

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

<hr/>)	
I/M/O the Board's)	
Investigation of Resource)	Docket No. EO20030203
Adequacy Alternatives)	
<hr/>)	

SUPPLEMENTAL COMMENTS OF CALPINE RETAIL HOLDINGS, LLC

Calpine Retail Holdings, LLC ("Calpine Retail") hereby submits supplemental comments in response to the presentation made by PSE&G on November 9, 2020, regarding the possibility of utilizing the Fixed Resource Requirement ("FRR") alternative established under the tariff of PJM Interconnection, LLC ("PJM") to satisfy New Jersey's needs for adequate electricity resources.

Having initially proposed FRR for all of New Jersey, PSE&G has done an about-face and proposed an FRR only for Jersey Central Power & Light Company ("JCP&L"). As discussed herein, this is a singularly bad time to ask JCP&L to embark on a radical new approach to obtaining the capacity needed to keep the lights on for its retail customers. The JCP&L's parent company is dealing with serious issues that may well have a spillover effect on JCP&L. Indeed, just a week after PSE&G's presentation, the Board launched an important investigation into JCP&L regarding these issues.

Moreover, PSE&G's attempt to pressure the Board into a quick decision when there is about to be a change in the leadership of the federal government may make sense for PSE&G, but it is an invitation that the Board should reject. Launching New Jersey into FRR is a minimum 5-year commitment that will raise costs for New Jersey consumers and do little or nothing to encourage the development of renewable energy resources. The Board has ample tools available to it to ensure that the goals articulated in its Energy Master Plan can be achieved.

Finally, even if the Board is inclined to continue its investigation, the process thus far of using comments and “conversation” (as described at the proceeding on November 9, 2020) needs to be supplemented with more formal evidentiary proceedings. There are substantial questions of what are known as “adjudicative” facts that must be resolved before the Board could make an evidenced-based decision to pursue FRR. The process so far has been useful to tee up the issues, but if the Board wishes to proceed further, it must launch a proceeding that includes discovery, sworn testimony, and opportunity for cross-examination.

A. JCP&L Is Not A Good Candidate to Be the Focus of an FRR Initiative at This Time.

On November 18, 2020, the Board opened an investigation into JCP&L’s proposal for mitigation of adverse effect stemming from recent credit downgrades. Although Calpine Retail is not aware of a formal Board order at this point, its understanding is that comments are due December 4, 2020, with a public hearing to follow on December 11, 2020.

The reasons for the credit downgrade are well known. JCP&L’s parent company, First Energy, is, to be blunt, a company in crisis. It is under criminal investigation. It has been forced to terminate its CEO and other senior executives. Its most recent 10-Q, just filed this past Thursday, contain the following sobering disclosures:

We are unable to predict the outcome, duration, scope, result or related costs of the investigations and related litigation, or adverse impacts on federal or state regulatory matters, including with respect to rates, and, therefore, any of these risks could impact us significantly beyond expectations. Moreover, we are unable to predict the potential for any additional investigations, litigation or regulatory actions, any of which could exacerbate these risks or expose us to potential criminal or civil liabilities, sanctions or other remedial measures, including adverse outcomes in pending or future rate cases, and could have a material adverse effect on our reputation, business, financial condition, results of operations, liquidity or cash flows.¹

¹ First Energy 10-Q, page 86, filed November 19, 2020, available at <https://investors.firstenergycorp.com/Cache/IRCache/2b5bd042-a19c-72e6-3511-965497ac9568.pdf>

Even before these most recent developments, JCP&L's comments to the Board regarding FRR revealed an understandably cautious approach. See JCP&L reply comments dated October 2, 2020. JCP&L identified the following issues, all of which Calpine Retail agrees with:

- How will contracts be structured?
 - Who will monitor market power issues in an FRR structure?
 - What time period is required to implement an FRR structure for the state or utility?
 - As between the utility, the supplier and end-use customers, what are the risks and who is responsible for each category of risks of an FRR?
- What are the reliability and cost impacts to customers to administer an FRR structure as compared to the current PJM Reliability Pricing Market capacity market, and as compared to other relevant options?
- What specific units or technologies are not expected to clear the currently filed PJM capacity auction under the Minimum Offer Price Rule and thus are at actual risk of losing capacity revenue streams?
- How would the transition occur with the FRR process and the Basic Generation Service auction process?
- Will the BPU administer the FRR plan, or will that fall to the utilities who ultimately have the PJM tariff obligation under an FRR?

JCP&L noted that it has a responsibility to make certain that its customers will not be disproportionately impacted as a result of any FRR plan or other capacity alternative, and it also noted that legislation would likely be required for New Jersey to exercise any FRR option.

For all these reasons, the Board should be skeptical about PSE&G's proposal to foist an FRR solution on JCP&L. It appears to be an effort motivated by a desire to ensure that PSE&G and Exelon will be guaranteed to receive capacity payments for their nuclear assets, rather

competing for these in the upcoming Base Residual Auctions. Whether this is truly necessary given the Independent Market Monitor's analysis of the upcoming auction should give the Board pause.

B. The Board should Not Be Pressured Into a Quick Decision

PSE&G presented a timeline that suggested the Board should resolve by early next year to pursue FRR, and to spend the next year after that developing the relevant auction rules. This timeline allows virtually no opportunity to determine what directions FERC might be taking as part of a Biden Administration. Certainly it is fair to expect that the attitude towards renewable energy resources is likely to be far more favorable than it has been during the previous four years.

PSE&G argued in comments filed on October 2, 2020, that was no indication that FERC intends to change its mind. Comments of PSE&G, at 3. Apparently PSE&G believed it was able to predict the outcome of the national election the following month. Now that this outcome is known, however, one cannot be so sure of what will come out of Washington next.

One point on which there is broad consensus is that moving to FRR is a minimum 5-year commitment, and quite possibly longer. New Jersey needs to be 100% certain that there is no other alternative before it abandons the PJM model that has worked well for many years.

C. A Record of Comments and "Conversation" Is Insufficient to Support Adoption of FRR.

At the beginning of the proceeding on November 9, Board Chief Counsel Silverman explained that the purpose of the proceeding was to continue the "conversation" to build an "evidentiary record." Calpine Retail appreciates the desire to maintain a casual and friendly exchange of ideas, but it must disagree that such an exchange will constitute a sufficient "evidentiary record." The exchange of comments to date has revealed a broad and deep disagreement among the parties regarding the fundamental question of what effect the FRR is

likely to have on customers' rates. The Independent Market Monitor has presented its study estimated a substantial increase in costs, potentially hundreds of millions of dollars. Comments of Monitoring Analytics, LLC, July 15, 2020. PSE&G argues to the contrary. P3 then submitted another analysis that supported the IMM and criticized PSE&G's position.

This type of "battle of the experts" should be very familiar to the Board. It surfaces in every rate case, on a variety of issues. But absent a settlement, the resolution of this dispute is not by comments and conversation, but by quasi-judicial proceedings, involving discovery, sworn testimony and cross-examination.

This requirement has been recognized for many years. An agency must grant a plenary hearing (including cross-examination) if material adjudicative facts are disputed. *Cunningham v. Dept. of Civil Service*, 69 N.J. 13, 24-25, 350 A.2d 58 (1975); *Bally Mfg. Corp. v. Casino Control Comm'n*, 85 N.J. 325, 334, 426 A.2d 1000 (1981), *app. dis.*, 454 U.S. 804 (1981).

The Appellate Division in *In re Bell Atlantic-New Jersey, Inc.*, 342 N.J. Super. 439, 444-45 (App. Div. 2001) (emphasis added), analyzed the hearing requirement applicable to the Board and as set out in *Cunningham* and *Bally* as follows:

In *High Horizons Dev. Co. v. Department of Transp.*, 120 N.J. 40, 575 A.2d 1360 (1990), the Supreme Court noted that, where there is no specific statutory or rule requirement that a hearing be held, see *id.* at 42, 575 A.2d 1360, the need for a trial-type hearing tends to be influenced by whether the agency is acting in a quasi-judicial or quasi-legislative capacity. *Id.* at 50, 575 A.2d 1360. If the agency is exercising its administrative expertise to make a policy determination not involving the adjudication of disputed facts, a trial-type hearing is ordinarily not required. *Id.* at 51, 575 A.2d 1360. Manifestly, however, if the question turns on a factual-type determination, including expert opinion submitted for the agency's evaluation and reliance, an interested party with the requisite standing must be able, in some effective way, to contest the bases offered. Therefore, if the issues require the agency to consider material facts and to apply the law and the agency's understanding of public policy to the facts found, a hearing suitable to a discharge of those functions is necessary. *Id.* at 50, 575 A.2d 1360.

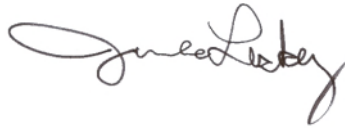
The Board of course is free to continue this proceeding for now as it presently is being conducted, and it may conclude at some point that the FRR option raises too many issues and too

few benefits. But if the Board intends to push ahead, then it must be in a position eventually to resolve the adjudicative facts that are clearly in dispute, by affording all interested parties the opportunity to engage in the same quasi-judicial procedures that are used for rate cases.

Conclusion

Calpine Retail continues to urge the Board to move carefully and avoid hasty shifts in policy that could have lasting impacts. Calpine Retail continues to maintain that there is far too much uncertainty regarding FRR to justify such a radical about-face after 20 years of effective competition and retreat to a monopoly control system that led to some of the highest electric costs in the nation.

Calpine Retail appreciates the opportunity to provide these supplemental comments, and looks forward to participating in the remainder of this proceeding.

	Respectfully submitted, 
Becky Merola Director, Regulatory & Government Affairs Calpine Energy Solutions LLC 5435 Mercier Street Lewis Center, Ohio 43035 (614) 558-2581 becky.merola@calpinesolutions.com	James H. Laskey Norris McLaughlin, PA 400 Crossing Blvd, 8th Floor Bridgewater, New Jersey 08807-5933 (908) 252-4221 (tel) (908) 722-0755 (fax) jlaskey@norris-law.com

Dated: November 23, 2020