



Agenda Date: 5/1/12  
Agenda Item: 2D

**STATE OF NEW JERSEY**  
**Board of Public Utilities**  
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ENERGY

IN THE MATTER OF STANDARD OFFER CAPACITY )  
AGREEMENTS BETWEEN NEW JERSEY POWER )  
DEVELOPMENT LLC AND PUBLIC SERVICE )  
ELECTRIC & GAS COMPANY; JERSEY CENTRAL )  
POWER & LIGHT COMPANY; ATLANTIC CITY )  
ELECTRIC; AND ROCKLAND ELECTRIC COMPANY; )  
SUBMISSION OF A DISPUTE TO THE BOARD FOR )  
RESOLUTION )

ORDER

DOCKET NO. EO11110845

and )

IN THE MATTER OF STANDARD OFFER CAPACITY )  
AGREEMENTS BETWEEN CPV SHORE LLC AND )  
PUBLIC SERVICE ELECTRIC & GAS COMPANY; )  
JERSEY CENTRAL POWER & LIGHT COMPANY; )  
ATLANTIC CITY ELECTRIC; AND ROCKLAND )  
ELECTRIC COMPANY; SUBMISSION OF A DISPUTE )  
TO THE BOARD FOR RESOLUTION )

DOCKET NO. EO12020145

Parties of Record:

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- Vilna Waldron Gaston, Esq.**, for PSEG Power, LLC
- Stephen B. Genzer, Esq.**, for Exelon Generation Company, LLC
- Mara E. Zazzali-Hogan, Esq.**, for Calpine Corporation
- Catherine E. Tamasik, Esq.**, for West Deptford Energy, LLC
- Glenn S. Pantel, Esq.**, for CPV Shore, LLC

BY THE BOARD:

This matter comes before the Board on separate applications by New Jersey Power Development (“NJPD”) and CPV Shore, LLC (“CPV”), seeking Board assistance in resolving a purported dispute under the Standard Offer Capacity Agreement (“SOCA”) executed by NJPD and CPV as part of the Long-Term Capacity Agreement Pilot Program (“LCAPP”), established by N.J.S.A. 48:3-98.2 and -98.4.

## **BACKGROUND**

On January 28, 2011, Governor Chris Christie signed into law P.L. 2011, c. 9, amending and supplementing P.L. 1999, c. 23, establishing LCAPP to promote the construction of qualified electric generation facilities. By Order dated February 10, 2011, the New Jersey Board of Public Utilities (“Board”) initiated this proceeding to implement the actions the Board is required to undertake under the LCAPP law.<sup>1</sup> The LCAPP law requires selected eligible generators, with Board-approved and executed SOCAs, to participate in and be accepted as a capacity resource in the base residual auction conducted by PJM.<sup>2</sup>

## **SOCA**

The SOCA, as defined in the LCAPP law, is a financially-settled transaction agreement that allows eligible generators to receive payments from, or make payments to, the EDCs for a defined amount of electric capacity for a term specified by the Board not to exceed fifteen (15) years. Pursuant to the LCAPP law, these payments are implemented through a fully non-bypassable irrevocable charge.<sup>3</sup> On March 29, 2011, the Board issued an Order approving the form of SOCA and directed each of the state’s four EDCs to enter into the SOCAs with the three winning generators, which included NJPD and CPV. On April 28, 2011, NJPD and CPV executed the Board’s final SOCA, which was accepted and approved by the Board on May 4, 2011.<sup>4</sup>

## **Minimum Offer Price Rule (“MOPR”)**

On February 1, 2011, the PJM Providers Group (“P3”) filed a Complaint and Request for Clarification seeking expedited revisions to PJM’s capacity procurement minimum offer price rule (“MOPR”) mechanism that applies in the annual capacity auctions, including the base residual auction (“BRA”) with the Federal Energy Regulatory Commission (“FERC”), Docket EL11-20-000. P3 asserted that the MOPR was flawed because it allowed uneconomic entry of state subsidized resources that could artificially suppress capacity market clearing prices. On February 4, 2011, FERC issued its Notice of Complaint and requested answers, comments, or protests from PJM and any intervenors by February 22, 2011. On February 11, 2011 PJM filed with FERC a proposal, pursuant to Section 205 of the Federal Power Act, to revise the MOPR rules for the PJM annual capacity auctions, incorporating, in part, P3’s requests. FERC Docket No. ER11-2875-000. On April 12, 2011, FERC issued an Order accepting most of PJM’s proposed tariff changes to its reliability pricing model (“RPM”), including changes to the MOPR

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<sup>1</sup> The provisions of the LCAPP Law have been codified in the following sections of the New Jersey Statutes: N.J.S.A. 48:3-51, 48:3-98.3-98.4.

<sup>2</sup> N.J.S.A. 48:3-98.3(a).

<sup>3</sup> N.J.S.A. 48:3.98.

<sup>4</sup> In the Matter of the Long-Term Capacity Agreement Pilot Program, BPU Docket No. EO11010026 (May 4, 2011).

provision, specifically the elimination of the state mandate exemption from the MOPR, and on November 17, 2011 FERC issued an Order on Rehearing which did not change the elimination of the state mandate exemption from MOPR ("FERC MOPR Order"). 135 FERC ¶ 61,022 (April 12, 2011), reaffirmed 137 FERC ¶ 61,145 (November 17, 2011).

### **PROCEDURAL HISTORY**

On October 17, 2011 NJPD issued a Notice of Dispute to each of the four EDCs, thereby initiating the contractual dispute resolution process relying on Section 12.1.3 of the SOCA. In that notice, NJPD declared that the tariff changes approved by FERC, specifically changes relating to new entrants under MOPR, modify the RPM in a material manner such that they adversely affect NJPD's ability to assume a capacity supply obligation by submitting a zero bid to the BRA, thereby creating a dispute ("Dispute"). NJPD Petition at paragraph 31. According to the petition, as required by Section 12.2.2 of the SOCA, between October 26, 2011 and October 31, 2011, NJPD met with each of the EDCs in an effort to resolve the alleged Dispute but was unsuccessful. NJPD Petition at paragraphs 10-19, 32. On November 28, 2011, NJPD filed a petition with the Board for resolution as provided for in the SOCA. NJPD Petition at paragraph 34.

On February 16, 2012, CPV filed its own petition with the Board for resolution of a Dispute pursuant to Section 12.2.4 of the SOCA, after a similar unsuccessful attempt of resolving the Dispute as required by Section 12.2.2 of the SOCA.

By Order dated February 10, 2012, the Board retained jurisdiction over NJPD's petition and appointed President Hanna to serve as the presiding officer. On March 30, 2012, President Hanna granted intervenor status to Hess as a SOCA signatory, and participant status to Calpine, Exelon, West Deptford Energy ("WDE"), and PSEG Power. On April 11, 2012, President Hanna consolidated CPV's petition with NJPD's petition. President Hanna also set a briefing schedule to address NJPD and CPV's petitions. On or about April 11, 2012, the initial briefs by (1) CPV, (2) NJPD, (3) a joint brief on behalf of all four EDCs, (4) a joint brief on behalf of Exelon, PSEG Power, and Calpine, and (5) WDE. On or about April 20, 2012, the same above mentioned parties filed reply briefs in accordance with the schedule set forth in President Hanna's March 30, 2012 Order.

Additionally, WDE filed a motion seeking review by the full Commission of the Presiding Commissioner's decision to grant them participant, rather than intervenor, status in the proceeding. Specifically, WDE appears to claim that the Presiding Commissioner failed to recognize this matter as more than a contractual dispute, and that it is "essential that interested entities that are not parties to a SOCA (such as WDE) be permitted to intervene as parties, not just as participants." WDE Letter Brief, at 2. WDE claims that the underlying dispute is much more than a contractual dispute, and that the proposed changes to the SOCA compel the Board to allow WDE in as a full intervenor, not as a participant. WDE appears to rely upon "public bidding" law as a core foundation for this claim. Id. at 5.

In response, NJPD calls upon the board to deny the request, noting that, to the extent any involvement was authorized, the Presiding Commissioner was correct to grant participant status. NJPD claims that the procedural status of the motion is incorrect, as the Board has yet to ratify the Presiding Commissioner's decision, and thus the determination is not yet final. NJPD Brief, at 2. Moving on to the merits, NJPD notes that the Presiding Commissioner was correct when he noted that the matter is, "at core, a contractual dispute." Id. at 4. This is not, according to NJPD, a public bidding case, and thus no significance should be placed upon

those arguments. Furthermore, the arguments raised by WDE are simply reiterations of prior arguments, and thus fail to rise to the level necessary to grant reconsideration. Thus, asks NJPD, the motion should be denied.

In reply, WDE claims that the procedural details are immaterial; it simply seeks review from the Board as allowed by the initial Order. WDE Reply Brief, at 2. As to the substantive issue, WDE repeats its claims that this matter is more than a contractual dispute, and thus intervention is necessary.

## **POSITIONS BY PARTIES**

### **CPV**

CPV claims that the material modifications to the PJM Tariff have made compliance with the SOCA terms “impracticable.” CPV Initial Brief at 1. CPV argues that the PJM tariff modification by FERC triggers the dispute provision under the SOCA and that the Board therefore has authority under the SOCA and LCAPP to provide a remedy to preserve the SOCA. Id. at 2-3. CPV further argues that Section 2.3.3(b) of the SOCA requires supply offers in the BRA to comply with PJM rules and that the rules were modified after the form of SOCA was finalized. Id. at 13-14. CPV argues that the Board has jurisdiction and authority over this alleged dispute. It requests suspension of time frames pushing out the Awarded Commencement Date and the Conclusion Date as those terms are defined in the SOCA, as of the date of the Order granting suspension until resolution of challenges or modifications “no longer prevent performance by CPV Shore.” Id. 17-18. CPV also seeks “clarification” that the remedies in Section 9 of the SOCA are not exclusive and supports NRG’s request to replace the Resource Clearing Price (“RCP”) to recalculate the RCP to push compensation for years when a unit does not clear to years when it does. Id. at 19-20.

In its reply brief, CPV reiterates that the Board has jurisdiction over this matter and that the issues here are not part of the matter under appeal, and therefore, R. 2:9-1 does not apply. CPV’s Reply Brief at 2-4. CPV asserts that even if R. 2:9-1 applied, the issue here is collateral to the state court appeals and therefore does not affect, impair or destroy the subject matter of the appeal as required by Van Horn v. Van Horn, 415 N.J. Super. 398, 409 (App. Div. 2010). Id. CPV argues that disputes under the SOCA are not limited to changes in the RPM and that remedies are not limited to the replacement of the RCP. Id. at 9-10. CPV also dismisses any arguments that the bidding process would have to be reopened because the dispute proceeding is separate from the bidding so there would be no prejudice to other bidders who did not rely on the SOCA. Id. at 10-11.

### **NJPD**

NJPD claims that a zero bid was permissible when NJPD submitted its bid in the LCAPP and when it executed the SOCA and that the rules were changed “in the middle of the game” making it more difficult to clear. NJPD Initial Brief at 2-3. More specifically, NJPD argues that “the practical effect of these changes was to eliminate the ability of NJPD to place a zero sell offer... Without the ability to bid as a price taker, NJPD may no longer voluntarily assume a capacity supply obligation unless its sell offer clears in the applicable BRA, this in turn adversely affects NJPD’s performance under the SOCA.” Id. at 9. NJPD claims that it is indisputable that the changes to the RPM are material and threaten the ability of NJPD to clear as noted in the LCAPP Agent’s Report. Id. at 13. NJPD argues that the Board has the authority to resolve the Dispute. Id. at 17. NJPD further argues that the LCAPP Act does not limit the Board’s authority

to resolve the dispute because NJPD is not requesting a change in costs, charges or cost recovery; rather, the remedy it is seeking is to preserve the 2015 Standard Offer Capacity Price ("SOCP") while "truncating" payments in later years, thereby extending the contract without payments in later years, which NJPD maintains is consistent with the SOCA and the LCAPP Act. Id. at 21-22 and 28.

In its reply, NJPD argues that the Board's jurisdiction is not divested by the state court appeals because the petition that is before the Board here is not part of the LCAPP proceeding but a separate contract dispute. NJPD Reply Brief at 12-14. NJPD maintains the claims before the Board in this Dispute are not part of the issues on appeal, and are not motions for reconsideration of orders on appeal. Id. at 15. NJPD further reiterates that the dispute provision in the SOCA is intended to cover material changes in the RPM, and that a dispute does indeed exist as defined in the SOCA because NJPD claims it will be more difficult for NJPD to clear and perform under the SOCA due to the FERC MOPR Order. Id. at 26-28.

### EDCs

The EDCs argue that the change in the RPM was anticipated and addressed by the LCAPP Agent in developing the SOCA. EDCs Initial Brief at 2. Further, even if the FERC MOPR Order constituted a material change, the proposed RCP by NJPD and CPV fundamentally changes the SOCA by either condensing the payment structure or extending the terms so that generators receive a subsidy even if they do not clear thereby rewriting the terms of the SOCA and altering the allocation of risks. Id. at 2. The EDCs claim that there has been no material change giving rights to invoke a dispute under the SOCA. Id. at 8-9. Lastly, the EDCs argue that the additional relief that CPV seeks is beyond the scope of the proceeding. Id. at 15.

In their reply brief, the EDCs argue that NJPD and CPV are attempting to impermissibly reallocate risks assumed by them with their execution of the SOCA, leaving no actual dispute for resolution. EDCs Reply Brief at 2-4. The EDCs argue that NJPD's decision to shape its bid to "front load" payments under the SOCA was a risk that it took and that CPV's request for a suspension as a modification of the SOCA changes the conclusion date and has no basis in N.J.S.A. 48:3-98.4. Id. at 7, 9-10. The EDCs further assert that the dispute provisions were not created to deal with MOPR and that other changes were made to reduce consequences, i.e. extension of time to clear and achieve commencement date and a reduction in construction period security. Id. at 9.

### Generators (Exelon, PSEG Power, and Calpine)

The generators argue that the Board lacks jurisdiction to consider NJPD and CPV's requests for relief due to the generators' filing of an appeal challenging the Board Orders approving the SOCAs and the provisions of the SOCAs under R. 2:9-1. Generators Initial Brief at 2. The generators also argue that the Board lacks authority to amend the SOCAs pursuant to N.J.S.A. 48:3-98.3. The generators likewise argue that NJPD and CPV have not shown that a dispute exists under the SOCA because they have failed to demonstrate that the MOPR Order in fact adversely affects the performance, calculation, or payment of the transaction. Id. at 19.

In their reply brief, the generators reiterate their position that the Board does not have jurisdiction to grant the relief sought, NJPD and CPV have not established the need for such relief. Additionally, NJPD and CPV have failed to establish that the relief they seek is reasonable, and altering the SOCAs at this late date would be fundamentally unfair and would

undermine the legitimacy of the Board's entire LCAPP decision-making process. Generators Reply Brief at 2.

## WDE

WDE argues that it would be unfair to allow changes in the SOCA after the bidding process and that if changes are allowed, then the LCAPP bid process must be reopened and the existing SOCAs be declared void. WDE's Initial Brief at 3, 17-18. WDE believes that there is no dispute under the SOCA and that the LCAPP law prohibits the relief requested. Id. at 12.

In its reply brief, WDE asserts that the Board addressed the pending rule changes within the development of the SOCA. WDE argues that CPV's requests echo the rejected recommendations of WDE and that NJPD's alternative pricing under a replacement RCP modifies the pricing from bidding, which could have eliminated it from competition. WDE Reply Brief at 1-2, 8-9. WDE further argues that CPV's request for clarification on exclusivity of remedies is outside the scope of the proceedings. Id. at 6.

## DISCUSSION

The Board first considers WDE's motion for reconsideration of its March 30, 2012 Order granting WDE participant status rather than intervenor status. As an initial matter, WDE improperly moves from reconsideration pursuant to N.J.A.C. 14:1-8.6 when interlocutory review pursuant to N.J.A.C. 1:1-14.10 is the proper procedure. WDE challenges the March 30, 2012 Order that was issued by President Hanna in his capacity as the appointed Presiding Officer pursuant to the Board's February 10, 2012 Order. President Hanna's decision is neither a final decision nor a final order by the Board.

Notwithstanding the procedural irregularity, following extensive review, the Board **HEREBY FINDS** that nothing in the WDE's motion requires the Board to modify or otherwise reconsider President Hanna's decision. Generally, a party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N. J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. E.g. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the action was arbitrary, capricious or unreasonable. D'Atria, 242 N.J. Super. at 401.

This Board is not bound to modify an Order in the absence of a showing that the action constituted an injustice or that the order evidences a misunderstanding or failure to take note of a significant element of fact or law. Here, the Board is not persuaded that the issue raised by WDE is sufficient to warrant reconsideration or modification of the March Order issued by President Hanna. In fact, WDE has failed to show any harm whatsoever from the decision to make them participants rather than intervenors. In this case, the two different situations are without distinction; both the participants and intervenors had all the same rights and opportunities to participate in this matter. Accordingly, the Board **HEREBY RATIFIES** that Order for the reasons stated therein.

Turning to the petitions filed by both NJPD and CPV, and addressing the issues raised in the briefs as summarized above, the first issue is that of jurisdiction. The generators, EDCs, and WDE have made various arguments as to why this Board does not have jurisdiction over the petitions to take any actions related to the LCAPP process. However, the Board is not

convinced that it is totally divested of jurisdiction. The Board takes no position on those matters at this time, other than to note that the issue of jurisdiction remains open. Based on the Board's decision today, the Board need not make a decision on this issue at this time.

Section 12 of the SOCA provides for a contractual dispute resolution process. CPV and NJPD have attempted to invoke this process. They argue that the PJM tariff modification by FERC, through the FERC MOPR Order, triggers the dispute provision under the SOCA. They argue that the tariff modifications will make it more difficult for them to clear the BRA and perform under the existing SOCA.

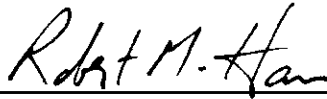
Here, to date, no SOCA winner has bid in a BRA. NJPD and CPV both argue that as a result of the FERC MOPR Order, they may no longer "voluntarily assume a capacity supply obligation" unless their sell offers clear in the applicable BRA. This, they maintain, adversely affects their performance under the SOCA. However, because the BRA has not yet occurred, neither NJPD nor CPV can demonstrate that the FERC MOPR Order does in fact adversely affect performance, calculation, or payment of the Transaction. Their allegations at this time are merely speculative, and thus not subject to resolution by the Board at this time.

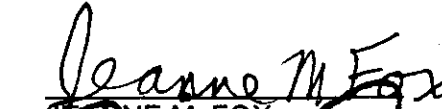
Lastly, because the Board believes that no resolution is necessary at this time, the Board declines to address CPV's request for "clarification" that the remedies in Section 9 of the SOCA are not exclusive. The Board does note, however, that in the absence of an express statement, all remedies available at law traditionally remain an option, and the Board takes no steps at this time to restrict this understanding. In the event that the remedies become a concern, the Board will further consider the issue.

Accordingly, the Board **HEREBY DENIES** WDE's Motion for Reconsideration. After consideration of the parties' submissions given the fact that the BRA has not occurred yet, the Board **FURTHER DENIES** the petitions of NJPD and CPV at this time.

DATED: 5/7/12

BOARD OF PUBLIC UTILITIES  
BY:

  
ROBERT HANNA  
PRESIDENT

  
JEANNE M. FOX  
COMMISSIONER

  
NICHOLAS ASSELTA  
COMMISSIONER

  
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COMMISSIONER

ATTEST:  
  
KRISTI IZZO  
SECRETARY

I HEREBY CERTIFY that the within  
document is a true copy of the original  
in the files of the Board of Public  
Utilities





**I/M/O STANDARD OFFER CAPACITY AGREEMENTS  
BPU DOCKET NOS. EO1110845 & EO12020145**

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