

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company, and The Toledo)	
Edison Company for Authority to Provide)	Case No. 14-1297-EL-SSO
for a Standard Service Offer Pursuant to)	
R.C. 4928.143 in the Form of an Electric)	
Security Plan.)	

**THE PJM POWER PROVIDERS GROUP’S AND
THE ELECTRIC POWER SUPPLY ASSOCIATION’S
MEMORANDUM CONTRA TO FIRSTENERGY SOLUTIONS CORP.’S
MOTION TO QUASH THE SUBPOENA DUCES TECUM**

The PJM Power Providers Group (“P3”) and the Electric Power Supply Association (“EPSA”), collectively the “Joint Movants,” are full parties of record in the matter at bar. The Joint Movants properly served a subpoena duces tecum on FirstEnergy Solutions Corp. (“FES”) and filed the process of service with the Commission. The subpoena noticed three topics for deposition, all of which relate to FES’ participation in the last three Base Residual Auctions. In addition the subpoena requested the production of documents related to the three topics. On Friday December 5th, FES sent the Joint Movants a letter listing its concerns with the subpoena and demanding that Joint Movants withdraw the subpoena by Monday December 8th. The concerns listed by FES in its letter of December 5th were lack of adequate time to produce the documents and conduct the deposition, that the information sought was highly confidential and finally that the information sought was not relevant and was burdensome to produce.¹

The next business day after receiving the FES letter, the Joint Movants offered to extend the time for production so long as the documents were produced prior to December 22nd, the date

¹ Copies of FES’ December 5th letter and the Joint Movants’ December 8th letter are attached to FES’ motion to quash.

intervenor testimony is due in this proceeding. The Joint Movants also offered to delay the deposition to a date that would be mutually agreeable to FES and the Joint Movants. As for the confidential nature of the information, the Joint Movant offered to sign the same confidentiality agreement they now have with Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (jointly the “Companies”) in which competitively sensitive information will only be reviewed by counsel and outside consultants.

On the same day in which FES received the Joint Movants’ letter offering to address the issues raised, FES filed a motion to quash in which it continued to claim that it was not given sufficient time to produce the documents and prepare for the deposition. FES also claimed that the confidential nature of the information sought prohibited its disclosure. FES clearly had seen the Joint Movants’ offer of compromise as FES attached the settlement letter as an exhibit to the motion to quash. Further, the motion to quash did not raise any inadequacies in either the Joint Movants’ offer to extend or the use of the Companies’ confidentiality agreement to protect any confidential information that would be disclosed through the subpoena. Thus, Joint Movants believe that the only colorable concern raised by FES in its motion to quash is the relevancy of the information requested and the alleged difficulty of producing it.

The information sought by the Joint Movants consists of three sets of documents. The first set consists of electronic spreadsheets that we believe FES, as a PJM generator, has submitted to PJM in support of requests for specific seller offer caps for its units (versus the PJM default offer caps) as part of its participation in the PJM RPM Base Residual Auction.² These spreadsheets with the supporting workpapers provide detailed historic information on the W.H. Sammis generating

² Topic 1 of the subpoena was “PJM RPM Avoidable Cost Rate Template (Alternative Bid Cap spreadsheets) submitted by FES for the W. H. Sammis and Davis Besse power plants in each of the last three Base Residual Auctions (“BRAs”).”

units’ and the Davis Besse plant’s annual costs of staffing, maintaining, operating and making capital investments in the plants. Importantly these submissions separate those costs incurred by FES to keep the plants available and able to produce power (i.e., what are called avoidable costs or the going forward costs to avoid shutdown) and other cash capital investments that are associated with longer-term investments. Because the Companies have represented that these plants are facing questionable economic viability, the credibility of these claims must be tested. Since these are important documents that are required by PJM for all Base Residual Auctions where generators request generating unit seller offer caps, the documents are expected to exist and FES should have them archived (no indication has been made that they do not exist). Further, the Joint Movants are only asking for the spreadsheets and workpapers from the last three Base Residual Auctions as the results of these auctions are relevant to the Companies’ proposal.³ Thus, no credible argument can be raised that locating, or producing the documents is unduly burdensome. Further, these documents are usually kept electronically and the Joint Movants would accept an electronic version so the cost of reproduction and transmission is not significant.

The second topic subject to the subpoena was for the “[c]ommunications to and responses from the Independent Market Monitor (“IMM”) regarding FES’ PJM RPM Avoidable Cost Rate for the Davis Besse and W. H. Sammis power plants for each of the last three BRAs.” That is also not burdensome to produce, but in the spirit of compromise, Joint Movants are agreeable to dropping Topic 2 from the subpoena, both as to the production of documents and as to the topic for the deposition. That will alleviate any claim or concern by FES that it has to search for multiple documents in order to respond to the second topic.

³ PJM conducts the Base Residual Auction every year for the time period three years in advance. So the Base Residual Auction conducted in May of 2014 was for the flow period of June 2017 through May 2018.

The third item requested was the Independent Market Monitor's designation of the default cap or alternative seller offer cap (PJM RPM Avoidable Cost Rate) for the Davis Besse plant and each of the W. H. Sammis generating units for each of the last three BRAs.⁴ Under the PJM rules and manual, the Independent Market Monitor must approve the maximum bid figure and energy revenue offset for any PJM Base Residual Auction applicant. The bid cap identifies the true incremental cost of providing service which is essential in the PJM capacity pricing scheme as the highest bid closing incremental cost sets the capacity price for all capacity providers in the Base Residual Auction.

It is hard to overstate the importance of the two groups of documents requested to be produced with examination of an FES person knowledgeable about the documents. The Companies are asking that all rate payers, on a non bypassable basis, make up the difference between (1) the costs of operating the W.H. Sammis units and the Davis Besse plant with a 11.15% rate of return on investment and (2) the BRA capacity revenues along with the revenues from energy and ancillary service sales in the PJM real time and day ahead markets. Clearing the triannual Base Residual Auction is implied in the Companies' application. The Base Residual Auction capacity revenues are the major source of capacity revenue for any power plant in the PJM system. Thus, knowing how the Davis Besse and W.H. Sammis plants fared in the last three auctions and how close they were to being excluded from capacity payments is extremely important for the Commission to consider before ordering all rate payers to take the risk of the investment in these capital plants for the next 15 years without carefully studying the relative capacity cost vis a vis the other competitors for capacity payments.

⁴ Topic 3 stated "[i]dentify what the IMM gave FES as the default cap or alternative cap (PJM RPM Avoidable Cost Rate) for Davis Besse and W. H. Sammis power plants for each of the last three BRAs."

PUBLIC VERSION

[REDACTED FROM PUBLIC VERSION]

As indicated above, the information sought by the subpoena is highly relevant and important to this proceeding. Avoidable cost information is required by PJM to develop unit-specific seller

offer caps. As defined by the formula found in Section 6.8a of Attachment DD of the PJM's Open Access Tariff (relevant pages attached as Exhibit A), the Avoidable Cost Rate equals 1.10 multiplied by the sum of Avoidable Operations and Maintenance Labor, Avoidable Administrative Expenses, Avoidable Maintenance Expenses, Avoidable Variable Expenses, Avoidable Taxes, Fees and Insurance, Avoidable Carrying Charges, Avoidable Corporate Level Expenses, and Avoidable Project Investment Recovery Rate. The spreadsheet PJM provides to its members to calculate the Avoidable Cost Rate reflects the detailed information on plant operations and incremental costs that are essential in determining whether a unit is economical and able to compete in the capacity market. A copy of that spreadsheet template⁵ is attached as Exhibit B and indicates that the information required to complete the spreadsheet is much more detailed than provided in the disclosures by the Companies in their application and any other discovery responses received thus far. Only FES has this information.

FES takes the position that this information, even if relevant, cannot be disclosed to the Joint Movants because the information will be used in future Base Residual Auction bidding. Given the offered confidentiality agreement, that argument is no longer relevant. Only Joint Movants' outside counsel and their outside experts will have access to this information, which will be used in cross examination and to develop testimony. Moreover, the Companies are using the same process for all other confidential information and FES appears to be agreeable to using this process given its alternative request for a protective order. FES' production of the documents and testimony at a deposition will not create any PJM or FERC confidentiality concerns because no employee of Joint Movants will see the Avoidable Cost Information and none will have the ability to use any information in future Base Residual Auctions. That is the purpose of a protective order and Joint

⁵ The template is publicly available at <http://www.monitoringanalytics.com/tools/tools.shtml>

Movants are fully agreeable, as offered to FES previously, to enter into a protective agreement with FES using the same terms as the protective agreement entered into with the Companies.

Indeed, a similar issue was addressed by FERC in 2011 when a market participant requested that bid related material and supporting documentation be protected from disclosure to third parties. *In re West Deptford Energy, LLC*, 134 FERC ¶ 61,189 (March 14, 2011), copy attached as Exhibit C. The market participant claimed that “providing intervenors (including competitors, states and customers) with access to pre-auction bid information, even subject to a Protective Agreement, would set a dangerous precedent and violate the Commission’s policy of preventing the disclosure of granular, non-aggregated bid and offer data that can be linked to a particular market participant.” *Id.* at ¶ 5. The market participant also tried to rely on PJM disclosure rules regarding capacity seller’s RPM data. *Id.* at ¶ 6. The FERC rejected the market participant’s argument against disclosure, finding that a protective agreement consistent with the FERC’s order would safeguard the market participant’s interest in maintaining confidentiality. *Id.* at ¶ 29.

FES has no basis to withhold the sought information from disclosure to the Joint Movants. As noted above, Joint Movants are agreeable to dropping Topic 2 from the subpoena, both as to the production of documents and as to the topic for the deposition. That will alleviate any concern by FES that it has to search for various documents in order to respond to that topic. Instead, FES can satisfy the subpoena by producing the Avoidable Cost Rate spreadsheets provided to the Independent Market Monitor in electronic form with workpapers, and identifying the bid caps set by the IMM for the W.H. Sammis generating units and the Davis-Besse plant for the last three Base Residual Auctions – a total of twenty-four numbers. That information can be made subject to a protective agreement, and will be disclosed only to outside counsel for the Joint Movants and their outside experts and handled in a limited fashion under that protective agreement.

In closing, FES should not be allowed to avoid disclosure of significant and relevant information on the historical costs and incremental costs of the generation from the W.H. Sammis units and the Davis-Besse plant, as that information is tied to the question of whether the Companies' proposed Economic Stability Program will "act as a retail rate stability mechanism against increasing market prices and price volatility for all retail customers over the longer term."⁶ FES has no basis to object to the timing of production because Joint Movants have agreed to give FES more time to produce the spreadsheet and communications. Joint Movants have also agreed to reschedule the deposition to a mutually agreeable date as well as enter into a protective agreement that would prevent any employee of the Joint Movants from receiving any of the produced information.

As to FES' claim that the Companies have already disclosed "all relevant cost and revenue information[,]" it is impossible for FES to know what information the Joint Movants will need to develop their theories in this case. The Companies and their affiliate, FES, simply cannot be put in the position of judging whether other discovery previously released is sufficient to meet the Joint Movant's needs. Information on the Avoidable Cost Rate spreadsheets and bid caps are highly relevant in this proceeding and include information that has not been disclosed by any other entity in this proceeding. More importantly, the information will provide the Commission with important information to determine the nature of risk being proposed in Rider RRS.

The Commission should deny FES' motion to quash and order FES to comply with the

⁶ Companies' Application at 9.

PUBLIC VERSION

subpoena duces tecum as to Topics 1 and 3. The subpoena is targeted in scope and reasonable as to both the time of production and the extent of production.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio e-filing system will electronically serve notice of the filing of the public version of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served upon the persons below via electronic mail this 15th day of December, 2014.

s/ Michael J. Settineri
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EXHIBIT A

Interconnection will accept such offers on a competitive basis. PJM will construct a supply curve of opportunity cost offers, ordered by opportunity cost, and accept such offers to export starting with the highest opportunity cost, until the maximum level of such exports is reached. The maximum level of such exports is the lesser of the Office of the Interconnection's ability to permit firm exports or the ability of the importing area(s) to accept firm imports or imports of capacity, taking account of relevant export limitations by location. If, as a result, an opportunity cost offer is not accepted from an existing generation resource, the Market Seller Offer Cap applicable to Sell Offers relying on such generation resource shall be the Avoidable Cost Rate less the Projected Market Revenues for such resource (as defined in Section 6.4). The default Avoidable Cost Rate shall be the one year mothball Avoidable Cost Rate set forth in the tables in section 6.7(c) above unless Capacity Market Seller satisfies the criteria delineated in section 6.7(e) below.

iii. **Projected PJM Market Revenues:** Projected PJM Market Revenues are defined by section 6.8(d), for any Generation Capacity Resource to which the Avoidable Cost Rate is applied.

(e) In order for the retirement Avoidable Cost Rate set forth in the table in section 6.7(c) to apply, by no later than one hundred twenty (120) days prior to the commencement of the offer period for the applicable RPM Auction, a Capacity Market Seller must submit to the Office of the Interconnection and the Market Monitoring Unit a written sworn, notarized statement of a corporate officer representing that the Capacity Market Seller will retire the Generation Capacity Resource if it does not receive during the relevant Delivery Year at least the applicable retirement Avoidable Cost Rate because it would be uneconomic to continue to operate the Generation Capacity Resource in the Delivery Year without the retirement Avoidable Cost Rate, and specifying the date the Generation Capacity Resource would otherwise be retired.

6.8 Avoidable Cost Definition

(a) Avoidable Cost Rate:

The Avoidable Cost Rate for a Generation Capacity Resource that is the subject of a Sell Offer shall be determined using the following formula, expressed in dollars per MW-year:

$$\text{Avoidable Cost Rate} = [\text{Adjustment Factor} * (\text{AOML} + \text{AAE} + \text{AME} + \text{AVE} + \text{ATFI} + \text{ACC} + \text{ACLE}) + \text{ARPIR} + \text{APIR}]$$

Where:

- **Adjustment Factor** equals 1.10 (to provide a margin of error for understatement of costs) plus an additional adjustment referencing the 10-year average Handy-Whitman Index in order to account for expected inflation from the time interval between the submission of the Sell Offer and the commencement of the Delivery Year.
- **AOML (Avoidable Operations and Maintenance Labor)** consists of the avoidable labor expenses related directly to operations and maintenance of the generating unit for the twelve months preceding the month in which the data

must be provided. The categories of expenses included in AOML are those incurred for: (a) on-site based labor engaged in operations and maintenance activities; (b) off-site based labor engaged in on-site operations and maintenance activities directly related to the generating unit; and (c) off-site based labor engaged in off-site operations and maintenance activities directly related to generating unit equipment removed from the generating unit site.

- **AAE (Avoidable Administrative Expenses)** consists of the avoidable administrative expenses related directly to employees at the generating unit for twelve months preceding the month in which the data must be provided. The categories of expenses included in AAE are those incurred for: (a) employee expenses (except employee expenses included in AOML); (b) environmental fees; (c) safety and operator training; (d) office supplies; (e) communications; and (f) annual plant test, inspection and analysis.
- **AME (Avoidable Maintenance Expenses)** consists of avoidable maintenance expenses (other than expenses included in AOML) related directly to the generating unit for the twelve months preceding the month in which the data must be provided. The categories of expenses included in AME are those incurred for: (a) chemical and materials consumed during maintenance of the generating unit; and (b) rented maintenance equipment used to maintain the generating unit.
- **AVE (Avoidable Variable Expenses)** consists of avoidable variable expenses related directly to the generating unit incurred in the twelve months preceding the month in which the data must be provided. The categories of expenses included in AVE are those incurred for: (a) water treatment chemicals and lubricants; (b) water, gas, and electric service (not for power generation); and (c) waste water treatment.
- **ATFI (Avoidable Taxes, Fees and Insurance)** consists of avoidable expenses related directly to the generating unit incurred in the twelve months preceding the month in which the data must be provided. The categories of expenses included in AFTI are those incurred for: (a) insurance, (b) permits and licensing fees, (c) site security and utilities for maintaining security at the site; and (d) property taxes.
- **ACC (Avoidable Carrying Charges)** consists of avoidable short-term carrying charges related directly to the generating unit in the twelve months preceding the month in which the data must be provided. Avoidable short-term carrying charges shall include short term carrying charges for maintaining reasonable levels of inventories of fuel and spare parts that result from short-term operational unit decisions as measured by industry best practice standards. For the purpose of determining ACC, short term is the time period in which a reasonable replacement of inventory for normal, expected operations can occur.

- **ACLE (Avoidable Corporate Level Expenses)** consists of avoidable corporate level expenses directly related to the generating unit incurred in the twelve months preceding the month in which the data must be provided. Avoidable corporate level expenses shall include only such expenses that are directly linked to providing tangible services required for the operation of the generating unit proposed for Deactivation. The categories of avoidable expenses included in ACLE are those incurred for: (a) legal services, (b) environmental reporting; and (c) procurement expenses.
- **APIR (Avoidable Project Investment Recovery Rate) = $PI * CRF$**

Where:

- **PI** is the amount of project investment completed prior to June 1 of the Delivery Year, except for Mandatory Capital Expenditures ("CapEx") for which the project investment must be completed during the Delivery Year, that is reasonably required to enable a Generation Capacity Resource that is the subject of a Sell Offer to continue operating or improve availability during Peak-Hour Periods during the Delivery Year.
- **CRF** is the annual capital recovery factor from the following table, applied in accordance with the terms specified below.

Age of Existing Units (Years)	Remaining Life of Plant (Years)	Levelized CRF
1 to 5	30	0.107
6 to 10	25	0.114
11 to 15	20	0.125
16 to 20	15	0.146
21 to 25	10	0.198
25 Plus	5	0.363
Mandatory CapEx	4	0.450
40 Plus Alternative	1	1.100

Unless otherwise stated, Age of Existing Unit shall be equal to the number of years since the Unit commenced commercial operation, up to and through the relevant Delivery Year.

Remaining Life of Plant defines the amortization schedule (i.e., the maximum number of years over which the Project Investment may be included in the Avoidable Cost Rate.)

Capital Expenditures and Project Investment

For any given Project Investment, a Capacity Market Seller may make a one-time election to recover such investment using: (i) the highest CRF and associated recovery schedule to which it

is entitled; or (ii) the next highest CRF and associated recovery schedule. For these purposes, the CRF and recovery schedule for the 25 Plus category is the next highest CRF and recovery schedule for both the Mandatory CapEx and the 40 Plus Alternative categories. The Capacity Market Seller using the above table must provide the Market Monitoring Unit with information, identifying and supporting such election, including but not limited to the age of the unit, the amount of the Project Investment, the purpose of the investment, evidence of corporate commitment (e.g., an SEC filing, a press release, or a letter from a duly authorized corporate officer indicating intent to make such investment), and detailed information concerning the governmental requirement (if applicable). Absent other written notification, such election shall be deemed based on the CRF such Seller employs for the first Sell Offer reflecting recovery of any portion of such Project Investment.

For any resource using the CRF and associated recovery schedule from the CRF table that set the Capacity Resource Clearing Price in any Delivery Year, such Capacity Market Seller must also provide to the Market Monitoring Unit, for informational purposes only, evidence of the actual expenditure of the Project Investment, when such information becomes available.

If the project associated with a Project Investment that was included in a Sell Offer using a CRF and associated recovery schedule from the above table has not entered into commercial operation prior to the end of the relevant Delivery Year, and the resource's Sell Offer sets the clearing price for the relevant LDA, the Capacity Market Seller shall be required to elect to either (i) pay a charge that is equal to the difference between the Capacity Resource Clearing Price for such LDA for the relevant Delivery Year and what the clearing price would have been absent the APIR component of the Avoidable Cost Rate, this difference to be multiplied by the cleared MW volume from such Resource ("rebate payment"); (ii) hold such rebate payment in escrow, to be released to the Capacity Market Seller in the event that the project enters into commercial operation during the subsequent Delivery Year or rebated to LSEs in the relevant LDA if the project has not entered into commercial operation during the subsequent Delivery Year; or (iii) make a reasonable investment in the amount of the PI in other Existing Generation Capacity Resources owned or controlled by the Capacity Market Seller or its Affiliates in the relevant LDA. The revenue from such rebate payments shall be allocated pro rata to LSEs in the relevant LDA(s) that were charged a Locational Reliability Charge for such Delivery Year, based on their Daily Unforced Capacity Obligation in the relevant LDA(s). If the Sell Offer from the Generation Capacity Resource did not set the Capacity Resource Clearing Price in the relevant LDA, no alternative investment or rebate payment is required. If the difference between the Capacity Resource Clearing Price for such LDA for the relevant Delivery Year and what the clearing price would have been absent the APIR amount does not exceed the greater of \$10 per MW-day or a 10% increase in the clearing price, no alternative investment or rebate payment is required.

Mandatory CapEx Option

The Mandatory CapEx CRF and recovery schedule is an option available, beginning in the third BRA (Delivery Year 2009-10), to a resource that must make a Project Investment to comply with a governmental requirement that would otherwise materially impact operating levels during the Delivery Year, where: (i) such resource is a coal, oil or gas-fired resource that began commercial operation no fewer than fifteen years prior to the start of the first Delivery Year for which such recovery is sought, and such Project Investment is equal to or exceeds \$200/kW of capitalized

project cost; or (ii) such resource is a coal-fired resource located in an LDA for which a separate VRR Curve has been established for the relevant Delivery Years, and began commercial operation at least 50 years prior to the conduct of the relevant BRA.

A Capacity Market Seller that wishes to elect the Mandatory CapEx option for a Project Investment must do so beginning with the Base Residual Auction for the Delivery Year in which such project is expected to enter commercial operation. A Sell Offer submitted in any Base Residual Auction for which the Mandatory CapEx option is selected may not exceed an offer price equivalent to 0.90 times the then-current Net CONE (on an unforced-equivalent basis).

40 Plus Alternative Option

The 40 Plus Alternative CRF and recovery schedule is an option available, beginning in the third BRA (Delivery Year 2009-10), for a resource that is a gas- or oil-fired resource that began commercial operation no less than 40 years prior to the conduct of the relevant BRA (excluding, however, any resource in any Delivery Year for which the resource is receiving a payment under Part V of the PJM Tariff. Generation Capacity Resources electing this 40 Plus Alternative CRF shall be treated as At Risk Generation for purposes of the sensitivity runs in the RTEP process). Resources electing the 40 Plus Alternative option will be modeled in the RTEP process as "at-risk" at the end of the one-year amortization period.

A Capacity Market Seller that wishes to elect the 40 Plus Alternative option for a Project Investment must provide written notice of such election to the Office of the Interconnection no later than six months prior to the Base Residual Auction for which such election is sought; provided however that shorter notice may be provided if unforeseen circumstances give rise to the need to make such election and such seller gives notice as soon as practicable.

The Office of the Interconnection shall give market participants reasonable notice of such election, subject to satisfaction of requirements under the PJM Operating Agreement for protection of confidential and commercially sensitive information. A Sell Offer submitted in any Base Residual Auction for which the 40 Plus Alternative option is selected may not exceed an offer price equivalent to the then-current Net CONE (on an unforced-equivalent basis).

Multi-Year Pricing Option

A Seller submitting a Sell Offer with an APIR component that is based on a Project Investment of at least \$450/kW may elect this Multi-Year Pricing Option by providing written notice to such effect the first time it submits a Sell Offer that includes an APIR component for such Project Investment. Such option shall be available on the same terms, and under the same conditions, as are available to Planned Generation Capacity Resources under section 5.14(c) of this Attachment.

- ARPIR (Avoidable Refunds of Project Investment Reimbursements) consists of avoidable refund amounts of Project Investment Reimbursements payable by a Generation Owner to PJM under Part V, Section 118 of this Tariff or avoidable refund amounts of project investment reimbursements payable by a Generation Owner to PJM under

a Cost of Service Recovery Rate filed under Part V, Section 119 of the Tariff and approved by the Commission.

(b) For the purpose of determining an Avoidable Cost Rate, avoidable expenses are incremental expenses directly required to operate a Generation Capacity Resource that a Generation Owner would not incur if such generating unit did not operate in the Delivery Year or meet Availability criteria during Peak-Hour Periods during the Delivery Year.

(c) For the purpose of determining an Avoidable Cost Rate, avoidable expenses shall exclude variable costs recoverable under cost-based offers to sell energy from operating capacity on the PJM Interchange Energy Market under the Operating Agreement.

(d) Projected PJM Market Revenues for any Generation Capacity Resource to which the Avoidable Cost Rate is applied shall include all actual unit-specific revenues from PJM energy markets, ancillary services, and unit-specific bilateral contracts from such Generation Capacity Resource, net of marginal costs for providing such energy (i.e., costs allowed under cost-based offers pursuant to Section 6.4 of Schedule 1 of the Operating Agreement) and ancillary services from such resource.

(i) For the first three BRAs (for Delivery Years 2007-08, 2008-09, 2009-10), the calculation of Projected PJM Market Revenues shall be equal to the simple average of such net revenues as described above for calendar years 2001-2006; and

(ii) For the fourth BRA (delivery year 2010-11) and thereafter, the calculation of Projected PJM Market Revenues shall be equal to the rolling simple average of such net revenues as described above from the three most recent whole calendar years prior to the year in which the BRA is conducted.

If a Generation Capacity Resource did not receive PJM market revenues during the entire relevant time period because the Generation Capacity Resource was not integrated into PJM during the full period, then the Projected PJM Market Revenues shall be calculated using only those whole calendar years within the full period in which such Resource received PJM market revenues.

If a Generation Capacity Resource did not receive PJM market revenues during the entire relevant time period because it was not in commercial operation during the entire period, or if data is not available to the Capacity Market Seller for the entire period, despite the good faith efforts of such seller to obtain such data, then the Projected PJM Market Revenues shall be calculated based upon net revenues received over the entire period by comparable units, to be developed by the MMU and the Capacity Market Seller.

EXHIBIT B

1 PJM RPM AVOIDABLE COST RATE TEMPLATE

2 Version 11 - October, 2013

3

4 12/15/14 3:47 PM

5 Generation owners should provide the most recent 12 months of actual data, escalated to the appropriate delivery year.

6 Section 1 - Power Plant Technology

7 CC - Two on One Frame F Technology

8 Use Default ACR (Yes/No) No

9 Enter Default ACR (\$/MW-Day) \$0.00

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Instructions to Participant

Participant to complete all cells in blue text.

Cells in black text are calculated values

Section 3A - Simple Cycle CT, Diesel or Combined Cycle Technical Information

Primary Fuel Gas

Back Up Fuel None

On Site Natural Gas Compression Yes

CT or Diesel OEM GE

CT or Diesel Model PG241FA

CT or Diesel Rating at ISO (MW) 171.7

Number of CT or Diesel Units 2

STG OEM GE

STG Capacity (MW) 200.0

Number of STG 1

Per HRSO Duct Burner Capacity (MMBTU/hr) (HHV) 30.0

CT/Diesel Nox Control Type Dry Low Nox

CT/Diesel Exhaust Nox Control SCR

HRSO HP Pressure/Temperature 2,000/1,000

HRSO Reheat Pressure/Temperature 600/1,000

Average Steam Export Flow to Host (Lbs/hr) 0

Average Electric Export Flow to Host (MW) 0

Condenser Cooling System Wet Cooling Tower

Turbine Inlet Air Cooling Technology (TIC) Evaporator

Target Inlet Temperature if Mechanical TIC 0

Section 3B - Boiler - Steam Turbine Plant Technical Information

Primary Fuel Coal

Back Up Fuel No. 2 Oil

Boiler OEM Foster Wheeler

Boiler Design Configuration Front Wall Fired

Boiler HP Steam Rating (Lbs/Hr) 1,800,000

Number of Boilers 4

Boiler HP Pressure/Temperature 2,000/1,000

Boiler Reheat Pressure/Temperature 600/1,000

Fuel Input at Rated Capacity (MMBTU/hr) (HHV) 3,630.8

STG OEM GE

STG Capacity (MW) 255.5

STG Water Rate (Lbs/kWh) 7,045

Primary Boiler Nox Control Low Nox Burners

Secondary Boiler Nox Control Offline Air

Primary Particulate Control Cyclones

Secondary Particulate Control ESP

Tertiary Particulate Control Bag House

Soot Control Dry Injection

Number of STG 1

Condenser Cooling System Wet Cooling Tower

Section 3C - Hydro and Pumped Storage

Turbine OEM ABB

Number of Turbines 1

Turbine Capacity (MW) 20.0

Pump OEM DeLaval

Number of Pumps 1

Section 2B - Non Avoidable Cost Data

Transition Adder (\$/MW-Day) \$0.00

Opportunity Cost (MW) 0.0

Opportunity Cost (\$/MW-Day) \$0.00

Opportunity Cost Justification Alphabetic - 50

PJM Net Market Revenues (\$/MW-Yr) \$0

Bilateral Revenues (\$/MW-Yr) \$0

Bilateral Costs (\$/MW-Yr) \$0

Exports (MW) 0.0

Export Justification Alphabetic - 50

using segmented opportunity cost

Opportunity Cost (MW)

\$/MW Day

Segment 1 0.0 \$0.00

Segment 2 0.0 \$0.00

Segment 3 0.0 \$0.00

Segment 4 0.0 \$0.00

Segment 5 0.0 \$0.00

Segment 6 0.0 \$0.00

Segment 7 0.0 \$0.00

Segment 8 0.0 \$0.00

Segment 9 0.0 \$0.00

Segment 10 0.0 \$0.00

94	Section 4 & 5 - Staffing Assumptions to Determine AOML and AAE																										
95	Base Annual Labor Hours		2,080																								
96	Overtime Hours (%)		10.0%																								
97	Overtime Wage of Base (%)		150.0%																								
98	Administrative Bonus (%)		0.0%																								
99	Benefits Percent of Base (%)		35.0%																								
100	Operating Onsite & Offsite Plant Work Force																										
101																											
102																											
103	Section 5 - Operating Administrative Expense (AAE)				Onsite		Offsite		On & Offsite						Base Salary		Annual Bonus	Annual Wages	Unit Benefits	Unit Cost w Benefits	Total Expense						
104	Plant Manager		1.00		0.00		1.00								\$125,000		\$43,750	\$125,000	\$43,750	\$168,750	\$168,750						
105	Operations Manager		0.00		0.00		0.00								\$80,000		\$0	\$80,000	\$28,000	\$108,000	\$0						
106	Maintenance Manager		0.00		0.00		0.00								\$75,000		\$0	\$75,000	\$26,250	\$101,250	\$0						
107	Technical Manager		0.00		0.00		0.00								\$70,000		\$0	\$70,000	\$24,500	\$94,500	\$0						
108	Plant-Environmental-Design Engineer		0.00		0.00		0.00								\$60,000		\$0	\$60,000	\$21,000	\$81,000	\$0						
109	ND Testing-Balancing-Chemist-Inspection		0.00		0.00		0.00								\$60,000		\$0	\$60,000	\$21,000	\$81,000	\$0						
110	Plant Engineer/Environmental		1.00		0.00		1.00								\$60,000		\$0	\$60,000	\$21,000	\$81,000	\$81,000						
111	Accounting/Purchasing		1.00		0.00		1.00								\$45,000		\$0	\$45,000	\$15,750	\$60,750	\$60,750						
112	Secretary/Administration		1.00		0.00		1.00								\$40,000		\$0	\$40,000	\$14,000	\$54,000	\$54,000						
113	Total Administrative				0.00		4.00														\$364,500						
114									Base Rate \$/Hour		Unit Base Hours	Unit OT Hours	Unit Total Hours	Unit Base Wages	Unit OT Wages	Unit Wages with OT	Unit Benefits	Unit Labor w Benefits	Total Expense								
115	Shift Number		1		2		3		4																		
116	Section 4 - Operating AOML Operations										Onsite		Onsite		Onsite		Offsite		On & Offsite								
117	Shift Supervisor														0.00		0.00	\$32.00	2.080	208	2,288	\$66,560	\$9,984	\$76,544	\$23,296	\$99,840	\$0
118	Lead Operator		1.00		1.00		1.00		1.00						0.00		4.00	\$28.50	2.080	208	2,288	\$59,280	\$8,892	\$68,172	\$20,748	\$88,920	\$356,680
119	Auxiliary Operator		2.00		2.00		2.00		2.00						0.00		8.00	\$27.50	2.080	208	2,288	\$57,200	\$8,580	\$65,780	\$20,020	\$85,800	\$686,400
120	Plant Mechanic														0.00		0.00	\$22.00	2.080	208	2,288	\$45,760	\$6,864	\$52,624	\$16,016	\$68,640	\$0
121	Fuel Handling														0.00		0.00	\$20.00	2.080	208	2,288	\$41,600	\$6,240	\$47,840	\$14,560	\$62,400	\$0
122	Total Operations														0.00		12.00										\$1,042,080
123	Section 4 - Operating AOML Maintenance										Onsite		Onsite		Onsite		Offsite		On & Offsite								
124	Foreman		0.00		0.00		0.00		0.00						0.00		0.00	\$31.00	2.080	208	2,288	\$64,480	\$9,672	\$74,152	\$22,568	\$96,720	\$0
125	Millwright		1.00		0.00		1.00		0.00						0.00		1.00	\$25.00	2.080	208	2,288	\$52,000	\$7,800	\$59,800	\$18,200	\$78,000	\$78,000
126	Pipe fitters		0.00		0.00		0.00		0.00						0.00		0.00	\$25.00	2.080	208	2,288	\$52,000	\$7,800	\$59,800	\$18,200	\$78,000	\$0
127	Boilermaker		0.00		0.00		0.00		0.00						0.00		0.00	\$25.00	2.080	208	2,288	\$52,000	\$7,800	\$59,800	\$18,200	\$78,000	\$0
128	Laborer		0.00		0.00		0.00		0.00						0.00		0.00	\$18.00	2.080	208	2,288	\$37,440	\$5,616	\$43,056	\$13,104	\$56,160	\$0
129	Electrician/I&C		3.00		0.00		3.00		3.00						0.00		3.00	\$30.00	2.080	208	2,288	\$62,400	\$9,360	\$71,760	\$21,840	\$93,600	\$280,800
130	Total Maintenance				0.00		4.00																				\$358,800
131	Total				0.00		20.00																				\$1,765,380
132																											
133	Non-Available Onsite & Offsite Plant Work Force																										
134																											
135																											
136	Section 5 - Non-Available Administrative Expense (AAE)				Onsite		Offsite		On & Offsite						Base Salary		Annual Bonus	Annual Compensation	Unit Benefits	Unit Cost w Benefits	Total Expense						
137	Plant Manager		0.00		0.00		0.00								\$125,000		\$0	\$125,000	\$43,750	\$168,750	\$0						
138	Operations Manager		0.00		0.00		0.00								\$80,000		\$0	\$80,000	\$28,000	\$108,000	\$0						
139	Maintenance Manager		0.00		0.00		0.00								\$75,000		\$0	\$75,000	\$26,250	\$101,250	\$0						
140	Technical Manager		0.00		0.00		0.00								\$70,000		\$0	\$70,000	\$24,500	\$94,500	\$0						
141	Plant-Environmental-Design Engineer		0.00		0.00		0.00								\$60,000		\$0	\$60,000	\$21,000	\$81,000	\$0						
142	ND Testing-Balancing-Chemist-Inspection		0.00		0.00		0.00								\$60,000		\$0	\$60,000	\$21,000	\$81,000	\$0						
143	Plant Engineer/Environmental		0.00		0.00		0.00								\$60,000		\$0	\$60,000	\$21,000	\$81,000	\$0						
144	Accounting/Purchasing		0.00		0.00		0.00								\$45,000		\$0	\$45,000	\$15,750	\$60,750	\$0						
145	Secretary/Administration		1.00		0.00		1.00								\$40,000		\$0	\$40,000	\$14,000	\$54,000	\$54,000						
146	Total Administrative				0.00		1.00														\$54,000						
147									Base Rate \$/Hour		Unit Base Hours	Unit OT Hours	Unit Total Hours	Unit Base Wages	Unit OT Wages	Unit Wages with OT	Unit Benefits	Unit Labor w Benefits	Total Expense								
148	Section 4 - Non-Available AOML Operations										Onsite		Onsite		Onsite		Offsite		On & Offsite								
149	Shift Supervisor														0.00		0.00	\$32.00	2.080	208	2,288	\$66,560	\$9,984	\$76,544	\$23,296	\$99,840	\$0
150	Lead Operator		0.00		0.00		0.00		0.00						0.00		0.00	\$28.50	2.080	208	2,288	\$59,280	\$8,892	\$68,172	\$20,748	\$88,920	\$0
151	Auxiliary Operator		1.00		1.00		0.00		0.00						0.00		2.00	\$27.50	2.080	208	2,288	\$57,200	\$8,580	\$65,780	\$20,020	\$85,800	\$171,600
152	Plant Mechanic														0.00		0.00	\$22.00	2.080	208	2,288	\$45,760	\$6,864	\$52,624	\$16,016	\$68,640	\$0
153	Fuel Handling														0.00		0.00	\$20.00	2.080	208	2,288	\$41,600	\$6,240	\$47,840	\$14,560	\$62,400	\$0
154	Total Operations														0.00		2.00										\$171,600
155	Section 4 - Non-Available AOML Maintenance										Onsite		Onsite		Onsite		Offsite		On & Offsite								
156	Foreman		0.00		0.00		0.00		0.00						0.00		0.00	\$31.00	2.080	208	2,288	\$64,480	\$9,672	\$74,152	\$22,568	\$96,720	\$0
157	Millwright		1.00		0.00		1.00		0.00						0.00		1.00	\$25.00	2.080	208	2,288	\$52,000	\$7,800	\$59,800	\$18,200	\$78,000	\$78,000
158	Pipe fitters		0.00		0.00		0.00		0.00						0.00		0.00	\$25.00	2.080	208	2,288	\$52,000	\$7,800	\$59,800	\$18,200	\$78,000	\$0
159	Boilermaker		0.00		0.00		0.00		0.00						0.00		0.00	\$25.00	2.080	208	2,288	\$52,000	\$7,800	\$59,800	\$18,200	\$78,000	\$0
160	Laborer		0.00		0.00		0.00		0.00						0.00		0.00	\$18.00	2.080	208	2,288	\$37,440	\$5,616	\$43,056	\$13,104	\$56,160	\$0
161	Electrician/I&C		0.00		0.00		0.00		0.00						0.00		0.00	\$30.00	2.080	208	2,288	\$62,400	\$9,360	\$71,760	\$21,840	\$93,600	\$0
162	Total Maintenance				0.00		1.00																				\$78,000
163	Total				0.00		4.00																				\$303,600

Technology Options Located in Section 3 Drop Downs									
Primary Fuels	Gas	Landfill Gas	Kero	No. 2 Oil	No. 6 Oil	Coal	Waste Coal	MSW	Biomass
CT Backup Fuels	Gas	Kero	No. 2 Oil	None					
Steam Backup Fuels	Gas	Kero	No. 2 Oil	No. 6 Oil	None				
Compressors	Yes	No	Not Available						
CT Diesel OEM	GE	ABB	Siemens	Westinghouse	Pratt & Whitney	Solar	Caterpillar	Other	Not Available
STG OEM	GE	ABB	Siemens	Westinghouse	Mitsubishi	Elliott	DeLaval	Other	Not Available
CT Emissions Controls	Water Injection	Steam Injection	Dry Low Nox	Other	None	Not Available			
HRSO Emissions Controls	SCR	CO Catalyst	SCR/CO Catalyst	Urea Injection	Other	None	Not Available		
Condenser Cooling System	Wet Cooling Tower	Air Condenser	River Water	Cooling Pond	Other	None	Not Available		
TIC	Evaporative	Fogging	Electric Mechanical	Steam Absorption	Wet Compression	Other	None	Not Available	
Boiler OEM	Foster Wheeler	Babcock Wilcox	Combustion Engineering	Zurn	Other	Not Available			
Boiler Design Configuration	Front Wall Fired	Tangential Fired	Down Fired	Other	None	Not Available			
Boiler Nox Control	Low Nox Burners	Flue Gas Recirculation	Overfire Air	Urea Injection	SCR	Other	None	Not Available	
Particulate Control	Cyclones	Wet Scrubber	ESP	Bag House	Other	None	Not Available		
SO2 Control	Wet Scrubber	Dry Injection	Other	None	Not Available				

LDA	Default Dropdown
MAAC Region and APS	Yes
ComEd, AEP, Dayton, Dominion and Duquesne	No
Eastern MAAC	
Southwestern MAAC	
NA	

Default Technology Categories		
No.	Technology Description	Capacity (MW)
1	Diesel	Up to 10
2	CT - First & Second Generation Frame B	20 to 45
3	CT - First & Second Generation Aero (P&W FT 4)	20 to 45
4	CT - Second Generation Frame E	80
5	CT - Third Generation Frame F	150
6	CT - Third Generation Aero (P&W FT- 8 TwinPak)	50
7	CT - Third Generation Aero (GE LM 6000)	40
8	CC - Three on One Frame E Technology	500
9	CC - Two on One Frame F Technology	500 Plus
10	CC - Three or More on One or More Frame F Technology	800 to 1,250
11	CC - NUG Cogeneration Frame B or E Technology	50 to 200
12	Oil or Gas Steam	250 to 500
13	Sub-Critical Coal	Up to 500
14	Super Critical Coal	Up to 600
15	Waste Coal - 80 to 100 MW	80 to 100
16	Waste Coal - 500 MW	500
17	Hydro	500
18	Pumped Storage	1000
19	CT - Industrial Frame	
20	CT - Aero Derivative	
21	CC - Combined Cycle	
22	Coal Fired	
23	Nuclear	
24	Wind	

EXHIBIT C



West Deptford Energy, LLC

Docket No. ER11-2936-000

FEDERAL ENERGY REGULATORY COMMISSION - COMMISSION

134 F.E.R.C. P61,189; 2011 FERC LEXIS 510

March 14, 2011

ACTION:

[**1] ORDER ON PROCEDURES FOR TREATMENT OF PROTECTED INFORMATION AND NOTICE OF DATE FOR COMMENTS AND PROTESTS

PRIOR HISTORY:

2011 FERC LEXIS 432

JUDGES: Before Commissioners: Jon Wellinohoff, Chairman; Marc Spitzer, Philip D. Moeller, John R. Norris, and Cheryl A. LaFleur

OPINION:

[*61,921]

1. In this order, the Commission hereby denies a request by West Deptford Energy, LLC (WDE) to deny intervenors in this proceeding the opportunity to view protected material submitted by WDE in support of its filing pursuant to a Protective Agreement. The Commission directs WDE to comply with the procedures of Rule 206(e) of the Commission's Rules of Practice and Procedure n1 with regard to the provision of its privileged material to intervenors, and to provide [*61,922] intervenors with a protective agreement consistent with this order no later than two business days of the date of this order and then to provide its privileged material to intervenors no later than one business day of intervenors' execution of non-disclosure certificates. The Commission also directs WDE to provide the Commission with a statement of the date on which its Protective Agreement is provided to intervenors, and also to provide the Commission with the names and contact information [**2] of the entities who have signed non-disclosure certificates. The Commission further requires that any parties who wish to file protests or comments on the substance of WDE's request do so on or before March 28, 2011.

n1 *18 C.F.R. § 385.206(e) (2010).*

I. Background

2. PJM Interconnection, LLC (PJM) operates the Reliability Pricing Model (RPM) capacity market, whereby resources submit offers to provide capacity into an annual Base Residual Auction (Auction). "Net short" sellers within PJM (parties who both buy and sell capacity, but who are primarily buyers) may have an incentive to use their capacity sales to lower the market price. To prevent this, Attachment DD to the PJM tariff contains a Minimum Offer Price Rule (MOPR) that addresses the potential market impact of new resources that are offered into the Auction at offer prices that are lower than their costs. n2 Under this rule, PJM develops benchmarks for combustion-turbine and combined-cycle units, and if a resource submits an offer that [**3] is lower than this benchmark, under certain circumstances PJM will substitute a mitigated (i.e., higher) offer price. The tariff provides, however, that prior to the Auc-

tion, a unit owner may obtain a determination from the Commission that even if the unit's sell offer is lower than the benchmark, it "is consistent with the real levelized (year one) competitive, cost-based, fixed, net cost of new entry" for that unit, assuming that the unit is relying solely on revenues from PJM-administered markets. n3

n2 PJM tariff, Attachment DD, section 5.14.

n3 *Id.*, section 5.14(h)(2).

3. WDE intends to construct a new generating station and to offer its capacity into the next Auction, scheduled for May 2, 2011. On February 22, 2011, WDE filed a request for relief under section 5.14(h)(2) of Attachment DD asking the Commission to make a determination that the offer that WDE anticipates making into the upcoming auction is justified by WDE's unit-specific costs and expected revenues. WDE states that the MOPR [**4] currently does not apply to it because it is not a net short seller, but that proceedings are pending under which the MOPR Rule might change prior to the May 2011 auction, n4 and those pending proceedings raise an uncertainty as to whether the MOPR will apply to WDE. WDE therefore seeks a determination at this time to ensure that it can participate in the May 2011 auction without triggering the mitigation of the MOPR Rule. n5 WDE asks for Commission action on the substance of its request on or before April 22, 2011.

n4 PJM Interconnection, LLC, Docket No. ER11-2875-000 (PJM Filing); PJM Power Providers Group v. PJM Interconnection, LLC, Docket No. EL11-20-000 (P3 Complaint).

n5 February 22, 2011 Request (February 22 Request) at 2-3.

II. WDE's Request To Limit Access to Protected Material

A. WDE's Request

4. WDE states that, to enable the Commission to determine whether its sell offer is justified by the unit's costs and expected revenues, it has provided sensitive, confidential [**5] bid-related material and supporting documentation with its request. n6 WDE states that releasing this information to third parties (including competitors, customers, and states) prior to the Auction could severely and adversely impact WDE's competitive position, create a risk of market manipulation and collusion, and damage the competitive markets the Commission seeks to foster. WDE states that it is seeking a determination on the discrete question of whether its unit-specific minimum Sell Offer in the upcoming Auction is supported by the unit's own specific costs and expected revenues, and that the limited scope of those factual issues presented by that request supports the restriction of access to that information to third parties. Additionally, WDE notes that it has gone to great lengths to withhold from the public version of this filing only bid- and cost-related information that is of a highly sensitive nature, and that its request and supporting affidavit have been drafted so as to restrict access to as little information as possible. WDE therefore asks the Commission to restrict access to confidential information in this proceeding to the Commission, PJM and PJM's Independent [**6] Market Monitor (IMM), and asks the Commission to require PJM and the IMM to execute the Non-Disclosure Certificate attached to the draft Protective Agreement that WDE provides. n7

n6 WDE submitted both a public and a privileged (non-public) version of its February 22 Request. All citations to the February 22 Request in this order are to the public version.

n7 February 22 Request, Attachment B (Protective Agreement).

5. WDE states that it recognizes that intervenors are routinely allowed access to confidential information under a Protective Agreement after signing a non-disclosure certificate. It notes, however, that the Commission has previously found that "[a]lthough the Commission has a model protective order, protective orders are to be drafted in light of the

facts in a particular case." n8 WDE also acknowledges that there is no precedent for how the Commission should treat confidential information submitted under section 5.14(h)(2) of Attachment DD of PJM's tariff, and it is not aware of any instance [**7] in which the Commission has ever addressed [**61,923] the question of whether a Protective Agreement adequately protects confidential data in advance of a competitive auction. n9 It argues, however, that it is critical to the integrity of the market that detailed unit-specific cost information be afforded greater protection than the Commission ordinarily allows, and that the confidentiality of commercially sensitive bid and cost information prior to an auction goes to the heart of "protection of competition, not competitors." n10 WDE states that providing intervenors (including competitors, states and customers) with access to pre-auction bid information, even subject to a Protective Agreement, would set a dangerous precedent and violate the Commission's policy of preventing the disclosure of granular, non-aggregated bid and offer data that can be linked to a particular market participant. n11 According to WDE, the Commission consistently has held that revealing specific bids and bidding strategies to competitors and other market participants could put parties at a competitive disadvantage, and has placed limitations on the release of even non-bid information that could be used to calculate the [**8] underlying prices, bids, reference prices, and costs. n12

n8 *Westar Energy, Inc. and ONEOK Energy Services Co., L.P.*, 115 FERC P 61,034 at P 9 (2006) (*Westar*).

n9 WDE states that in *Sithe New Boston, LLC*, 100 FERC P 61,106 (2002) (*Sithe New Boston*), a generator was required to disclose specific cost information to market participants (with the protection of a protective agreement), but notes that this was after the cost-of-service rates of the generator under an ISO New England Inc. Reliability Must Run Agreement had been set for a hearing. WDE also acknowledges *State of Illinois ex rel. Madigan v. Exelon Generation Co., LLC*, 119 FERC P 61,107 (2007) (*Illinois AG*), in which the Commission required the release of auction data subject to a protective agreement, but argues that this occurred after the auction had concluded and parties were responding to claims of market manipulation. February 22 Request at 16 n.24.

n10 February 22 Request at 14, citing *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (internal citations omitted).

[**9]

n11 February 22 Request at 17 n.25, citing *PJM Interconnection, L.L.C.*, 132 FERC P 61,123, at P 75 (2010); *New York Indep. Sys. Operator (NYISO)*, 129 FERC P 61,103, at P 30 (2009) ("[G]enerator or equipment specific data, and transmission system information which is commercially valuable, necessary to participation in the marketplace, and not yet public is confidential. This includes bidding strategies that have not yet been made public, generator reference prices, and generator costs"); *New York Indep. Sys. Operator*, 125 FERC P 61,005, at P 10 (2008); *New York Indep. Sys. Operator*, 118 FERC P 61,201, at P 23-25 (2007).

n12 February 22 Request at 17 n.26, citing *NYISO*, 129 FERC P 61,103 at P 30 (2009).

6. WDE states that the Commission has recognized that the release of detailed bid and cost data could result in market-damaging collusion. n13 WDE states that under current Regional Transmission Organization (RTO) tariffs, non-aggregated bid and offer data may be released only without identifying [**10] the bidder and only after a period of time has elapsed since the auction, and that, given that the release of bid, bidding strategy, and detailed cost information cannot occur without triggering significant concerns about market impacts and collusion after an auction takes place, the Commission should not allow competitors and other third parties access to the confidential information in this filing even before the Auction. n14 WDE further notes that in PJM, third parties are prohibited from accessing a capacity seller's RPM data, including pricing-related information, and that bidding and detailed cost information may not be disclosed to other market participants by the IMM, including in circumstances in which a seller submits a bid that triggers additional mitigation under the MOPR; n15 further, when PJM does make bid information available after auctions, PJM takes steps to ensure that no market participant can identify the bidding entity by posting only aggregated market data. n16

n13 February 22 Request at 17, citing *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. and Regs. P 31,281, at P 432 (2008); *PJM Interconnection, L.L.C.*, 129 FERC P 61,250, at P 202-203 (2009) (Order No. 719 requires that bid and offer data be released only after a lag time has elapsed and with market participant identities masked to guard against "the ability of market participants to exercise market power" and to "avoid participant harm and the possibility of collusion"); *San Diego Gas & Elec. Co.*, 101 FERC P 61,186, at P 12 (2002) (CAISO tariff "requires [the ISO] to keep confidential virtually all information relating to individual bids"); *San Diego Gas & Elec. Co.*, 95 FERC P 61,115, at 61,364 (2001) ("The amount particular competitors bid is generally considered confidential business information. Disclosure of such information may lead to a reduction in competition because it will allow competitors to learn what their competitors are bidding and could lead to collusion or coordination."); *Central Hudson Gas & Elec. Co.*, 86 FERC P 61,062, at 61,204 (1999) (explaining that the basis for keeping bid data confidential for six months is to prevent collusive behavior); *PJM Interconnection, L.L.C.*, 86 FERC P 61,247, at 61,890 (1999).

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n14 WDE states that in 2010 the PJM IMM raised this concern in a Commission filing seeking to ensure greater protection of RPM bid data that it alleged PJM was releasing that could reveal the identity and offers of specific generation units, and that PJM voluntarily agreed in the future to refrain from posting RPM data, even in non-aggregated, tabular form, until at least six months after an auction. February 22 Request at 18, *Citing PJM Interconnection, L.L.C.*, Supplemental Answer of PJM Interconnection, L.L.C. Rendering Moot Motion to Cease and Desist of PJM's Independent Market Monitor, Docket Nos. ER09-1063-000 and ER09-1063-003 (filed Apr. 6, 2010).

n15 February 22 Request at 18-19, citing PJM Tariff § 1.5.01, PJM Tariff Attachment M-Appendix, § 1.A.

n16 February 22 Request at 19, citing PJM Manual 33, Administrative Services for the PJM Interconnection Operating Agreement, at 22 (effective July 22, 2010).

7. WDE states that if its bid-related information were submitted to PJM or the IMM for a determination as to whether its minimum Sell Offer is justified, rather [**12] than to the Commission, no other market participants would have any input in the decision-making process or access to the supporting data. It therefore argues that the Commission should impose similarly strict limitations on access to bidding and cost information when the Commission, as opposed to an RTO or market monitor, makes the determination as to whether a minimum Sell Offer justifies an exemption from [**12] the MOPR's benchmark. WDE further notes that the Commission has expressed concern with the release of confidential information to state regulatory commissions where it is unclear how the state would keep the information confidential and how the information would be used, n17 and that this concern is also present here, given the focus of the PJM and P3 filings n18 on state initiatives to encourage the development of generation.

n17 February 22 Request at 20, citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC P 61,163 at P 561 (2004).

n18 See note 3 above.

8. Finally, [**13] WDE states that it believes that the Commission, together with PJM and its IMM, have sufficient resources and expertise to evaluate its request. It suggests, however, that if the Commission deems it necessary or appropriate, it could require WDE to retain an independent expert, to be approved by the Commission, to help the Commission evaluate WDE's unit-specific costs and expected revenues, with the expert's fees to be paid by WDE.

B. Notice of Filing, Interventions, Responsive Pleadings, and Answers

9. On February 23, 2011, the Commission issued a notice for intervention in this proceeding, and comments specifically on WDE's request for protection of confidential bid-related information and for special procedures, with interventions, comments and protests due on or before March 4, 2011. n19

n19 76 Fed. Reg. 13,180 (2011).

10. Dominion Resources Services, Inc.; FirstEnergy Solutions Corp.; Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.; the [**14] New Jersey Division of Rate Counsel; PJM's IMM, Monitoring Analytics, LLC; NextEra Energy Generators; JPMorgan Ventures Energy Corporation; Exelon Corporation; Edison Mission Energy; Commonwealth Chesapeake Company, LLC; Calpine Corporation; GenOn Parties; the PJM Industrial Customer Coalition; PJM; PPL Electric Utilities Corp., *et al.* (PPL); the Electric Power Supply Association (EPSA); P3; and Shell Energy North America (US) (Shell) filed timely motions to intervene. The Public Service Commission of Maryland, the New Jersey Board of Public Utilities (NJBPU), and the Pennsylvania Public Utility Commission filed Notices of Intervention. P3, PPL, Shell and EPSA filed protests or comments opposing WDE's request. n20 PSEG Energy Resources & Trade LLC (PSEG) and the Hess Corporation submitted motions to intervene out of time. On March 7, 2011 WDE filed an answer to the protests.

n20 P3 styled its pleading as an answer to WDE's request for special procedures. Since P3 is expressing its opposition to WDE's request, we will treat the pleading as a protest. Shell states that it adopts the protest filed by EPSA.

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C. Protests and Answer

11. PPL, EPSA, P3 and Shell oppose WDE's request to deny access to its protected information to intervenors in this case.

12. PPL states that WDE's request would impair the rights of interested parties to represent and protect their rights before the Commission, and WDE has not shown why the Commission's standard protective agreement, including limitations on providing information to competitive duty personnel, would not adequately protect WDE's confidential information while accommodating the rights of interested parties.

13. PPL and P3 state that if the Commission is deprived of an adequately-developed record in this case and WDE is thereby able to offer its unit into the auction at a bid that does not reflect its true costs and establishes the clearing price in that manner, other sellers will be compensated based on that bid. They assert that the harm to both other sellers and the market from such an outcome would be significant; therefore, they argue that other parties must be able to effectively review and challenge WDE's request. Additionally, P3 states that WDE's request comes within the context of pending proceedings involving [**16] the buyer market power protections of PJM's tariff, and P3 is concerned that the State of New Jersey may use WDE's resource to suppress capacity market auction outcomes. P3 further suggests that discrepancies between WDE's representations to the Commission and its other actions or statements (such as the fact that WDE's parent corporation urged the state of New Jersey to provide WDE a guaranteed capacity payment that is significantly higher than PJM's calculation of the net Cost of New Entry for the West Deptford region, and that WDE's claim that it can finance its unit on terms that will allow greater leverage than the 50/50 capital structure used in PJM's benchmark is inconsistent with representations by WDE's parent to the NJBPU) require resolution before the Commission can rule on WDE's request. n21 PPL further asserts that the Commission has recognized the fundamental rights of parties to participate in proceedings that directly affect them, citing to the Commission's rule that an intervenor may show that it has "an interest which may be directly affected by the outcome of the proceeding." n22 PPL asserts that parties cannot meaningfully exercise this right of intervention without [**17] necessary information.

n21 P3 Answer at 3-5.

n22 Rule 214(b) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(b) (2010).

14. PPL states that the Commission should thus balance WDE's interest in confidentiality with parties' right to participate meaningfully in [*61,925] this proceeding, as it has done in *Mojave Pipeline Co.* n23 and *Pacific Gas Transmission Co.* n24 EPSA and PPL argue that WDE has made no showing as to why all of its confidential information should be withheld from parties, as was required by the Commission in its balancing test in *Mojave*, and WDE has failed to show why its information should be kept confidential. n25 PPL further notes that in many of the cases cited by WDE, the Commission in fact permitted access to confidential information, so long as an intervenor agreed to be bound by a protective agreement, n26 and that in cases where the Commission protected certain information from disclosure in contested proceedings, those protections were limited to [**18] excluding the release of information not directly related to parties' direct interests. PPL also states that the Commission has rejected proposed limitations on providing information where that limitation would unduly prejudice participants or unduly disadvantage litigants in pursuing legitimate arguments. n27

n23 38 FERC P 61,249 (1987) (*Mojave*).

n24 44 FERC P 61,209 (1988) (*Pacific Gas Transmission*).

n25 EPSA states that much of the information submitted by WDE may not be confidential, citing to WDE's use of the calculation of the Energy and Ancillary Services (EAS) Offset, which EPSA states is derived from models commonly used in the electric industry.

n26 PPL Protest at 9, citing *Westar*, 115 FERC P 61,034 at P 10-11.

n27 PPL Protest at 10, citing *Illinois AG*, 119 FERC P 61,107 at P 18 and *Pacific Gas Transmission*, 44 FERC P 61,209 at 61,766.

15. P3 argues that use of an appropriate protective agreement [**19] would address all of WDE's concerns regarding confidentiality, and that WDE has in fact provided a common variant on the Commission's Model Protective Order that precludes access by "competitive duty personnel." P3 notes that this language was used in litigation in which competitively sensitive data as to the costs of every generator attached to the California Independent System Operator (CAISO) grid was subject to discovery, even though that same data would also be used to develop future energy and ancillary services offers in CAISO markets. In order to prevent competitive harm, the protective agreement was modified to preclude anyone actually transacting in the relevant markets from gaining access to the data; however, others within those companies, such as inside counsel and non-lawyers who did not transact, could review the data. n28 P3 further states that the burden is on the party seeking to safeguard information to show that a protective agreement does not adequately protect its interests, and WDE has not met that burden.

n28 P3 Answer at 2, referring to "the California Refund Case" (referring presumably to *San Diego Gas & Electric Co., et al.*, Docket No. EL00-95-045, *et al.*).

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16. With regard to the appropriate protective agreement, P3 states that the Commission should issue the least restrictive order that will accomplish the purpose of protecting against the harm of disclosure, and, consistent with this principle, presiding administrative law judges have adopted revisions to the Commission's Model Protective Order that restrict competitive market duty personnel from having access to information. P3 states that competitive duty personnel are those engaged in "competitive duties," usually the marketing, sale, or purchase of relevant products, services or facilities, or overseeing the same. n29 EPSA states that it would be willing to execute a similar protective agreement. n30

n29 *Id.* at 11, citing *N. Border Pipeline Co.*, 113 FERC P 63,041, at P 23 (2005).

n30 EPSA Protest at 10.

17. P3 also takes issue with WDE's suggestion that the Commission hire an independent expert at WDE's expense to evaluate WDE's request. P3 states that it is unclear what [**21] expert would be chosen, whether more than one expert would be needed and who (WDE or the Commission) would select the expert. P3 states that the normal litigation process before the Commission offers a better solution. P3 further states that "it is inappropriate for a party to decline to produce data under a reasonable protective agreement based on the speculative possibility that another party . . . might violate the terms of the protective order. . . . The Commission thus rightly assumes that parties will obey protective orders[.]" n31

n31 P3 Answer at 11.

18. In its answer, WDE continues to assert that disclosure of its confidential information presents an unacceptable risk of harm both to WDE and to the PJM capacity market generally, for which there would be no meaningful possible relief such as refunds, and that the potential harm from such disclosure outweighs the value to the Commission's decision-making process of disclosing the confidential information. WDE states that, contrary to the assertions [**22] of intervenors, due process considerations support WDE's request. It states that in *Mathews v. Eldridge*, n32 the Supreme Court set forth the applicable balancing test for regulators and courts to determine whether additional procedures are required in an administrative proceeding. WDE states that *Mathews* requires evaluation of three factors:

- (1) the private interest that will be affected by the agency action;
- (2) (a) the risk of an erroneous deprivation of this interest through the procedures used, and (b) the probable value, if any, of the additional process requested to the accuracy of the agency's decision; and
- (3) the Government's interest, including the function involved and the fiscal and administrative [**61,926] burdens that the additional procedural requirement would entail. n33

n32 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (*Mathews*).

n33 *Mathews*, 424 U.S. at 335.

19. WDE asserts that the private interest affected here, its confidential bid data, is one of the [**23] most valuable economic assets of a generator competing in a bid-based auction market, and is critically important to WDE. It further states that the risk of an erroneous deprivation of this interest through the disclosure of such confidential information to competitors is significant. WDE notes that, given the large number of intervenors in this proceeding, it is possible that its confidential data may inadvertently be released; it also states that regardless of whether or not this occurs, there will be suspicion that the bid data has been released, which could undermine public confidence in the auction and its results. On the other hand, WDE argues, permitting market participants to access this information will not provide any increment of increased accuracy to the Commission's ability to make a reasoned decision, as the Commission's staff, PJM and the IMM (along with an independent expert, if necessary) are fully competent to make the limited determination that WDE has requested (as, indeed, the IMM would make without the participation of other parties in other circumstances). Finally, WDE argues that the Commission has the highest interest in maintaining the competitiveness and [**24] integrity of the RPM, and also has a duty to ensure that applicants exercising their rights under

Commission-approved tariffs do not suffer an erosion of those rights due to burdensome administrative procedures. Thus, WDE asserts, the applicable due process framework requires that WDE's confidential information remain protected. n34

n34 WDE Answer at 11-14. WDE also cites *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (concluding that procedures should be adapted to the limited nature of the controversies to be resolved and recognizing "the importance of not imposing . . . procedural requirements beyond those demanded by rudimentary due process").

20. WDE notes that it is asking for a limited fact-specific determination as to whether its offer in the upcoming Auction is justified by its unit-specific costs and revenues, not a fully-litigated cost-of-service proceeding, and asks the Commission not to convert it into such a proceeding. It also asserts that in justifying its minimum Sell Offer in its [**25] February 22 Request, WDE calculated only its expected revenues from PJM-administered markets, and expressly excluded any revenues it might receive from other sources, such as revenues through a long-term contract under a state-sponsored program; thus, WDE argues, this issue has no bearing on WDE's request for relief here. WDE further notes that incumbent generators (such as P3's members) have a financial incentive to exclude new low-cost generation from participating in the upcoming Auction and potentially lowering the clearing price, and that it would be inappropriate for the Commission to permit incumbents to use procedural roadblocks and delay as a barrier to the participation of new resources in the Auction.

21. WDE notes again that if the IMM, rather than the Commission, were determining whether WDE's offer required mitigation, the IMM would make that determination without revealing confidential WDE information and without input from other parties, and P3's proposed MOPR revision would continue this procedure. WDE reiterates that in *NYISO*, the Commission did not require the provision of confidential data to parties in circumstances similar to these (i.e., the application [**26] of a mitigation measure by a Regional Transmission Organization (RTO)), and also states that, with regard to the California Refund Case to which P3 refers, the Commission only required the provision of confidential data after the sales that were the subject of discovery had occurred. n35 WDE asserts that although the data supplied to participants in the California refund proceedings was indeed highly confidential, it "did not rise" to the level of the data here, involving a bid that will be submitted in a future auction. n36

n35 WDE Answer at 5, citing *San Diego Gas & Elec. Co.*, 114 FERC P 61,070, at P 1-3 (2006).

n36 WDE Answer at 5.

III. Discussion

A. Procedural Issues

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notices of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to 214(d) of the Commission's [**27] Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2010), we will grant the late-filed motion to intervene, given those parties' interest in this proceeding, the early stage of this proceeding, and the absence of undue prejudice or delay.

23. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept WDE's answer because it has provided information that assisted us in our decision-making process.

B. Analysis

24. The Commission denies WDE's request to limit access to its confidential material to the Commission and its advisory staff, PJM, and the IMM.

25. Fairness requires that in a Commission adjudicatory proceeding, entities which have intervened properly in a proceeding and are parties to that proceeding be permitted to participate meaningfully in that proceeding. In this regard, the outcome of this proceeding could have a significant effect on those parties who are capacity suppliers [*61,927] who intend to offer capacity into PJM's upcoming Auction, as well as on customers who will pay the price that the Auction [**28] will set for capacity. Under RPM, all of the capacity resources accepted in the auction are paid the auction clearing price. A supplier whose offer price is below a competitive price that reflects its actual costs could impact other suppliers in two ways: first, some suppliers whose resources would otherwise have been accepted in the auction may not be accepted, and second, if the impact is a lower auction clearing price, those suppliers whose capacity resources are accepted in the auction could receive a lower price than would otherwise be the case. n37 Other participants in PJM, including capacity suppliers and customers, therefore have an economic interest in the question of whether WDE's offer into the May Auction genuinely reflects its costs.

n37 See generally PJM tariff, Attachment DD.

26. We also recognize that WDE has a legitimate interest in appropriately protecting the confidentiality of its data. Contrary to the allegations of intervenors, WDE has identified the competitive harm that could [**29] occur to it as a result of an inappropriate release of its confidential information. An unconstrained release of information relating to WDE's costs and its development of its offer could "severely and adversely impact WDE's competitive position and ability to participate in the [Auction]." n38

n38 February 22 Request at 14.

27. WDE has not shown, however, why the Commission's normal procedure of requiring such information to be disclosed to parties pursuant to a Protective Agreement that requires disclosure only to certain individuals who sign the agreement n39 is not an appropriate balancing of those competing concerns. In *Mojave*, the Commission addressed discovery disputes that "place[d] a party's right to discover relevant information against another party's desire not to disclose confidential and proprietary information to a competitor." n40 The Commission first noted that a party objecting to discovery of particular material had "the burden of demonstrating that the discovery request should [**30] be denied or limited." While the Commission recognized that material could be treated confidentially if "the documents will give the party seeking discovery an unfair business advantage," n41 the Commission also stated that:

Since in most instances a protective order can protect against harmful disclosure, *a party claiming that confidential material should be withheld entirely will be expected to show that a protective order will not adequately safeguard its interests* and that this concern outweighs the need for the material to develop the record. n42

n39 Rule 206(e) of the Commission's Rules of Practice and Procedure states: "if a complainant seeks privileged treatment for any documents submitted with the complaint, the complainant must submit ... a proposed form of protective agreement." 18 C.F.R. § 385.206(e) (2010).

n40 *Mojave*, 38 FERC at 61,842.

n41 *Id.*

n42 *Id.* (footnote omitted, emphasis added). See also *Bradwood Landing, LLC*, 116 FERC P 61,125, at P 3 (2006).

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28. The Commission then noted that "no one protective order will be appropriate for every case," and that "[i]n crafting a protective order the goal is to issue the least restrictive order that will accomplish the purpose of protecting against the harm of disclosure." n43

n43 *Id. See also Westar*, 115 FERC P 61,034 at P 9, citing *Mojave*, 38 FERC at 61,842; and *Pacific Gas Transmission Co.*, 44 FERC P 61,209, at 61,766 (1988) (*Pacific Gas Transmission* (PGT)) ("PGT asserts that the opposing parties could fully defend [their position] without knowing the particulars of negotiations with potential customers, and such sensitive matters as PGT's internal rate of return On the other hand, excluding discovery of such documents might unduly hamstring the litigants in pursuing what might be a legitimate argument. The ALJ should balance the potential harm of disclosure against the need of the opposing parties for the information").

29. The Commission [**32] finds that a Protective Agreement consistent with this order will meet the legitimate needs of the parties who should be able to view the entire submittal by WDE in order to be able to respond, n44 as well as safeguard WDE's interest in maintaining confidentiality. WDE stated in its request, without any additional explanation (other than speculation that state commissions may not protect confidential material n45 that it seeks "additional protections against the release of confidential information to end users, retail electric providers or the regulators of retail electric service." n46 This limitation is inconsistent with permitting intervening parties n47 the ability to participate in this case in an informed manner, and we therefore reject it. WDE has not demonstrated that these parties are any more likely to disclose confidential information than other parties. As stated above, a reasonably crafted Protective Agreement can ensure the safety of WDE's confidential information, while simultaneously allowing all parties to participate meaningfully in these proceedings. n48

n44 As noted above at P 15-16, both PPL and P3 indicate that they are willing to execute WDE's proposed Protective Agreement.

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n45 See P 7 above.

n46 February 22 Request at 16 n.21.

n47 Intervenor include the NJBPU, the Public Service Commission of Maryland, the Pennsylvania Public Utility Commission, and the PJM Industrial Customer Coalition.

n48 Given the sensitivity of the material involved here, WDE may draft a protective agreement that precludes access to competitive duty personnel. *Illinois AG*, 119 FERC P 61,107 at P 9 of the approved protective order; *AERO Energy*, 118 FERC P 61,047 (2007); *Northern Border*, 113 FERC P 63,041 at P 23 (2005).

30. The Commission is obligated to balance the interests of a party seeking confidential treatment for information with the interests of parties seeking access to that information, and WDE, as [*61,928] the party requesting confidential treatment, has the burden of showing that an appropriate protective agreement will not adequately safeguard its interests. WDE has not met this burden. WDE has provided no persuasive arguments as to why it believes that the provisions above are not sufficient to maintain the confidentiality [**34] of its information. The confidential nature of the information does not justify an absolute prohibition on any dissemination.

31. WDE asserts that disclosure of its information prior to the PJM Auction would be particularly damaging, and notes that in the California Refund Case, cited by P3, similar confidential information was not disclosed until after the auction. n49 While we agree that confidential bid information is competitively sensitive, similar information previously has been filed as confidential subject to protective agreements, n50 and the Commission followed the balancing test of *Mojave* to protect the interests of all parties. Additionally, while WDE speculates, in its answer, that in a proceeding with a large number of intervenors, confidential information may inadvertently be disclosed, it does not make any specific allegations suggesting that any particular parties or individuals might violate the Protective Agreement, or explain otherwise why it believes that these provisions are insufficient to protect its interests. WDE does not cite to, nor is the Commission aware of, any cases in which protective agreements were violated, which would suggest that protective [**35] agreements are generally sufficient to protect parties' confidentiality. n51 As WDE correctly notes, if in other circumstances the IMM were making a determination based on WDE's competitive data, it would do so on a confidential basis. But the IMM is not an administrative agency, and in any event, any challenge to such a determination at the Commission would result in a proceeding in which parties would equally be entitled to access the data provided to the Commission. n52 WDE chose to seek a determination from the Commission, and we will follow our precedent in *Mojave* and *Westar* to balance the rights of all parties in this case. Further, as an administrative agency, we are bound by the Administrative Procedure Act, under which, in any adjudication, "[t]he agency shall give all interested parties opportunity for . . . the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit," n53 and the other parties to this case cannot "consider the facts" of WDE's submission when they are unable to know what those facts are.

n49 WDE Answer at 5 n.11.

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n50 *BJ Energy LLC v. PJM Interconnection, LLC*, 127 FERC P 61,182, at P 19 (2009) (the Commission "has the ability to require disclosure of otherwise confidential information to the parties in a case, with a protective agreement, when such information is necessary for the parties' to participate in the proceeding"); *PJM Interconnection, LLC*, 107 FERC P 61,105 (2004), order on *Reh'g* 108 FERC P 61,187, at P 50 (2004) (Commission established procedures to permit access to confidential material under a protective agreement); *PJM Interconnection, LLC*, Docket No. ER05-10-000 (May 6, 2005) (Notice issued requiring confidential material relating to regulation service to be provided pursuant to a confidentiality agreement).

n51 Moreover, as WDE's draft Protective Agreement provides, any violation of that Protective Agreement and of any Non-Disclosure Certificate executed under it constitutes a violation of an order of the Commission, for which WDE could seek sanctions.

n52 See note 50 above.

n53 5 U.S.C. § 554(c)(1) (2006).

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32. WDE argues that it is requesting a limited fact-specific ruling, rather than seeking, in effect, to open a cost-of-service rate case. But this is a distinction without a difference in this case: if WDE's unit is able to participate in the May Auction, its bid (whether its original Sell Offer or a mitigated bid) has the potential to affect the outcome of the auction and the price paid to all capacity suppliers. The information included with WDE's application is not peripheral to the issues in this case; such information is critical to the analysis of whether WDE has justified its request for a determination from the Commission pursuant to section 5.14(h)(2) of Attachment DD of PJM's Tariff. The Commission must therefore balance parties' need for access to this data with the potential for harm from a violation of the protective agreement, as it did in *Mojave* and subsequent cases.

33. WDE's citation to *Mathews*, to support the position that due process does not require giving intervenors access to WDE's confidential data, is inapposite. *Mathews* involved a recipient of Social Security disability benefits whose benefits were terminated. The Supreme Court found that [**38] Eldridge had received sufficient due process without an evidentiary hearing. The Court noted, however, that "some form of hearing is required before an individual is finally deprived of a property interest," n54 and took note of the fact that while "[t]he disability recipient is not permitted

personally to examine the medical reports contained in his file . . . [t]his restriction is not significant, since he is entitled to have any representative of his choice, including a lay friend or family member, examine all medical evidence," n55 and "the disability recipient's representative [is allowed] full access to all information relied upon by the state agency." n56 This is the opposite situation of the one that WDE seeks to impose here, in which counsel and experts working for parties with a significant interest in this matter would be entirely unable to access precisely the information on which WDE is relying in its request. We additionally note, with regard to the three-step *Mathews* test discussed at P [*61,929] 18 above, that even if steps 1 (the private interest that will be affected by the agency action) and 2(a) (the risk of an erroneous deprivation of this interest through the [**39] procedures used) are construed as supporting WDE's position, steps 2(b) and 3 do not. With regard to step 2(b) (the probable value, if any, of the additional process requested to the accuracy of the agency's decision), it is our view that participation by other parties, informed by access to WDE's confidential information, could potentially provide highly relevant and useful information to the Commission in its decision-making process. Thus, with regard to step 3 (the government's interest, including the function involved and the fiscal and administrative burdens that the additional procedural requirement would entail), informed participation by other parties works in favor of, rather than against, the government's interest.

n54 *Mathews*, 424 U.S. at 333, citing *Wolff v. McDonnell*, 418 U.S. 539, 557-58, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

n55 *Mathews*., 424 U.S. at 338 n.18.

n56 *Id.* at 345-46.

34. Nor are the cases cited by WDE in which the Commission denied [**40] access to confidential material on point. In *New York Independent System Operator, Inc.*, n57 no party sought access to the confidential material in question, and in *NYISO*, n58 the Commission was ruling on mitigation measures that NYISO proposed to impose on certain generators, and the parties who sought disclosure of confidential matters in that case did so not on the basis of their direct economic interest, but on the more general basis that greater transparency would benefit consumers and the market. n59 The confidential information withheld from parties was not critical to preserve their due process rights in the case and did not prevent them from making arguments in support of their position to the Commission. n60 In these cases, as in the cases cited by WDE in which the Commission delayed the release of confidential data until after an auction, n61 the Commission did not have to balance the specific, immediate economic interests of both the parties seeking disclosure and the party seeking confidentiality that is present here, where both parties have an interest in the accurate resolution of WDE's request prior to the May auction; thus, the Commission must balance and seek [**41] to accommodate both of those interests, as required by *Mojave*.

n57 125 FERC P 61,005 (2008).

n58 129 FERC P 61,103 (2009).

n59 *NYISO*, 129 FERC P 61,103 at P 19-23 ("Consumer Protection Board argues that New York's electric consumers and NYISO's market participants are entitled to know the extent to which unnecessary costs were incurred and the identity of the companies that caused the problem. . . . The New York Commission argues that . . . the Commission should release details regarding the extent and magnitude of the anticompetitive behavior so that market participants can fully understand the magnitude of the harm to consumers. . . . Trans-Canada Power Marketing states [the information] would provide market participants transparency into how NYISO interprets and implements its Services Tariff and would give market participants insight into market rules and potential NYISO actions APPA contends that a well-functioning market requires open and transparent information and the public release of bidding information in a timely manner, especially where allegations of market power are concerned. . . . NYAPP states that . . . this blanket request [for confidentiality] is unduly prejudicial to the other interested parties in the case and it runs counter to the trust and transparency required for competitive markets"). Further, the parties seeking disclosure in *NYISO* did not request the Commission to issue a protective agreement.

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n60 *See Akzo N.V. v. U.S. International Trade Com.*, 808 F.2d 1471, 1484 (Fed. Cir. 1986) (in reviewing an unfair competition case, the court stated that "it is obvious that that confidential information -- relating to Du Pont's business, activities, plans and expectations -- should not be made available (unless, perhaps, where absolutely necessary for a fair hearing) to a direct competitor like Akzo. That such full access was not absolutely necessary to appellants' making of their own case is shown by the crucial fact that Akzo was at all times perfectly free to offer its own market projections as well as to reveal its own activities, forecasts, and interpretations. Both sides could present to the Commission their own information on those matters without knowing those of the other side's").

n61 *San Diego Gas & Elec. Co.*, 95 FERC P 61,115 (2001); *Central Hudson Gas & Elec. Co.*, 86 FERC P 61,062 (1999); *PJM Interconnection, L.L.C.*, 86 FERC P 61,247, at 61,890 (1999).

35. It is, therefore, our view that a protective agreement [**43] consistent with this order will sufficiently protect WDE from the competitive harm that it fears. We therefore deny WDE's request to limit access to the privileged version of its February 22 Request and supporting material solely to the Commission, PJM and PJM's IMM. In order to enable the speedy resolution of this matter, we direct WDE to comply with the procedures of Rule 206(e) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206(e) (2010) with regard to the provision of its privileged material to intervenors, and to provide intervenors with a protective agreement consistent with this order no later than two business days of the date of this order and then to provide its privileged material to intervenors no later than one business day of intervenors' execution of non-disclosure certificates. The Commission also directs WDE to provide the Commission with a statement of the date on which its Protective Agreement is provided to intervenors, and also to provide the Commission with the names and contact information of the entities who have signed non-disclosure certificates.

IV. Notice of Comments or Protests on Substance of WDE's February 22 Request [**44]

36. The Commission will require any parties who wish to file protests or comments on the substance of WDE's request for relief to do so on or before March 28, 2011.

The Commission orders:

(A) The Commission hereby denies WDE's request to limit access to the privileged version of its February 22 Request and supporting material solely to the Commission, PJM and PJM's IMM, as discussed above.

(B) The Commission hereby directs WDE to comply with the procedures of Rule 206(e) of the [**61,930] Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206(e) (2010) with regard to the provision of its privileged material to intervenors, as discussed in the body of this order, and to provide intervenors with a protective agreement consistent with this order no later than two business days of the date of this order and then to provide its privileged material to intervenors no later than one business day of intervenors' execution of non-disclosure certificates.

(C) The Commission hereby directs parties who wish to file protests or comments on the substance of WDE's February 22 Request to do so on or before March 28, 2011.

(D) The Commission hereby directs WDE to file with the Commission [**45] a statement of the date on which its Protective Agreement is provided to intervenors, and also to provide the Commission with the names and contact information of the entities who have signed non-disclosure certificates.

By the Commission.

Legal Topics:

For related research and practice materials, see the following legal topics:

134 F.E.R.C. P61,189, *; 2011 FERC LEXIS 510, **

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Summary: Memorandum Contra by The PJM Power Providers Group and the Electric Power Supply Association to FirstEnergy Solutions Corp.s Motion to Quash the Subpoena Duces Tecum (Public Version) electronically filed by Mr. Michael J. Settineri on behalf of PJM Power Providers Group and Electric Power Supply Association