LAW AND ADMINISTRATIVE FEASIBILITY, IS UNABLE TO COMPLY WITH THE MOPR ORDERS.

As PJM explains in its rehearing request, "state default service programs are mechanisms by which load-serving entities in retail choice states acquire obligations to provide energy and related services to retail customers through a state-directed auction."[10] Therefore, "[a]bsent any reason to believe that winning load-serving entities in such auctions are in any way receiving an out-of-market payment for resources they then procure to provide such retail service, it is not apparent how these auctions amount to a State Subsidy, as defined in the December 19 Order."[11] It is for this very reason that NJ Rate Counsel, DC OPC, and MD OPC argue that, "[t]reating the … payments to [stated default service auction] suppliers as a State Subsidy triggering mitigation of the … suppliers' PJM capacity auction offers would harm competition rather than protect it" subjecting "suppliers to unnecessary, purposeless, and unjustly discriminatory risks, which, ultimately, would mean needlessly and unreasonably high costs."[12] Applying a MOPR to state

[10] PJM Rehearing Request, p. 23.

[11] *Id.*

[12] NJ-DC-MD Rehearing Request, p. 44.

default service auctions is also inconsistent with prior Commission policy, which "has been careful in the past to preserve and not impede state authority to conduct competitive procedures to procure resources to serve retail load."[13]

Unfortunately, despite the fact that the December 19 Order "identifies no basis in law, fact, or Commission precedent for such a decision,"[14] paragraph no. 386 of the Rehearing Order reiterates the Commission's mistaken belief that "[s]tate default service auctions meet the definition of State Subsidy."[15] PJM, in its June Compliance Filing, again "recognizes that these auctions only occur in states that have retail competition, because wholesale electric supply must be procured for those customers who do not choose a competitive supplier and generally are conducted in a manner that provides the benefits of economic efficiency to end-use customers."[16] Furthermore, as PJM explains, one of its "primary responsibilities," and presumably a primary goal of the December 19 Order, "is to support robust, competitive and non-discriminatory power markets in the PJM Region—not only the organized markets, but the attendant bilateral market activity as well."[17] The application of a MOPR to state default service auctions is an anathema to the existence of these state-directed, but market-driven, mechanisms for competitively procuring retail energy requirements. While PJM's Compliance Filing is a good faith effort to meet the Commission's misbegotten directive, no amount of administrative or regulatory manipulations can overcome the MOPR Orders' failings.

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[13] *Id.*

[14] *Id.*

[15] Rehearing Order, P 386.

[16] June Compliance Filing, p. 16.

[17] *Id.*

As the June Compliance Filing explains, a "significant amount of efficient competitive commercial activity surrounds such auctions as they are conducted today—both in the submission of bids for tranches of service, but also importantly in the secondary bilateral activity conducted to hedge or supply such tranches of default service—all of which could be considered an indirect subsidy with very material consequences to Capacity Resources."[18] Importantly, as PJM notes, many market participants, especially in the secondary markets, "*will not* even have visibility into how or where their energy is being used."[19] In other words, these market participants could be subject to the MOPR and not even know it. As explained by PJM and others, including parties who support the concept of a more limited MOPR, "a blanket definition of any direct or indirect revenues resulting from a state default service auction award as a State Subsidy would result in subjecting the majority, if not all, Capacity Resources in PJM to the MOPR, because winning bids in default service auctions are not tied to any particular generating resource."[20] While the intended target of the December 19 Order was supposed distortions in PJM's capacity market, the impact of applying the MOPR to state default service auctions would reach well beyond the capacity market because a winning market participant "may satisfy its default retail service obligations

[18] *Id.*

[19] *Id.* (emphasis added).

[20] *Id.*, p 17 (citing, Motion for Leave to File Answer and Answer of the Public Utilities Commission of Ohio, eLibrary No. 20200528-5244 (May 28, 2020), at Exhibit A; Request for Limited Rehearing of the Pennsylvania Public Utility Commission, eLibrary No. 20200518-5137 (May 18, 2020), pp. 13-17; Request for Rehearing or, in the Alternative, Clarification of Vistra Energy Corp. and Dynegy Marketing and Trade, LLC, eLibrary No. 20200518-5162 (May 18, 2020), pp. 5-10; Request for Rehearing of Energy Harbor LLC, eLibrary No. 20200518-5163 (May 18, 2020), pp. 4-7 (May 18, 2020); Comments of the PJM Power Providers Group, eLibrary No. 20200515-5228 (May 15, 2020), pp. 6-8; Comments of Calpine Corporation, eLibrary No. 20200515-5236 (May 15, 2020), pp. 6-8; Comments of the Organization of PJM States, Inc., eLibrary No. 20200515-5266 (May 15, 2020), p. 26; Comments and Protest of the New Jersey Board of Public Utilities, eLibrary No. 20200515-5262 (May 15, 2020), pp. 8-12; Comments and Limited Protest of the Maryland Public Service Commission, eLibrary No. 20200515-5271 (May 15, 2020), pp. 5-8).

through numerous voluntary bilateral transactions with third parties at any time in advance of the Day-ahead Energy Market and Real-time Energy Market, or may simply carry the obligation into the Day-ahead Energy Market and Real-time Energy Market."[21]

Because of the very nature of the interaction among PJM's markets and the attendant secondary markets, a specific resource may be completely unaware that its energy is being used to satisfy requirements in a state default service auction and, thus, that it is subject to the MOPR. Moreover, as PJM explains, that specific resource "with no other form of State Subsidy could potentially be subject to the asset life ban and/or capacity revenue forfeiture provisions simply because the Capacity Market Seller did not certify that the resource is a Capacity Resource with State Subsidy, but provided supply (directly or indirectly) to a default service award winner."[22] Such an outcome, PJM correctly predicts, "could paralyze the voluntary bilateral markets as they exist today."[23] While this result may not be the Commission's intent, it will be the consequence of the MOPR Orders' unwarranted intrusion into markets traditionally overseen by the states.

Finally, PJM's parade of horribles does not even address the administrative nightmare of applying a MOPR to multiple markets with very different auction schedules. While PJM's Base Residual Auction ("BRA") is traditionally a three-year-ahead auction that occurs in May, that is not the case for many of the state default service auctions.[24] Some state default service auctions occur earlier in the year, others occur later in the year. Some auctions, like the BRA, cover a three

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[21] *Id.*

[22] *Id.*, p. 18

[23] *Id.*

[24] A BRA that occurs in May and looks to procure resources three years ahead won't even be a reality for PJM for at least the next three auction cycles because of auction delays stemming from this proceeding.

year window while others look ahead only one or two years. Again, the directives of the December 19 Order and the Rehearing Order provide no recognition of this problem, let alone any administrative guidance on addressing it.

While the Joint Consumer Advocates appreciate PJM's earnest attempt to work within the confines of an unjust and unreasonable requirement, the June Compliance Filing demonstrates that meeting those requirements in a just, reasonable, and administratively feasible fashion is simply not possible.

III. CONCLUSION

The Joint Consumer Advocates respectfully request that the Commission consider the Protest herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated on this 22nd day of June, 2020.

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