UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Independent Market Monitor for PJM	)	Docket No. EL19-47-001
v.	)	
PJM Interconnection, LLC;	)	
	)	
Office of the People's Counsel for District of Columbia	)	Docket No. EL19-63-001 Not Consolidated
Delaware Division of the Public Advocate	)	
Citizens Utility Board	)	
Indiana Office of Utility Consumer Counselor	)	
Maryland Office of People's Counsel	)	
Pennsylvania Office of Consumer Advocate	)	
West Virginia Consumer Advocate Division	)	
PJM Industrial Customer Coalition	)	
v.	)	
PJM Interconnection, LLC	)	

REQUEST FOR EXPEDITED CLARIFICATION OR, IN THE ALTERNATIVE, REHEARING OF PJM POWER PROVIDERS GROUP

Pursuant to Section 313(a) of the Federal Power Act ("FPA")[1] and Rules 212 and 713 of the Commission's Rules of Practice and Procedure,[2] the PJM Power Providers Group ("P3")[3] respectfully submits this request for clarification, or in the alternative, rehearing of the Commission's March 18, 2021 order in the above-captioned proceeding granting complaints and

---

1 16 U.S.C. § 825l(a) (2018).

2 18 C.F.R. §§ 385.212, 385.713 (2020).

3 P3 is a non-profit organization that supports the development of properly designed and well-functioning markets in the PJM region. Combined, P3 members own approximately 67,000 megawatts of generation assets, produce enough power to supply over 50 million homes in the PJM region covering 13 states and the District of Columbia. For more information on P3, visit www.p3powergroup.com. The comments contained in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

ordering additional briefing.[4] Specifically, P3 seeks expedited clarification, or in the alternative, rehearing with respect to one aspect of the March 18 Order concerning the upcoming capacity auction that is unrelated to the merits of the proceedings, but that could have material impacts on market participants, including in the upcoming May 2021 auction.

I. BACKGROUND

In the March 18 Order, the Commission granted the complaints seeking changes to the calculation of the Market Seller Offer Cap ("MSOC") for PJM capacity auctions.[5] However, as the Commission recognized, the next PJM capacity auction will be held in May 2021 for the delivery year commencing June 1, 2022.[6] Given that, the Commission held: "In light of the imminent start of the delivery year and the two-year delay that the auction already has encountered, we conclude that the auction should go forward as scheduled under the current rules."[7] However, the Commission also stated that:

> The Commission will, of course, continue to exercise its oversight of the upcoming auction. Any anticompetitive conduct observed during the May 2021 auction may be referred to the Commission's Office of Enforcement and the Commission may take all measures necessary and appropriate to address anticompetitive conduct in the May 2021 auction.[8]

In light of this impending auction, P3 respectfully requests that the Commission clarify on an expedited basis that: 1) the currently effective PJM Tariff language set forth with respect to the Sell Offers remains effective; and 2) the Commission's use of the term "anticompetitive conduct" was not intended to change or reinterpret the Commission's enforcement authority.

---

[4] *Indep. Market Monitor for PJM v. PJM Interconnection, LLC*, *et al.*, 174 FERC ¶ 61,212 (2021) ("March 18 Order" or "Order").

[5] March 18 Order at P 65.

[6] *Id.* at P 73.

[7] *Id.*

[8] *Id.*

II. REQUEST FOR CLARIFICATION

A. MSOC Safe Harbor

As noted above, the Commission held that the methodology to determine the default offer cap was no longer just and reasonable, but, in light of the delays, PJM should proceed with running the next auction "while the Commission determines the just and reasonable replacement rate."[9] The March 18 Order does not specifically find that other aspects of the relevant PJM Tariff provision are unjust and unreasonable. In relevant part, the PJM Tariff provides that "the submission of a Sell Offer with an Offer Price at or below the revised Market Seller Offer Cap permitted under this proviso shall not, in and of itself, be deemed an exercise of market power in the RPM market."[10] When reading this Tariff language – which the Commission's March 18 Order does not address – in light of the Order with respect to the methodology used to develop the MSOC, it is unclear how the Commission intends to apply the safe harbor. P3 seeks clarification that Capacity Performance Resources can rely on this currently effective Tariff language as a safe harbor while the market awaits the resolution of this proceeding and the development of a new MSOC.

Expedited clarification of this issue is critical as the timing of the Commission's March 18 Order leaves Capacity Market Sellers without sufficient time to seek unit-specific Avoidable Cost Rates. Absent such clarification, generators are being required to offer into the market potentially without the currently effective safe harbor language that is in the Tariff, and without any guidance or direction as to the Commission's view of the "anticompetitive conduct" that it intends to police. Therefore, P3 urges the Commission to move expeditiously to provide clarification that Capacity

---

[9] *Id.*

[10] PJM Tariff, Attachment DD, § 6.4.

Market Sellers are able to rely on the specific market mitigation rules set forth in the currently effective PJM Tariff, even if such rules may change in the future following due process, including notice and an opportunity for comment, as is ongoing in the current proceedings.

B. Oversight of Anticompetitive Conduct

As discussed above, the Commission stated that it would "take all measures necessary and appropriate to address anticompetitive conduct" in the upcoming auction.[11] The Federal Power Act ("FPA")[12] and the Commission's regulations[13] limit enforcement actions to those actions that involve allegations of a tariff violation, or allegations of market manipulation (including fraud), or a violation of market behavior rules – both of which are codified in the Commission's regulations. Not only are such expressly prohibited behaviors codified in the Commission's regulations, but the Commission has also provided detailed guidance on how it views and will enforce those regulations through policy statements and published precedent.[14] Simply stated, there is nothing in the FPA or in the Commission's regulations that defines "anticompetitive behavior." Anticompetitive conduct also is not expressly noted as an element of market manipulation, fraud, or any market behavior rule. Therefore, P3 urges the Commission to clarify that it has neither changed nor reinterpreted the scope of its enforcement authority to include undefined "anticompetitive behavior."

---

[11] March 18 Order at P 73.

[12] 16 U.S.C. § 824v.

[13] *See* 18 C.F.R. §§ 385.1c.1 (prohibition of natural gas market manipulation), 1.c.2 (prohibition of electric energy market manipulation) and 35.41 (market behavior rules).

[14] *See, e.g.*, *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 (2008).

III. IN THE ALTERNATIVE, REQUEST FOR REHEARING

A. Statement of Issues

If the Commission does not clarify its March 18 Order as addressed herein, then, in accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[15] P3 hereby sets forth the issues on which it seeks rehearing of the March 13 Order:

1. **The Commission erred by invalidating currently effective Tariff language without notice and due process.** In the March 18 Order, the Commission found that the MSOC methodology was no longer just and reasonable. The Commission did not otherwise find unjust and unreasonable the MSOC safe harbor language that "the submission of a Sell Offer with an Offer Price at or below the revised Market Seller Offer Cap permitted under this proviso shall not, in and of itself, be deemed an exercise of market power in the RPM market."[16] Nevertheless, the Commission's Order suggests that this safe harbor language might not be effective in violation of the Administrative Procedure Act and judicial precedent concerning filed rates, and is otherwise arbitrary and capricious.

2. **The Commission erred by introducing a new standard for enforcement actions without due process.** In the March 18 Order, the Commission stated that "[a]ny anticompetitive conduct observed during the May 2021 auction may be referred to the Commission's Office of Enforcement." The Commission's regulations and long-standing enforcement policy provide for enforcement actions related to market behavior that does not otherwise violate an effective tariff only for market manipulation and violations of market behavior rules and not simply "anticompetitive conduct." The Commission's use of "anti-competitive conduct" as a standard for enforcement, without any further definition, notice or opportunity for comment, is a violation of the Administrative Procedure Act and judicial precedent and reflects a lack of reasoned decision-making.[17]

---

[15] 18 C.F.R. § 385.713(c)(2).

[16] PJM Tariff, Attachment DD, § 6.4.

[17] *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995) ("In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability."); *see also id.* at 1333 (Because "EPA did not provide GE with fair warning of its interpretation of the regulations," the regulated party was "not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished."); *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."); *City of Idaho Falls v. FERC*, 629 F.3d 222, 231 (D.C. Cir. 2011) (where FERC changed its own regulations, doing so "required notice-and-comment rulemaking").

B. Request for Rehearing

As explained above in the request for clarification, market participants rely on the Commission's regulations, effective tariff requirements and long-standing Commission policy to ensure that their market offers are compliant with law. Changes to any of those require sufficient due process such that market participants will have reasonable notice of the type of conduct that may result in civil or criminal penalties. The safe harbor language set forth in the PJM Tariff with respect to offers at the MSOC is the currently effective filed rate. Yet, the Commission's March 18 Order calls the effectiveness of such Tariff language into question. Moreover, the FPA, the Commission's regulations, and the Commission's own long-standing enforcement policy clearly define the Commission's enforcement authority. That authority – to enforce Tariffs, police potentially manipulative conduct, and enforce the market behavior rules does not extend to undefined, and undetermined "anticompetitive conduct."[18] When the Commission stated in the March 18 Order that "[a]ny anticompetitive conduct observed during the May 2021 auction may be referred to the Commission's Office of Enforcement and the Commission may take all measures necessary and appropriate to address anticompetitive conduct in the May 2021 auction,"[19] it effectively created a new standard for enforcement and compliance without any notice or other due process in violation of the Administrative Procedure Act and applicable judicial precedent.[20] As such, the Commission should grant rehearing and remove the foregoing sentence from the March 18 Order.

---

[18] *See* 18 C.F.R. §§ 385.1c.1 (prohibition of natural gas market manipulation), 1.c.2 (prohibition of electric energy market manipulation) and 35.41 (market behavior rules); *see also Policy Statement on Enforcement*, 113 FERC ¶ 61,068 (2005); *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 (2008).

[19] March 18 Order at P 73.

[20] *See supra* n.11.

IV. REQUEST FOR EXPEDITED CONSIDERATION AND SHORTENED COMMENT PERIOD

P3 respectfully seeks expedited consideration of this filing. Pursuant to PJM's revised Base Residual Auction ("BRA") schedule, the next BRA is scheduled to commence on May 19, 2021. Therefore, it is critical for Capacity Market Sellers to have the guidance and clarification requested herein when they offer their resources into the forthcoming BRA. To that end, P3 requests that the Commission issue an order on this Request for Clarification no later than May 10, 2021. This will provide enough time for Capacity Market Sellers to finalize their offers prior to the start of the BRA. Accordingly, P3 respectfully requests that the Commission establish a 14-day comment period with respect to the information made public in this Answer, with any such comments due by Thursday, April 22, 2021.

V. CONCLUSION

For the foregoing reasons, P3 respectfully requests that the Commission grant this request for clarification or in the alternative, grant this request for rehearing.

Respectfully submitted,

On behalf of the PJM Power Providers Group

By*: Glen Thomas*
Glen Thomas
Laura Chappelle
GT Power Group
101 Lindenwood Drive, Suite 225
Malvern, PA 19355
gthomas@gtpowergroup.com
610-768-8080

April 8, 2021

Certificate of Service

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

Dated at Washington, D.C. this 8th day of April, 2021.

On behalf of the PJM Power Providers Group

By: *Laura Chappelle*
Laura Chappelle
GT Power Group
101 Lindenwood Drive, Suite 225
Malvern, PA 19355
gthomas@gtpowergroup.com
610-768-8080