UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Maryland Public Service Commission, *et al*.	)	
Complainants,	)	
v.	)	Docket No. EL08-67-000
PJM Interconnection L.L.C.,	)	
Respondent.	)	

MOTION TO INTERVENE OF THE NRG COMPANIES AND COMMENTS IN OPPOSITION TO COMPLAINT

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"),[1] the NRG Companies[2] hereby move to intervene in the above-captioned proceeding, and file comments in opposition to the May 30, 2008 complaint filed by the Maryland Public Service Commission, *et al*. ("Complainants").

NRG files these comments to provide concrete examples of how Market Participants have relied on the results of the Reliability Pricing Model ("RPM") auctions to engage in a series of hedging and other transactions, and the need for the Commission to reject this retroactive attack on the PJM capacity market. NRG's comments address three distinct points:

1. Retroactively altering RPM auction prices would disrupt a variety of physical and financial bilateral contracts and hedges designed to manage risk. The regulatory certainty provided by the Filed Rate Doctrine and the prohibition

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[1] 18 C.F.R. §§ 385.214 & 385.2008 (2008).

[2] The NRG Companies that are parties to this proceeding are NRG Power Marketing LLC, NRG New Jersey Energy Sales LLC, Conemaugh Power LLC, Indian River Power LLC, Keystone Power LLC, NRG Energy Center Dover LLC, NRG Energy Center Paxton LLC, NRG Rockford LLC, NRG Rockford II LLC, and Vienna Power LLC (collectively, "NRG" or the "NRG Companies").

against retroactive ratemaking are critical to risk management by both customers and suppliers.

2. To the extent that state commissions chose to have their Load Serving Entities ("LSEs") rely on the spot market capacity auction prices instead of entering into forward bilateral contracts, engaging in competitive procurement, reducing demand or otherwise hedging or limiting their RPM exposure, does not justify disturbing the RPM settlement and auction results.

3. The fact that LSEs have not procured capacity at lower price indicates that the RPM prices are just and reasonable.

The NRG Companies are also participating in this proceeding as part of the PJM Power Providers ("P3") trade association. NRG supports the discussion of the numerous legal and procedural deficiencies in the complaint discussed by P3 and incorporate those arguments by reference.

I. COMMUNICATIONS

Communications in connection with this filing should be addressed to:

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II. MOTION TO INTERVENE

NRG Power Marketing, LLC is a power marketer participating in the PJM markets, engaging in bilateral transactions in the PJM region, and is a Basic Generation Service supplier to load-serving entities in the PJM region. Conemaugh Power LLC, Indian River Power LLC, Keystone Power LLC, NRG Energy Center Dover LLC, NRG Energy Center Paxton LLC, NRG Rockford LLC, NRG Rockford II LLC, and Vienna Power LLC own and operate power generation facilities interconnected to the PJM system. As participants in the markets operated by PJM, through both their power

marketing activities and their generating facilities, the NRG Companies have participated in each of the PJM RPM auctions to date. The NRG Companies thus have a direct and substantial interest in the outcome of this proceeding that cannot be adequately represented by any other party and their intervention is in the public interest.

III. COMMENTS OPPOSING COMPLAINT

A. Retroactive Changes To The RPM Auction Prices Would Disrupt Physical And Financial Contracts Critical To Managing Risk.

Suppliers in PJM entered into a variety of physical and financial bilateral contracts that are inextricably linked to the already settled RPM prices. Suppliers relied on the market certainty provided by the Federal Power Act's ("FPA") rule against retroactive ratemaking and the Filed Rate Doctrine to enter into forward bilateral sales of capacity, long-term energy supply contracts, and other mechanisms designed to reduce their market risk.[3] Complainants' attempt to resettle the RPM market, however, threatens to upset both the physical RPM market and the forward bilateral contracts that are dependant on the RPM clearing price.

For example, many suppliers entered into binding bilateral contracts to sell capacity in the forward bilateral market. These positions were designed to reduce market by reducing the supplier's naturally long position in the RPM auction, and also served to monetize the value of the capacity and allowed the purchaser of the capacity to hedge its market risk. These "pure" hedges were settled financially based on the actual RPM auction results. NRG entered into bilateral capacity transactions and paid or received from the counterparty the difference between the financial price and the market clearing price. If the Commission were to order refunds, NRG could have to pay again – based on

[3] 16 U.S.C. § 824d (2008).

the revised (and now lower) spot market clearing price in the physical market.[4] Such an outcome would work a severe injustice on Market Participants who acted responsibly by entering into hedges based on an auction conducted according to the filed rate.

Further, many suppliers entered into state-sanctioned long-term contracts to provide energy and capacity to LSEs at a fixed price. Maryland, Delaware and New Jersey all require their regulated utilities to enter into Standard Offer Service ("SOS") or Basic Generation Service ("BGS") type arrangements, to cover a portion of their capacity needs. These forward contracts obligate suppliers to provide electric generation services – including capacity – at a fixed price for up to three years.

NRG hedged approximately one-third of its total Eastern MACC unforced capacity through these SOS and BGS auctions. These Eastern MACC hedges caused NRG to lose money (because NRG gave up the opportunity to sell capacity at the higher RPM auction price); however, as a hedge to the exposure of both NRG and retail rate payers, the transactions performed as intended in a cost-effective and predictable manner.

By their very nature, RPM transactions have extremely long lead times, involve large financial commitments and can entail substantial market uncertainty and risk. The Commission recognized as much in the *Duquesne* case, holding that the "obligation to pay the generators is fixed at the time of the auction."[5] The Commission found that once the RPM auction parameters are set, Market Participants "make business decisions and enter into binding contracts, including financial hedges and bilateral arrangements."[6]

[4] Further, it is uncertain whether the counterparties to the financial transactions would willingly refund the appropriate monies to NRG if refunds are ordered by the Commission in the physical market.
[5] *Duquesne Light Co.*, 122 FERC ¶ 61,039 at P 89 (2008) ("*Duquesne*").
[6] *Duquesne*, 122 FERC ¶ 61,039 at P 92.

Complainants even concede that RPM prices for the first three years are "rates already set."[7]

It is entirely inconsistent with the Commission's goal of encouraging responsible hedging and market participation to punish those entities that actively hedged their risk, while rewarding entities that failed to hedge. Were the Commission to now reduce the RPM clearing price it would have the perverse result of penalizing companies that responsibly hedged their market risk, while rewarding LSEs and others who did not.

B. Load Serving Entities Apparently Took Few Steps To Control Their RPM Exposure And Instead Chose To Rely On Spot Capacity Prices.

Contrary to the complaint's focus on supply-side behavior, demand-side policies also play an equal role in setting RPM prices. Further, as shown by the SOS and BGS contracts let by various states, Complainants were well aware of their ability to hedge, and either made the business decision not to hedge their positions, or now wish they had hedged more extensively.[8]

Suppliers in the PJM market prepared for the RPM market by entering into a variety of transactions designed to decrease their RPM exposure. Load Serving Entities had many of the same options, but apparently made the business decision not to hedge in a similar manner. Most likely, Complainants made a business decision not to actively hedge their RPM obligations in the hopes that the auction prices would clear below the costs of hedging. The Commission should not now upset the RPM results simply

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[7] Complaint at p. 7.

[8] For example, the Maryland Public Service Commission recently announced that it was considering requiring utilities to enter into contracts of up to fifteen years in order to better hedge retail energy prices. *See* In The Matter Of The Commission's Investigation Of Investor-Owned Electric Companies' Standard Offer Service For Residential And Small Commercial Customers In Maryland, July 3, 2008 (available at: http://www.psc.state.md.us/psc/index.htm).

because some entities chose not to hedge as extensively as they would now with 20/20 hindsight.

The complaint provides no evidence that states made any attempt to prepare for the new PJM capacity market by taking steps to mitigate their potential exposure or reduce their need for capacity. For example, there is no evidence that the States:

- Increased the amount of energy and capacity acquired in SOS or BGS contracts or required their LSEs to enter into long-term bilateral contracts;
- Increased participation in demand response programs that would reduce their need for capacity;
- Directed LSEs to engage in competitive procurement to acquire capacity at a lower price or construct new generation;[9] or
- Supported additional transmission system investments that would have resulted in lower RPM clearing prices.

Finally, Complainants fail to recognize that RPM prices responded to the price signals sent by state regulatory policies. Many of the state agencies that have filed this complaint have regulatory policies that inhibit the construction of new generating capacity or transmission projects in their service territories, while allowing load growth to continue unchecked.[10] The complaint fails to acknowledge that these load-side policies play a direct role in increasing RPM prices and the Commission must find then that RPM auction results are responsive to actual system conditions, increases in demand, increased costs of new entry and driven by conscious decisions by state regulators to prevent siting of new generation and transmission projects within their service territories.

[9] Instead, most states have required their integrated utilities to divest their generation assets, while allowing the LSE to continue procuring power from their now non-regulated affiliates without engaging in competitive procurement.

[10] Examples of such policies include long-term "rate freeze" agreements with the incumbent utilities and a lack of competitive procurement designed to create a robust wholesale fleet of generation owned by diverse competitors.

C. The Reliance Of Load Serving Entities On RPM Auction Prices Is Evidence That Those Prices Are Reasonable.

State agencies that believe the RPM prices cleared at an excessive level were free to require their LSEs to procure capacity at lower prices, either by soliciting bids for the construction of new generation in their service territories, entering into demand response programs or otherwise acquiring capacity. The fact that state commissions and LSEs have not contracted for capacity at a lower price is convincing evidence that the prices determined by the RPM auctions are within the zone of reasonableness.[11]

If Complainants were correct that RPM prices are not competitive, then load would have responded to the RPM price signals by procuring the necessary capacity through other means and at a lower price. That this has not happened is strong evidence that the RPM prices are within the zone of reasonableness and must be upheld. Instead of responding to these price signals, the states filed this complaint seeking a regulatory solution to what is inherently a market problem. The proper response from the states is not to attempt to overturn the RPM auction, but use competitive mechanisms to encourage siting of additional generation resources, transmission lines, demand response programs, long-term contracts or other mechanisms designed to allow LSEs to respond to capacity price signals and hedge their RPM risk.

The NRG Companies stand ready and willing to work with states and LSEs to procure capacity pursuant to state competitive procurement proposals, RFPs or other

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[11] *See* "Cost of Electric Generation," *available at*: http://www.ferc.gov/industries/eng-sup-dem.asp at p. 7 ("The need for new generation is important because new construction is becoming more Expensive . . . . Cambridge Energy Research Associates . . . produces an index of costs for the main inputs that go into building new generating plants. The slide shows how that index has almost doubled since 2003. . . Much of this cost increase results from rising global demand for basic materials. Part of it also comes from shortages of people to do key engineering and construction jobs. In any case, the implication is that, we will pay more, not less, for the next round of construction.")

long-term contracting opportunities.[12] However, the Commission must first preserve the price signals sent by the RPM auctions to date and reject this complaint.

IV. CONCLUSION

Undoing the RPM auction results would send a dangerous precedent that binding capacity contracts are not actually binding. The Federal Power Act does not permit such an outcome. Moreover, Market Participants have a critical need for market certainty when they attempt to hedge their exposure in capacity markets. While suppliers were actively reducing their market risk, there is little evidence that Load Serving Entities or their state regulators – including many of the parties filing this complaint – took any action to prepare for the adoption of the new PJM capacity construct. Changing the results after the fact would punish entities that engaged in responsible hedging transactions and reward parties that failed to do likewise.

WHEREFORE, NRG requests that the Commission deny this complaint.

Respectfully submitted,

/s/ Abraham Silverman

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[12] For example, NRG and United Illuminating Company recently entered into a joint agreement to provide 200 MW of additional power at NRG's existing Devon power plant pursuant to a state-commission organized procurement process. *See* http://www.dpuc.state.ct.us/FINALDEC.NSF/6fe094d5f95a0bad85256448006902a0/71195d97631aed71852574730057da09/$FILE/080101-062508.doc

CERTIFICATE OF SERVICE

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

Dated at Washington, DC this 11th day of July 2008.

/s/ Abraham Silverman
Abraham Silverman