UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Power Providers Group	
v.	Docket No. EL11-20-000
PJM Interconnection, L.L.C.	
PJM Interconnection, L.L.C.	Docket No. ER11-2875-000
	(not consolidated)

MOTION FOR LEAVE TO ANSWER AND ANSWER OF NEW JERSEY RATE COUNSEL

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.213, New Jersey Rate Counsel (NJ Rate Counsel), an intervenor in the above-captioned dockets,[1] moves for leave to answer certain of the protests and comments filed by other parties in the above-captioned dockets and PJM's answer to the complaint filed by the PJM Power Providers Group (P3).

I. SUMMARY

At the outset, NJ Rate Counsel wishes to apprise the Commission of a recent development that refutes the erroneous claims of P3 and their supporters that immediate, radical action is required to avoid imperiling the upcoming Base Residual Auction (BRA). Last week, the agent implementing New Jersey's Long-Term Capacity

[1] NJ Rate Counsel moved for leave to intervene in Docket No. EL11-20-000 on February 4, 2011. Motion for Leave to Intervene and Request for Establishment of Response Date (Feb. 4, 2011), eLibrary No. 20110204-5148. NJ Rate Counsel moved for leave to intervene in Docket No. ER11-2875-000 on March 3, 2011. Motion to Intervene of New Jersey Division of Rate Counsel (doc-less) (Mar. 3, 2011), eLibrary No. 20110303-5027.

Agreement Pilot Program (LCAPP) narrowed the candidates to three entities, none of which proposes a project that would be developed earlier than 2015-16. Consequently, *no* LCAPP resource is expected to participate in the next BRA for 2014-15. Thus, there would be no reason for precipitous action even if the Commission were concerned that the efforts of New Jersey and Maryland to encourage the construction of needed new generation in their respective states might be contrary to the RPM design. As no LCAPP resource entry is imminent, the Commission should proceed in the cautious and deliberate manner consistent with the importance of the interests at stake.

This case presents fundamental questions about how to balance existing generators' economic interests with states' interests in securing reliability and determining the mix of resources that should supply their states. RPM treats all electric capacity as fungible. Demand reducing capacity is treated as interchangeable with electric generating capacity, and all generation types are considered the same regardless of technology, fuel, location within a zone, operational characteristics, local employment consequences, or any other factor except price. But state legislatures and regulatory authorities have good reasons *not* to consider all capacity to be fungible. They have legitimate public policy bases for preferring some sources to others or for concluding that their states should have a portfolio of resources with specific characteristics. In the name of leveling the playing field between new and existing resources, P3 would have the Commission tax states' ability to vindicate such interests.

The March 4 submissions demonstrate how ill-advised it would be to consider the market overhauls proposed by P3 and PJM. Contrary to the claims of P3 and their supporters, the testimony submitted in this proceeding by the Chairman of the Maryland

Public Service Commission (Maryland Commission) shows that the actions taken by the state of Maryland, like those initiated in New Jersey, are responses to demonstrated reliability needs and not inappropriate efforts to suppress market prices for short-term economic gains. As we explained in our protest, it is critical that the Commission allow PJM's residual capacity market to work as intended: as a *residual* market. That means allowing states and load-serving entities (LSEs) to engage in long-term integrated resource planning and resource procurement in accordance with states' public policy objectives; permitting the selected resources to offer at low, economically-rational prices reflecting their procurement outside of the residual capacity market; and allowing the residual market price to adjust accordingly.

These positions are supported by both Maryland and New Jersey, and by market participants throughout PJM. Notably, supporters include Dominion Resources, a vertically-integrated utility serving load in Virginia and North Carolina, which are non-restructured states that rely on *both* RPM and resources planned and procured outside of that market. Like Maryland and New Jersey, Dominion recognizes that PJM's residual capacity market must accommodate, rather than thwart, long-term integrated resource planning and procurement.

P3's proposed changes (and to a lesser but still significant extent PJM's proposed changes) would frustrate state and LSE resource planning and procurement efforts. To avoid "discrimination" between new and existing resources (even ones that are demonstrably dissimilar), P3 would force states in particular to make a choice between abandoning their policy goals or pursuing them at unreasonable cost. They would require states either (a) to rely exclusively on RPM-selected resources, regardless of whether they meet the states' perceived needs, or (b) to buy more capacity than needed, paying for both the state-selected resources and the RPM-selected resources at prices insulated against "suppression" by the new, state-planned resources. That outcome would be neither just nor reasonable. Nor would it be consistent with either the settlement establishing RPM or the Commission's prior orders finding the price-mitigation exception for certain state-planned resources to be just and reasonable.

Finally, contrary to P3's claims, the opportunity to submit unit-specific cost justification neither ameliorates the risk of deterring new entry nor prevents P3's RPM *über alles* approach from frustrating legitimate state planning and procurement. First, relying on unit-specific cost justification begs the question of what costs and revenues should be counted in determining a permissible offer or mitigated bid. P3's answer—that PJM, the market monitor, and the Commission must pretend that no resource was procured outside of RPM and must ignore any costs or revenues associated with those arrangements—would leave states with the untenable choice described above. Second, the dispute about access to West Deptford Energy LLC's (WDE's) cost data,[2] and WDE's subsequent withdrawal of its request for a Commission ruling that its sell offer was justified by its unit-specific costs,[3] demonstrate that the opportunity to seek such rulings is not a panacea and could operate as a barrier to entry.

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[2] *See W. Deptford Energy, LLC*, 134 FERC ¶ 61,189 (2011).

[3] Letter from George D. (Chip) Cannon, Jr., Attorney for WDE, to Hon. Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, Docket No. ER11-2936-000 (Mar. 15, 2011), eLibrary No. 20110315-5061.

Rather than stepping with unnecessary haste down the ill-considered path laid out by P3 and PJM, the Commission should proceed more cautiously. It should give PJM, its market monitor, and stakeholders an opportunity, which they have not had to date, to address holistically the important questions raised by these proceedings. Whatever value is realized by strengthening the Minimum Offer Price Rule's (MOPR's) protections against anti-competitive price suppression, such efforts must not be allowed—or worse yet, be designed—to frustrate legitimate state resource-planning and procurement.

In these circumstances, NJ Rate Counsel continues to request that the Commission dismiss P3's complaint and reject PJM's Section 205 filing. If it does not do so outright, the Commission should at least do so without prejudice to the re-filing of an improved plan after due stakeholder consultation. Alternatively, the Commission should dismiss the P3 complaint and suspend PJM's Section 205 filing for five months, while setting the case for hearing and holding that hearing in abeyance pending Settlement Judge procedures. Either approach would afford PJM stakeholders an important opportunity to seek to resolve these issues without inefficient reliance on the Commission's administrative resources.

II. MOTION FOR LEAVE TO ANSWER PROTESTS AND PJM'S ANSWER TO COMPLAINT

Rule 213 of the Commission's Rules of Practice and Procedure normally prohibits the filing of answers to protests or answers. 18 C.F.R. § 385.213(a)(2). Nonetheless, the Commission has authority to waive the prohibition for good cause, 18 C.F.R. § 385.101(e), and it has accepted otherwise-prohibited answers where they assure a complete record,[4] provide information helpful to the disposition of an issue,[5] permit the issues to be narrowed or clarified,[6] or aid the Commission in understanding and resolving issues.[7]

Here, there is good cause to waive the prohibition and to accept New Jersey Rate Counsel's answer to (a) PJM's answer to the P3 complaint and (b) certain of the protests or comments submitted by other parties in response to either the complaint or PJM's Section 205 filing. Because P3 filed their complaint without first seeking to resolve the dispute informally and because PJM responded to the complaint by filing a hastily prepared Section 205 filing without meaningful stakeholder consultation,[8] New Jersey Rate Counsel and other intervenors have had no opportunity to consider and respond to each others' views. And they have had little opportunity to hear or to react to arguments made by P3, PJM, and the market monitor in response to each other. Therefore, accepting this filing is in the public interest as it will assure a more complete record.

Furthermore, New Jersey Rate Counsel's answer (set forth below) provides new information regarding the status of the LCAPP program, the resources likely to be selected through it, and how those developments affect the alleged need for a hurried

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[4] *E.g.*, *Pac. Interstate Transmission Co.*, 85 FERC ¶ 61,378, at 62,443 (1998), *pet. for rev. dismissed sub nom. DEK Energy Co. v. FERC*, 248 F.3d 1192 (D.C. Cir. 2001).

[5] *E.g.*, *CNG Transmission Corp.*, 89 FERC ¶ 61,100, at 61,287 n.11 (1999).

[6] *E.g.*, *PJM Interconnection, L.L.C.*, 84 FERC ¶ 61,224, at 62,078 (1998); *New Energy Ventures, Inc. v. S. Cal. Edison Co*., 82 FERC ¶ 61,335, at 62,323 n.1 (1998).

[7] *E.g.*, *Tenn. Gas Pipeline Co.*, 92 FERC ¶ 61,009, at 61,016 (2000).

[8] *See generally* New Jersey Rate Counsel's Protest Opposing P3 Complaint and PJM Section 205 Filing, at 50, Docket Nos. ER11-20-000 *et al.* (Mar. 4, 2011), eLibrary No. 20110304-5199 (NJ Rate Counsel Protest) (describing P3's failure to seek informal resolution of the dispute about proposed changes to the RPM MOPR and its effect in truncating stakeholder consideration of such issues).

resolution of the matters raised in P3's complaint and PJM's Section 205 filing. Accepting this answer (in both dockets) should therefore aid in the Commission's disposition of the complaint and the related Section 205 filing.

III. ANSWER TO PROTESTS AND TO PJM'S ANSWER

Developments in the implementation of New Jersey's LCAPP program and the withdrawal of WDE's request in Docket No. ER11-2936-000 make plain that any need for expedited action on the P3 and PJM filings has evaporated. At the same time, the March 4 pleadings demonstrate the difficulty and importance of the matters at issue here. The P3 and PJM filings are unwarranted and collateral attacks on settled questions about how to meld the Commission's responsibility to ensure just and reasonable rates for transmission and wholesale power with states' prerogatives and responsibilities to ensure resource adequacy, safeguard the reliability of retail electric service, and pursue other public policy objectives.

As we explained in our March 4 protest, the 2006 settlement establishing RPM already answered those questions satisfactorily by including a carefully-negotiated MOPR exception for certain state-planned and procured resources. The Commission expressly approved that exception as just and reasonable. It remains just and reasonable; and it ought to be retained.[9] No party has explained why a settlement agreement can be collaterally attacked and rewritten simply because parties avail themselves of its provisions. If the Commission is nonetheless inclined to break new ground by

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[9] While we do not object to PJM's proposal to remove its decision-making role in implementing that exception, we do oppose PJM's attempt to rewrite the exception's substantive provisions. *See* NJ Rate Counsel Protest at 39.

considering changes to the negotiated, Commission-approved settlement, despite the absence of changed circumstances rendering it unreasonable, then the Commission should first give PJM and its stakeholders a chance to address the issues collaboratively.

A. The LCAPP Agent's selection of recommended resources obviates any need to consider MOPR changes before the May auction.

In their comments and protest in response to PJM's Section 205 filing, P3 continue to claim that various issues "need[] to be resolved before the May 2011 Base Residual Auction."[10] Various other entities urge equally hurried action, ostensibly to protect against an influx of supposedly uneconomic resources subsidized by the LCAPP program.[11] Arguments alleging a need for expedited action based on the LCAPP program are simply incorrect.

On February 10, 2011, the New Jersey Board of Public Utilities (BPU) initiated a proceeding to implement the actions required by P. L. 2011, c. 9. The BPU selected Levitan & Associates, Inc. as the LCAPP Agent to facilitate implementation. Under the process established by the BPU and the LCAPP Agent, prequalification applications were due on February 22.[12] Of the thirty-four prequalification applications that were submitted, twenty-one were deemed ineligible because they were tied to existing generation

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[10] *E.g.*, P3's Comments and Protest, at 2, Docket Nos. EL11-20-000 *et al.* (Mar. 4, 2011), eLibrary No. 20110304-5218 (P3 March 4 Comments) (asserting that the Commission must determine, before the May 2011 BRA, whether the MOPR conduct screen should be set at 80%, 90%, or 100% of the administratively determined cost of new entry). *See also id.* at 9-10, 12-13 (urging resolution, before the May 2011 BRA, of multiple alleged issues concerning PJM's calculation of the energy and ancillary services offset for combined cycle and combustion turbine resources).

[11] *E.g.*, Comments and Limited Protest of the PSEG Companies, at 2-3, Docket Nos. EL11-20-000 *et al.* (Mar. 4, 2011) (PSEG Comments), eLibrary No. 20110304-5207.

[12] *See* Letter from Richard Levitan, President, Levitan & Associates, Inc. to Kenneth Sheehan, Chief Counsel, NJ BPU, at 1 (Mar. 15, 2011) (Levitan March 15 Letter), available at http://www.nj-lcapp.com/Documents/Initial_Recommended_SOCA_Proposals.pdf.

facilities and did not satisfy the statutory criterion aimed at fostering the development of new generation resources. *Id.* Another four were disqualified as peaking facilities that would not fulfill the statute's purpose of spurring development of new baseload or mid-merit resources. *Id.* Three bidders withdrew, leaving six prequalified resources. *Id.* at 2. The LCAPP Agent eliminated certain of the offers from those resources because they were predicated on changes to the LCAPP standard offer capacity agreement (SOCA), were inconsistent with facility configurations submitted during prequalification, or were incomplete. *Id.* Ultimately, the LCAPP Agent identified three new natural-gas fired, combined-cycle generation facilities, with a total unforced capacity (UCAP) of 1,948.5 MW, to be recommended for contracts under the LCAPP program. *Id.*

Of those resources, two (sponsored by New Jersey Power Development LLC and by CPV Shore, LLC) would begin participation during the 2015-16 SOCA year. *Id.* The third (sponsored by Hess Newark LLC) would begin participation a year later. *Id.* Based on the LCAPP Agent's selection of recommended resources and their LCAPP participation timeframes, it is now apparent that no resources with an LCAPP agreement will participate in the upcoming BRA for the 2014-15 RPM Delivery Year. Consequently, the alleged need for expedited consideration and implementation of radical changes to the MOPR has dissipated.

B. As many parties acknowledge, the Maryland and New Jersey programs respond to legitimate reliability and public policy concerns and should not be frustrated by rules to prop up market prices despite new, state-planned supply.

Regrettably, some parties have accepted P3's false premise that the Maryland and New Jersey programs are illegitimate efforts to suppress prices. These parties consist mainly of those with economic interests aligned with those of P3, *i.e.*, those whose balance sheets will look better if needed new generation is not built and the status quo is maintained. Other parties know better, however, and properly view the states' programs as efforts to protect reliability. Such parties explain clearly why the MOPR must not be reformed in a way that will undercut the states' long-term planning and procurement measures. Those parties include not only New Jersey and Maryland entities, but other governmental entities, market participants, and load-serving entities and their representatives throughout PJM. The Commission should heed their calls.

Maryland Commission Chairman Nazarian testified at length about the proceedings the Maryland Commission convened to determine the extent and nature of the reliability risks facing the state, to assess whether RPM is likely to solve them, and, if not, to decide what Maryland should do to address them. Chairman Nazarian explained Maryland's motivations and conclusions in terms that track almost exactly the findings included in the New Jersey legislation.[13]

Like the New Jersey Legislature, the Maryland Commission concluded that "RPM has assisted to fill anticipated capacity gaps in the short term," but "has not attracted significant new generation to constrained Maryland LDAs."[14] And like New Jersey, the Maryland Commission was told that "long-term contracts, and not RPM alone,

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[13] *See generally* Protest of the Maryland Public Service Commission, Exh. MD PSC-1, at 28-38, Docket Nos. EL11-20-000 *et al.* (Mar. 4, 2011), eLibrary No. 20110304-5174) (Nazarian Testimony) (describing the Maryland Commission's response to imminent reliability gaps forecasted by PJM and to NERC recommendations that federal and state regulators use their authority to moderate the anticipated reliability impacts of projected retirements of coal-burning generation).

[14] Nazarian Testimony at 46.

are needed to facilitate investment in new generation."[15] The Maryland Commission thus determined that they had a responsibility to act:

> Q. With these points in mind, do you believe there is cause for optimism that RPM will eventually provide the right signals for investment in significant new generation?
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> A. No. But even if I did, we cannot sit back and hope that the forward price signals that PJM intends the RPM to provide will eventually provide the right signals for investment in significant new generation or that PJM's markets will someday provide the revenue certainty that lenders require to finance a new generation facility.… If the EPA promulgates new regulations as expected, generation capacity located in other parts of PJM may not be available to import into Maryland LDAs, and we may find ourselves facing a crisis without time to respond.

Id. at 58. Apart from P3 and their supporters, most other observers recognize that Maryland and New Jersey are acting to protect their citizens against genuinely perceived reliability threats and to vindicate other important policy interests.[16] Even the market monitor, who generally supports the P3 and PJM initiatives, concedes that point.[17]

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[15] *Id.*

[16] *E.g.*, Motion to Intervene and Protest of the American Pub. Power Assn., at 8, Docket Nos. EL11-20-000 *et al.* (Mar. 4, 2011), eLibrary No. 20110304-5120 ("Both states are implementing or considering 'self help' remedies in the form of mandated bilateral generation contract procurements for the utilities that provide default retail power supply service in their states, to 'anchor' the construction of new generation capacity that they had hoped to see as a result of the implementation of RPM, but which to all appearances is not forthcoming."); Comments of Viridity Energy, Inc., at 2-3, Docket Nos. EL11-20-000 *et al.* (Mar. 4, 2011), eLibrary No. 20110304-5175 (Viridity Comments) ("With respect to new generation, RPM has not achieved the desired results. New Jersey, Maryland, and much of the rest of the Mid-Atlantic region have seen little if any new generation built in the area since the advent of RPM, and expect significant retirements of generation…. It is this failure that New Jersey and Maryland are taking direct action to address."); Motion to Intervene, Protest, and Request for Rejection or, in the Alternative, Further Procedures of the National Rural Electric Cooperative Assn., at 8, Docket Nos. EL11-20-000 *et al.* (Mar. 4, 2011), eLibrary No. 20110304-5227 ("[S]uch state actions … represent the states' responses to the perceived failure of private actors to build on their own—without state action—in response to RPM prices."); Answer and Protest of CPV Power Development, Inc. to Complaint and Proposed Tariff

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The comments of Viridity Energy are particularly apt. After reviewing the evidence of the reliability problems facing these states, Viridity Energy concludes that:

> New Jersey and Maryland—the states whose reliability concerns were cited as a major basis for RPM originally—have demonstrated that they are willing to plan for the development of new generation, and to use ratepayer money to support it. The New Jersey legislation … and the Maryland Request for Proposals provide two examples of this willingness; more examples abound. For example, recent New Jersey legislation would provide a long-term revenue stream to promote the development of 1,000 MW of offshore wind generation through long-term revenue guarantees. Regulatory approvals of long-term contracts, utility financing, and utility construction of solar generation demonstrate still further the willingness to make ratepayer money available to support new generation.
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> [T]he P3 Group and PJM are asking the FERC to change a longstanding rule that specifically protects the ability of New Jersey and Maryland to do exactly what they propose to do. The changes would have the effect of propping up prices in the capacity market—at the same time that the circumstances listed above suggest that the RPM market construct should be eliminated or at least substantially modified.

Viridity Comments at 9-10.

Modifications, at 3, Docket Nos. EL11-20-000 *et al.* (Mar. 4, 2011), eLibrary No. 20110304-5229 (“It is perfectly appropriate … that in the absence of a means by which new baseload and intermediate peaking facilities can be build where needed, [New Jersey and Maryland] … have begun processes that will offer long-term contracts through open, transparent, competitive solicitations to meet what these states have determined, and what they have a legal right to determine, to be their legitimate resource needs.”) *Cf.* Comments of the Pennsylvania Public Utilities Commission, at 2, Docket Nos. EL11-20-000 (Mar. 4, 2011), eLibrary No. 20110304-5112 (noting that the Commission must “protect[] the States’ ability to formulate individual energy policies”); *id.* at 29 (dismissing the notion that “low bids made pursuant to state projects should never be permitted in the RPM”).

[17] Comments of the Independent Market Monitor for PJM, at 1-2, Docket Nos. EL11-20-000 *et al.* (Mar. 4, 2011), eLibrary No. 20110307-5031 (IMM Comments) (“The actions of New Jersey and Maryland have highlighted issues with the PJM RPM construct that need to be addressed. The states have legitimate concerns about long term reliability and the potential for the new entry necessary to provide that reliability.”); *id.* at 10 (“New Jersey clearly has the right and the obligation to address its own reliability needs if it does not think they are being adequately addressed through the PJM markets.”).

Nor are the concerns about the P3 and PJM proposals' effects on state planning and procurement limited to Maryland and New Jersey. Dominion Resources Inc. has similar concerns about how the P3 and PJM proposals would affect state integrated resource planning and procurement in Virginia and North Carolina, which continue to plan generation through formal administrative processes and to establish cost-of-service rates to recover investment in such planned generation.[18] As Dominion observes:

> [S]tate IRP and CPCN processes are built on prudent least-cost principles, and consider a host of other issues including demand response, state renewable requirements, environmental impacts, and fuel diversity. Any one of those considerations may lead a state to procure capacity … that is 'uneconomic' at any given point at least to the extent its fixed costs exceed the clearing price of the next RPM auction.

Id. at 13. Dominion notes that the "key drivers" of its 2010 IRP were "assumptions related to global warming mitigation legislation; United States Environmental Protection Agency ('EPA') regulations concerning air, water, and waste; the cost and performance of future advanced energy technologies; and the continuing indication that the Company's service territory will maintain strong load growth over the Planning Period." *Id.* at 6-7. Dominion states that its IRP process identified the supply- and demand-side resources that mitigate these risks at the lowest reasonable cost, which means "building new generation when prudent and relying on the market to satisfy any capacity shortfall." *Id.* at 7.

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[18] Motion to Intervene and Comments of Dominion Resources Services, Inc., at 6-7, Docket Nos. EL11-20-000 *et al*. (Mar. 4, 2011), eLibrary No. 20110304-5147 (Dominion Comments). The state processes include formal Integrated Resource Planning (IRP) and proceedings to consider Certificates of Public Convenience and Necessity (CPCN).

Dominion warns that the changes proposed by P3 and to a lesser extent PJM threaten to undermine such least-cost integrated resource planning processes. As Dominion explains,

> The P3 complaint and, to a lesser extent, the PJM rate filing threaten to undermine state IRP and CPCN approvals by limiting a vertically-integrated utility's participation in RPM. Under P3's approach, any new generating unit in a constrained LDA would be prohibited from participating in RPM as a price-taker (*i.e*. bidding zero to ensure clearing). This solution may be appropriate for new resources subsidized and bid into the RPM market at zero for the purpose of artificially depressing wholesale rates. However, this result would be unjust and unreasonable if applied to rational resource planning and generation investment, particularly in the case of states that have IRP and CPCN processes.

Id. at 8. Of course, it would be equally unreasonable to frustrate the efforts of states that have restructured their retail electricity markets and no longer rely on formal IRP processes but still must ensure reliable electric service for their citizens. And make no mistake: adopting the P3 or PJM proposals would certainly frustrate those efforts. As Dominion explains:

> the premise for P3's complaint, indeed an argument it makes directly, is that units with "out-of-market" revenue sources are anti-competitive and should be treated as such.… P3 appears to argue that state-regulated utility generation is "out-of-market" and should be kept out of the RPM auction altogether, or forced to bid at levels that will not ensure clearing, even when the vertically-integrated utility build decision is part of rational state-approved planning process designed to meet the needs of state ratepayers. The simple fact is RPM was never intended to replace non-market capacity procurement mechanisms. Rather, RPM should allow a variety of stakeholders to co-exist in the auction setting, including state regulated utilities with state IRP processes.

Id. at 9. We could not agree more.

And while we appreciate the market monitor's acknowledgment that states have both the right and the obligation to address their own reliability needs if they believe that the markets are failing to do so, IMM Comments at 10, we disagree with the market monitor's cramped view of what the states should be permitted to do to achieve those ends. As we explained in our protest, the P3 and PJM positions supported by the market monitor effectively nullify a state's ability to make long-term planning decisions to procure resources other than those selected through RPM—a result directly at odds with RPM's role as a residual capacity market. Indeed, the notion that participating in RPM must be an all-or-nothing proposition runs throughout these parties' arguments.

For example, when the market monitor describes the New Jersey legislation as requiring utilities to procure capacity "when it is not needed for reliability at levels above prevailing capacity prices,"[19] he implicitly assumes the exclusivity of RPM. After all, New Jersey has decided that the new in-state generation *is* needed for reliability. And it is conducting a competitive (*i.e.* market-based) process to procure it. While the resulting contracts may be above prevailing *RPM* prices, they will not be "above prevailing capacity prices."[20] Because of implicit assumptions about RPM's exclusivity, the market monitor concludes that "[t]he rationality of this arrangement from the state's perspective entirely depends upon a reduction of market prices sufficient to offset the costs to procure the P.L. 2011 Resource." *Id.* at 8. But that would be true only if RPM dollar savings were

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[19] IMM Comments at 7.

[20] The notion that RPM can serve as the exclusive mechanism for procurement of new capacity is belied by the facts on the ground to date. As the record here amply demonstrates, RPM's one-year capacity prices are too short-lived and too volatile to support investment in capital-intensive resources. Such investments require long-term analyses and very often, if not always, a long term contract.

the only consideration that might motivate a state to require utilities to enter such contracts. It is obviously *not* the only reason. Other, valid reasons why states might require utilities to enter long-term contracts with certain kinds of resources include (but are not limited to) state choices about how to safeguard reliability, as well as state environmental policy, risk tolerance, and economic development goals. Residual markets must be structured to accommodate, not thwart, such choices. The existing MOPR recognizes this imperative; the proposed changes would run roughshod over it.

While the IMM posits two ways in which a state could pursue such objectives consistent with the proposals advanced by P3 and PJM, neither is sufficient. First, the IMM says, states can opt out of RPM entirely using the Fixed Resource Requirement (FRR) alternative.[21] But, as Dominion explains:

> This argument and P3's "all in or all out" proposal ignore the very purpose of the RPM Base *Residual* Auction.… As utilities engage in long-term planning and load grows, they may be capacity short or capacity long in any given time period. One of the great benefits, and arguably the basic purpose, of RPM is to permit that utility to satisfy unmet needs through RPM and sell any excess capacity into the market to meet the needs of other load-serving entities. The FRR option is an important one for a load-serving entity that wants to opt out of RPM entirely. However, *the FRR option is not a replacement for flexible participation in the market* by state-regulated vertically-integrated utilities, participation which improves the liquidity and efficiency of the market.

[21] *See* IMM Comments at 10.

Dominion Comments at 13-14 (emphasis added). Moreover, in many instances the FRR option is either infeasible or would expose LSEs within the area to supplier market power.[22]

Second, the IMM says, New Jersey could implement a program similar to that set forth in the proposed legislation so long as winning resources were required "to offer and clear in the next Base Residual Auction at [their] full annualized costs … [without] subsidies or out of market payments."[23] The suggestion is a highway to nowhere, leaving states with the option of having the resources they deem to be necessary only if (a) they happen to be the same resources that RPM would select, in which case no separate state procurement would be needed, or (b) state ratepayers pay for *both* the state-selected resources and the RPM-selected resources, at prices propped up as if the state-selected resources did not exist, even though duplicative capacity is not needed.

In effect, the IMM is saying that, where there is a (supposedly residual) bid-based market for capacity, there can be no bilateral contracts or cost-of-service-supported resources because any such arrangement "renders a selected investment immune to market results in a manner that confiscates a portion of the market value of existing investment not similarly immune." IMM Comments at 8; *see also id*. at 19 (defining as a prohibited "subsid[y]," requiring mitigation, the receipt of "any revenues from outside the organized PJM markets"). The assertion that RPM is the only game in town is directly

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22 *See, e.g.*, Monitoring Analytics LLC, 2010 State of the Market Report for PJM, vol. 2, at 349 (Mar. 10, 2011), *available at* http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2010/2010-som-pjm-volume2-sec5.pdf (describing PJM capacity market as structurally "not competitive," either locally or in the aggregate).

23 IMM Comments at 10.

contrary to the Commission-approved, fundamental premise of the RPM design—that RPM is to be a residual capacity market with an express MOPR exception for state-planned and procured resources.

It is also inconsistent with the reality that governments at all levels (federal, state, and local) have many important and wholly legitimate reasons for preferring some electric capacity resources over others—and for using either ratepayer or taxpayer funds to advance their policy goals. Governments legitimately implement programs to advance policy goals that include: promoting the use of renewable resources (defined differently in different states) or demand-response resources; enhancing reliability and reducing price volatility by diversifying resource mixes; encouraging re-use of brownfield sites for new plant construction; and promoting investment in economically-disadvantaged areas.[24] All such programs have the ability to aid some resources and disadvantage others. That is the *point* of such programs, and it is a legitimate one. For example, incentives to develop brownfield sites inherently favor new resources over existing ones. The Commission should not be in the business of attempting to identify and to nullify the effects of each such program on the ground that it may have an incidental impact on prices in PJM's residual capacity market.

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[24] Some of these programs result from federal rather than state or local law. For example, the Public Utility Regulatory Policies Act promoted the development of qualifying facilities (QFs) by establishing an obligation to purchase their output at typically high, avoided cost rates. Presumably such high rates and mandatory-purchase obligations have allowed many QFs to recover their fixed costs more quickly than many non-QF resources—thus providing a competitive advantage if and when the QF and non-QF resources offer their facilities into a bid-based market.

For these reasons, we disagree with the IMM's premise that RPM should be the exclusive mechanism for deciding what capacity is needed and procuring it. PJM's residual capacity market should continue to accommodate, not thwart, governmental programs to achieve legitimate public policies. That means that residual capacity prices should reflect the existence, as a price-taker, of resources that are procured through governmental programs.

However, if PJM and P3's paradigm-shifting changes are nonetheless adopted, we appreciate the IMM's recognition that other aspects of the newly-exclusive capacity market should be addressed "without delay" to see if it can spur the development of new generation resources where needed.[25] Thus, if the PJM proposal is not rejected, it should be suspended for five months and should be accepted "subject to the condition," as the IMM says (at 26), that PJM and its stakeholders attempt to address the issues that are preventing RPM from securing new generation resources in NJ.

C. Contrary to P3's claims, the opportunity for unit-specific cost justification does not eliminate the risk of over-mitigation.

One of the themes running through P3's pleadings in this case is their contention that the risks of under- and over-mitigation are asymmetrical, and argue for erring on the side of over-mitigation.[26] We explained in our protest why that is not the case with

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[25] IMM Comments at 22 ("MOPR reform is needed, but it is not enough to fix the problem with RPM design. The concerns of New Jersey and Maryland about whether the RPM market design is adequate to ensure effective competitive from new entry are valid and should be addressed without delay. If the Commission acts to prevent states from subsidizing new entry in a manner that undercuts the wholesale market design, then it should also exercise its authority to rectify some of the critical problems in that wholesale market design.").

[26] *E.g.*, P3 March 4 Comments at 7.

respect to state-planned resources. Over-mitigation of state-planned resources interferes with sovereign states' abilities to fulfill the responsibilities placed upon them by both state and federal law. P3 and others nonetheless attempt to downplay the risks of over-mitigation by suggesting that the opportunity to seek to justify resource offers on a unit-specific cost basis represents a failsafe that limits the danger of over-mitigation.[27] That is incorrect.

First, relying on unit-specific cost justification begs the question of what costs and revenues may legitimately be counted in determining a permissible offer or mitigated bid. P3, PJM, and the market monitor answer that, in answering that question, the Commission should pretend that a resource has not been procured outside of RPM and should ignore any costs or revenues associated with those arrangements—effectively nullifying the states' choice. Thus, as proposed by P3 and PJM, the opportunity for unit-specific cost justification reinforces and does not ameliorate a revised MOPR's interference with state planning and procurement.[28]

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[27] *E.g.*, P3 March 4 Comments at 5-6 ("While we do not advocate deliberately choosing a mitigation benchmark higher than competitive capacity price levels, the consequences of an error in that direction would be far less severe[, because] any resource that can establish to the Commission that its actual costs are below the mitigation benchmark will be permitted to offer at its actual costs (the 'actual cost exemption').").

[28] The market monitor's version of this proposal suffers from the same problem and would be unworkable. The market monitor states that "there should be an exception process under which a market participant could submit its proposed offer with full documentation to the MMU for review and discussion[, and, i]f the MMU agreed that the offer reflects costs and does not reflect out of market payments, and PJM did not disagree and no party appealed to FERC, the offer could be used." IMM Comments at 13-14. The market monitor does not explain how this process would work. Would it be a public process? Who would have access to the data? And if it is not a public process, how would any party be able realistically to appeal to FERC?

Second, the administrative offer-review process can act as its own barrier to entry. As the recent dispute over access to WDE's cost data[29] and the subsequent withdrawal of WDE's request for unit-specific review[30] makes clear, new merchant generators operating in ostensibly competitive markets may be extremely reluctant to share their cost data with actual and potential competitors.[31] We take no position now on what steps should be taken to protect the confidentiality of such data while allowing appropriate participation by all intervenors in Commission adjudicatory proceedings. For present purposes, it is sufficient to note that the reluctance to share such data appears to be genuine and to operate as a significant deterrent to seeking unit-specific offer review. Even if a potential new resource is willing to take that step in a given case, substituting an administrative decision-maker's economic judgment for that of the resource vitiates one of the primary benefits that markets were thought to provide. It also creates the risk that the decision-maker will mistakenly require too high an offer, erecting a regulatory barrier to entry.

IV. CONCLUSIONS

The pleadings filed on March 4 illustrate the high stakes involved in this proceeding. This case will determine whether Commission policy facilitates or frustrates states' ability to safeguard the reliability of electric service to their citizens, whether

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29 *See W. Deptford Energy, LLC*, 134 FERC ¶ 61,189 (2011).

30 Letter from George D. (Chip) Cannon, Jr., Attorney for WDE, to Hon. Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, Docket No. ER11-2936-000 (March 15, 2011), eLibrary No. 20110315-5061.

31 We note that new resources and some existing resources may not be similarly situated in this regard. Resources that were constructed and operated by vertically-integrated utilities before restructuring or that have changed ownership several times may have relatively well known cost structures. New resources presumably do not.

states can pursue other energy policy objectives effectively and economically, and whether Commission policy creates or dismantles barriers to new entry. In approving the 2006 RPM settlement establishing a residual capacity market with a well-defined exception for state-planned resources, the Commission already answered these questions appropriately. We urge the Commission not to change course and thus to dismiss the P3 complaint and reject the PJM filing. If the Commission intends to consider such changes, the choice of New Jersey LCAPP resources unlikely to be bid into the upcoming BRA means that the Commission need not rush to a hurried resolution. In that case, the Commission should dismiss the complaint and reject the filing without prejudice to re-filing after the completion of a PJM stakeholder process. Alternatively, the Commission should dismiss the complaint, suspend the PJM filing for five months, and initiate settlement judge procedures.

Respectfully submitted,

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March 21, 2011

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 21st day of March, 2011.

/s/ *Jeffrey A. Schwarz*
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