

INVESTIGATION OF RESOURCE ADEQUACY ALTERNATIVES

BPU Docket No. EO20030203

COMMENTS OF THE NEW JERSEY LARGE ENERGY USERS COALITION REGARDING THE INTEGRATED CLEAN CAPACITY MARKET PROPOSAL

The New Jersey Large Energy Users Coalition (“NJLEUC”) appreciates the opportunity to offer these comments regarding the Integrated Clean Capacity Market (“ICCM”) proposal advanced by The Brattle Group, a consultant to the Board. The proposal is the latest in a series of FRR-type MOPR avoidance alternatives, ostensibly designed to enable the State to procure clean energy and capacity independently of FERC regulation. For the reasons set forth below, ICCM should be rejected as a wishful “ivory tower” - type proposal whose “ala carte” approach to clean energy and capacity procurement has the clear potential to disrupt the State’s energy and capacity markets and, more fundamentally, is far beyond the Board’s regulatory authority to implement. NJLEUC incorporates by reference its prior comments in this proceeding regarding FRR and the PSEG/Exelon proposals.

What Does New Jersey Have In Common With Texas?

Texas has a long history of hostility to oversight by the federal government. This independent mindset extended to energy regulation, leading to Texas’ decision to form the Electric Reliability Council of Texas (“ERCOT”) to avoid being subject to FERC regulation. ERCOT enabled Texas to literally disconnect from the interstate power grid and afforded the state an opportunity to operate its own power grid and to assume responsibility for the formulation and implementation of its energy policies and goals, freed of FERC interference.

ERCOT advanced Texas’ renewable energy policies, and facilitated the development of wind and solar resources that together account for more than 10% of the state’s total energy production. However, ERCOT was not developed utilizing a central planning structure, but

relied instead on the power markets to provide price signals to market participants to incentivize infrastructure investments that contribute to system reliability and the availability of sufficient capacity to meet demand in all operating and weather conditions.

As part of its market-focused approach to reliability, ERCOT and the Texas PUC recently commissioned a study to model an appropriate “market equilibrium reserve margin” and the “economically optimal reserve margin” for the ERCOT system. The model was to project ERCOT system conditions through 2022 by probabilistically simulating the economic and reliability implications of a range of possible reserve margins under a range of weather and other conditions. In other words, given its market-based nature, what reserve margin would be appropriate to support the reliability of the ERCOT system?

Who did ERCOT enlist to perform the study? The Brattle Group. The Brattle team included Samuel Newell and Kathleen Spees, who is a primary author of, and advocate for the pending ICCM proposal. It was Ms. Spees who presented the ICCM proposal at the recent staff webinar and responded to stakeholder questions about the proposal. The Brattle Texas study, entitled “*Estimation of the Market Equilibrium and Economically Optimal Reserve Margins for the ERCOT Region 2018 Update*” dated December 20, 2018, estimated a market equilibrium reserve margin of 10.25% for the projected 2022 market conditions, including weather conditions, a margin that Brattle acknowledged was “much lower than historical reserve margins” (at page iii.). This estimated reserve margin was far lower than those established for other RTOs, including PJM.

To state the obvious, New Jersey is not Texas, and it is not NJLEUC’s purpose to challenge the merits of Brattle’s Texas report in light of recent unfortunate events in that state. Nor do we think it instructive to compare the circumstances of the Texas ERCOT market to PJM

or the FERC MOPR-avoidance alternatives currently under consideration by the Board. What does concern us, however, is the similarity of circumstances involving Brattle: consultants that urge adoption of an untried and untested market structure, the efficacy of which they cannot and will not vouch for prior to implementation. The Board should take careful note of the extensive disclaimers that Brattle included in the Texas report regarding its findings, as well as the preclusion of Texas regulators from relying on those findings. Brattle, which presented the report “as is,” disclaimed:

...any and all express or implied representations or warranties of any kind relating to the accuracy, reliability, completeness, or currency of the data, conclusions, forecasts, or any other information in this report. Readers of this report should independently verify the accuracy, reliability, completeness, currency, and suitability for any particular purpose of any information in this report. Readers of this report should independently verify the accuracy, reliability, completeness, currency, and suitability for any particular purpose of any information in this report.

...To the fullest extent permitted by law, The Brattle Group...along with their respective directors, officers, and employees, shall not be liable for any errors, omissions, defects or misrepresentations in the information contained in this report, whether intentional or unintentional, or for any loss or damage suffered by persons who use or rely on such information or any conclusions that could be drawn from the report that turn out to be inaccurate (including by reason of negligence, negligent misstatement, or otherwise).

Our concern is this: before inviting New Jersey to jump off the ICCM cliff, Brattle should, at minimum, provide the Board some idea of what might be waiting at the bottom. As in Texas, however, Brattle’s proposal here comes free from any promises, warranties or assurances regarding its effects on New Jersey’s energy and capacity markets, and without actual modeling of any of the seemingly endless number of potential procurement scenarios proposed under ICCM. What we can say with some assurance though is that Brattle’s ICCM proposal represents

the most recent iteration of a proposal that it has peddled to a number of potential “consumers” including NRG Energy* and that, if fully implemented, would cause a seismic shift in the operation and regulation of the State’s energy and capacity markets. As was the case in Texas, New Jersey’s departure from the PJM capacity market, combined with the implementation of “integrated” clean energy and capacity procurements, would impose a tremendous burden on State officials to assume PJM’s responsibility for system reliability and market monitoring and reinstate a form of BPU economic regulation of power generation. At the risk of understatement, this would be a tremendous lift for the State that would take years to implement.

As prudent regulators, the Board must look before it leaps, and not the opposite. We are not aware whether Brattle has studied the real world outcomes, including cost and reliability issues, projected to occur if some or all of its expansive recommendations were to be adopted. This much is clear: the State cannot accept what is on its face an interesting intellectual exercise in the art of the possible without fully understanding the many implications of ICCM adoption. More is required than merely pie charts and demand curves. At minimum, the State should insist on program modeling that Brattle is willing to stand behind. It is not enough for Brattle to simply advance its ICCM proposals and wish us good luck. Given the seismic policy shift that ICCM would foster, it is incumbent upon the State to proceed with extreme caution as the consequences of bad policy decisions in this regard could be cataclysmic and not easily rectified.

Just ask Texas.

Why Do We Need All This Anyway?

The Board’s investigation of resource adequacy alternatives resulted from the issuance of FERC’s Minimum Offer Price Rule Order on December 19, 2019. The Order directed PJM to

* See, e.g. “*How States, Cities, and Customers Can Harness Competitive Markets To Meet Ambitious Carbon Goals Through A Forward Market For Clean Energy Attributes*,” prepared for NRG, September 2019.

expand application of the MOPR to all “state-subsidized” resources, including renewable energy projects that seek to participate in the capacity market. The Board properly viewed the Order as a potential threat to the State’s ability to achieve the aggressive renewable energy goals set forth in the Energy Master Plan and initiated this proceeding to explore the State’s procurement alternatives under PJM’s Fixed Resource Requirements option.

(i) It’s A New Day In Washington

To state the obvious, the FERC MOPR issued to advance Trump Administration policies that were hostile to the expansion of renewable energy. With the arrival of the Biden Administration, all indicators are that the country’s future energy policies will emphasize clean energy technologies as part of the Administration’s aggressive efforts to mitigate the threats posed by global climate change. The policies being advanced by President Biden are quite consistent with those of the Energy Master Plan.

FERC is also undergoing a significant personnel change at the Commission level, which will have an unquestionable influence on the future direction of federal energy policy. New FERC Chairman Richard Glick has made no secret of his strong opposition to the MOPR Order, which he described in his dissent to the April, 2020 Order on Rehearing as “illegal, illogical and truly bad public policy.” In the same Order he stated bluntly that the December 2019 MOPR Order “turned the ‘market’ into a system of bureaucratic pricing so pervasive that it would have made the Kremlin economists in the old Soviet Union blush” and evidenced that the Commission “had no concern for the interests of states seeking to exercise their authority over generation resources or for the customers that would be left to pick up the tab.”

Chairman Glick’s total disdain for the MOPR Rule was cogently expressed in his Dissent in the October 2020 Order on Compliance in the same docket, in which he stated:

It is becoming increasingly clear that the PJM MOPR saga will ultimately be remembered as a model case of egregious Commission overreach. The majority has taken MOPRs, already a controversial topic, and thoroughly weaponized them as a tool for increasing prices and stifling state efforts to promote clean energy. The result is an unsustainable construct that will eventually collapse under its own weight. The Commission's contortions on default service auctions and its failure to address the most important questions implicated by today's order are just the latest indicator of that inevitable result. At this point, the only real question remaining is how much damage the Commission's arrogant approach to the states will do in the meantime.

Chairman Glick's stinging dissents eliminate any doubt regarding his position on the MOPR and signal that he will consistently oppose federal attempts to blunt the impact of state clean energy programs in the regional wholesale electric markets, having observed with respect to PJM "there's a recognition that the MOPR process in general just isn't sustainable."

For her part, new Commissioner Allison Clements has expressed her hope that the Commission will "focus on concrete issues and actual paths forward on capacity market design that respect state policy choices." Commissioner Clements has made clear that she doesn't think "that state policy choices and capacity markets have to be irreconcilable" and has noted her concerns "about the ongoing compatibility of a blunt capacity product that doesn't distinguish between resource characteristics." Finally, new Commissioner Mark Christie—the only current FERC Commissioner to have previously served as a state utility regulator—has indicated that he'd "like to look at alternatives that maybe keep the integrity of the capacity markets while at the same time allowing states that have individual policies they want to pursue to pursue those policies."

It is also noteworthy that former FERC Chairman Neil Chatterjee was fired as Chairman the day after the 2020 election in apparent retaliation for his openness to incorporating market-based carbon pricing into the electricity markets. His term as Commissioner expires in June.

This is the new FERC.

It should therefore be abundantly clear that the days of the FERC MOPR—the Order that triggered the Board’s resource adequacy investigation—are numbered. This is the reality and it cannot be ignored. With the Biden Administration and the new FERC, federal and state clean energy and climate policies will much more closely align, and there will be no need for New Jersey to undertake the huge regulatory lift to reassert jurisdiction over power generation and to design, implement and monitor new and untested clean energy and capacity markets that could be fraught with unanticipated risks and regulatory landmines. The leap into the regulatory unknown that is ICCM is simply not a viable or necessary alternative in the circumstances.

The “Illness” Does Not Justify The “Cure”

In prior comments, NJLEUC noted the almost complete absence of stakeholder support for FRR, which was viewed by most commenters as not sufficiently necessary or beneficial to justify the substantial market power and other risks inherent in the structure. Many concluded that FRR would entail the partial re-regulation of power generation through an untested device fraught with the potential for unintended consequences and potential financial and other risks that could vastly overshadow FRR’s limited benefits.

The ICCM proposal appears to considerably exceed the limited boundaries of FRR, by its terms having the potential to, among other things, fully replace the PJM capacity market with an alternative structure that could involve the cooperation of multiple states. And what is the justification for all of this?

The primary justification continues to be the need to foster the development of renewable resources by assuring that these resources obtain capacity revenues that would otherwise be lost if, due to the MOPR, the resources fail to clear in the PJM auction. The loss of these revenues

would increase REC values and in turn drive up the cost of achieving the State's clean energy goals.

One of the more interesting facts developed early in the proceeding is that there is consensus that the potential benefits of FRR are slim in comparison to the potential for significant increases in costs, exercises of market power, threats to competition and the BGS auction, and ratepayer risks associated with the abandonment of the decades-old regulatory paradigm. The comments of multiple stakeholders agreed that the only real problem posed by the MOPR for several years to come is the threat that the first tranche of offshore wind would not clear the PJM auction, representing 286 MW of unforced capacity associated with the Ocean Wind project. There was further agreement that FRR could lead to rate increases far greater than those created by the exclusion of offshore wind from the capacity market.

A number of interested stakeholders, including Oersted, the developer of the Ocean Wind project, agreed that the loss of revenues associated with the project would not be significant. The parties agreed on the formula to calculate lost capacity revenues—e.g. the project's unforced capacity value multiplied by the BRA price per MW-day—and derived a total revenue loss figure in the range of \$18 million per year beginning in 2023 or 2024 depending on when the offshore wind resources begin commercial operation. While this figure would increase as additional tranches of offshore wind are phased in, the loss figure would remain modest in relative terms.

Therefore, the question must again be asked, with so little seemingly at stake—particularly given the doubtful future of the MOPR Order under the new FERC--why would the State willingly undertake the huge risks associated with the massive, multi-year effort that would inevitably be required to re-regulate power production, re-establish the Board as economic regulator of the power industry, and establish the new regulatory paradigm and procurement

vehicles proposed by ICCM? The restructuring of the electric industry occurred over an eight year period and required a multitude of stakeholder processes and contested proceedings to resolve the many issues associated with the deregulation of the state's power plants and generation function. It cannot be assumed that a re-regulation process would be any less complicated.

Threshold questions that also need to be answered include: who in the State has the expertise to anticipate and properly address the issues that will arise and assure the proper implementation of the new structure? How will ratepayers be protected against exercises of market power or being subjected to significant performance-related penalties or expenditures if all does not go as planned? What happens if at the end of the day the lights go out? Who will fix the system if it's broken and how long will that process take? Could we be the next Texas? Is the exercise worth the risk?

The Board Lacks The Legal Authority To Adopt Many Aspects of ICCM

NJLEUC previously commented that although the Board's general delegation of authority over "public utilities" pursuant to N.J.S.A. 48:2-13 has consistently been broadly interpreted, the fact remains that the current definition of an "electric public utility" refers only to "an entity that transmits and distributes electricity to end users within this State." N.J.S.A. 48:2-13 (a) and N.J.S.A. 48:3-51. These sections do not purport to grant the Board authority over public utilities beyond the distribution function, which clearly does not encompass the procurement of capacity.

The Board's authority over power generation is set forth in Section 8 of EDECA, N.J.S.A. 48:3-56 (a), which states that "the board shall not regulate, fix, or prescribe the rates, tolls, charges, rate structures, rate base or cost of service of competitive services."

N.J.S.A. 48:3-56 (b) makes clear that “electric generation is deemed to be a competitive service.” The same section describes the Board’s residual authority over power generation as limited to seeking Legislative authorization to reclassify generation as a regulated service should the Board determine that insufficient competition exists for generation.

The deregulation of the State’s electric industry also ended the Board’s involvement with generation resources generally and integrated resource planning in particular. The Board no longer issues Certificates of Need authorizing new power plants or expansions of existing plants, and has no regulatory authority over how deregulated generating companies are operated, or how and to whom they sell their power.

While Section 9 of EDECA, N.J.S.A. 48:3-57 (a) authorizes the Board to direct utilities to procure Basic Generation Service and to oversee the auction procurement process, no parallel can be drawn between BGS and the ICCM proposal. BGS is a statutorily authorized, non-competitive, bundled default service that is provided only to non-switching retail customers “at prices consistent with prevailing market conditions.” The Section authorizes the Board to regulate BGS prices, based on the reasonable and prudent cost to the utilities to provide the service.

However, neither Section 9 nor any other provision of EDECA provides authorization to the Board to engage in the types of integrated capacity procurements that are contemplated by the ICCM proposal, as such exercise would involve the procurement of a competitive service over which the Board lacks jurisdiction and ratemaking authority. This is particularly so with regard to Brattle’s blithe proposal for New Jersey to combine with other states to form an interstate capacity market alternative to the PJM capacity market.

While it is true that the Public Utility Law, N.J.S.A. 48:2-15 and N.J.S.A. 48:2-22 grants the Board limited authority to enter into compacts in the State’s name with other states, including Vermont, Massachusetts, Connecticut and Pennsylvania, to establish joint regulation and control of rates for electricity and gas transmitted in interstate commerce, and for transportation by carrier for hire between New Jersey and other states. However, even in this limited context, the Public Utility Law makes the exercise of this power subject to authorization by the State Legislature and an Act of Congress due to the interstate nature of the arrangement. Even if such authorization were obtained, it would only extend to rate regulation and not provide the basis for the establishment of an interstate capacity market or procurement mechanism, which would likely be a bridge too far for FERC and PJM.

At the ICCM webinar, Kathleen Spees was asked if the Board had the authority to implement Brattle’s capacity procurement proposals, and in particular the suggestion that New Jersey could implement them alone or “in concert with other states or by implementing the design at the PJM-level.” She professed to have no knowledge on the subject. Her response exposed the fundamental problem with these types of “ivory-tower” think pieces—they might sound good in theory but they do not necessarily align with the regulatory and legal boundaries that will determine whether or to what extent the proposal could actually be implemented. The fact that Brattle apparently did not consider it necessary or appropriate to first determine whether its sweeping program proposals comply with the State’s energy laws and policies, let alone acknowledge that issues exist in this regard, speaks volumes about the value of this exercise to New Jersey.

The ICCM Proposal

We will leave to others the task of dissecting the nuances of the procurement regime set forth in the ICCM Proposal. For our purposes, we view ICCM as a non-starter for a number of reasons. In general, we view ICCM as the equivalent of a regulatory empty suit, that leaves much assumed (e.g. PJM, suppliers and customers will cooperate, the laws will be accommodative) and much untested (e.g. relevant market data). We previously addressed the absence of Board authority to implement, among other things, the regional integrated procurement structure that is proposed to substitute for the PJM capacity market, which appears to be the ultimate goal of the proposal.

However, even if ICCM is limited in scope to New Jersey, the Board's authority over power generation, resource planning, and competitive energy and capacity products is quite limited, given the restructuring of the electric industry and transition to energy competition. It would therefore be an appropriate exercise for the Board to examine each element of the ICCM Proposal to determine whether the Board has the authority to implement that feature. In many instances the answer could well be no. More than two decades ago, the Board relinquished its authority to engage in the economic regulation of power producers in all of its particulars, and it would require an expansive act of the Legislature to change this framework to accommodate ICCM.

How Do We Know ICCM Is Viable (And What If It Isn't)?

The ICCM Proposal is presented as a white paper. The white paper format is frequently used to facilitate discussions of new and untested ideas, and ICCM certainly falls into this category. While Brattle has apparently proposed variations of ICCM elsewhere in recent years, the model has yet to be implemented anywhere. Therefore, ICCM has no track record or data points that may be examined to gauge ICCM's potential viability as a procurement mechanism.

Brattle dangles the carrot that the ICCM “will position our market as the regional, national, and global leader on how to rapidly and reliably decarbonize the grid at the lowest possible cost”. Of course, we have heard this kind of pabulum before.

The various FRR proposals that preceded ICCM were grounded, to varying degrees, in the parameters established in the PJM Tariff and Reliability Assurance Agreement. We have previously debated whether the FRR alternative is sufficiently “flexible” to accommodate the various FRR proposals that have been presented to the Board. However, as discussed in NJLEUC’s initial comments, FRR is in fact highly inflexible, and was intended to be an unattractive option, particularly for deregulated states like New Jersey.

However, the ICCM Proposal is untethered to FRR or the PJM rules generally, which is understandable given ICCM’s purpose to substitute for the PJM capacity market. While ICCM holds open the prospect that PJM would be a willing participant in ICCM, thereby enabling the State to leverage PJM to fill in many of the regulatory gaps that permeate the ICCM proposal, there is no assurance that this will be the case.

And what would occur if PJM (and FERC) elect not to cooperate with the creation of an alternative interstate capacity market? One likely scenario would be that FERC and PJM could simply step in and end the ICCM experiment. Alternatively, without PJM cooperation, New Jersey would be compelled to assume the expansive regulatory role now played by PJM in the capacity markets. The challenges that the State would confront in assuming such a role cannot be overstated. However, it is fair to ask who has the requisite expertise to step into the shoes of Joe Bowring and others at PJM to establish the new market, and all the needed structural, procurement, consumer protection and market power mitigation rules, and the market monitoring

and enforcement capabilities that will be required? What assurance does Brattle offer that if they build new clean energy and capacity markets, power producers and customers will come?

Unfortunately, the white paper is not supported by any studies or modeling demonstrating that any aspect of the ICCM Proposal would be workable in real world conditions. Such a requirement would appear to be particularly necessary given the open-ended, “ala carte” nature of the program, in which a wide variety of energy and capacity products, clean and fossil, produced by an expanded universe of suppliers would be made available for purchase by a multiplicity of consumers, including the State, cities, corporate sustainability buyers, retailers and others. It would be good to have some degree of comfort that all of these moving parts could effectively be managed by a central authority and not devolve into chaos.

While demand curves and bar charts are appropriate tools to stimulate debate about market design and the art of the possible, they must ultimately be supported with actual New Jersey market data to determine if what is being proposed could actually work if adopted. A particular area of concern is the failure of ICCM to address market power and how it could be mitigated under an ICCM structure. Market power was cited as a primary concern by most stakeholders who commented on the earlier FRR proposals, and for good reason. The PJM Independent Market Monitor has consistently found market power to be “endemic” in the PJM capacity market. The ICCM proposal to further segment the market by conducting narrow, technology-specific procurements has the potential to exacerbate market power concerns.

However, the ICCM Proposal contains only the following passing reference to market power: “A sloping (demand) curve mitigates year to year price volatility as market conditions fluctuate and mitigates potential exercise of market power”. (ICCM at 10). Needless to say, PJM has many market power mitigation tools in its arsenal to address exercises of market power,

including offer price caps, “must bid” requirements and active market monitoring. Perhaps Brattle considers these tools to be unnecessary. In any event, Brattle makes no attempt to explain how its sloping demand curve will suffice to curb market power.

Conclusion

We continue to share the State’s frustration with the FERC MOPR Order and other federal actions that could impede implementation of the State’s energy policies and, in particular, the clean energy goals of the Governor’s Energy Master Plan. However, the State should not allow near term frustrations to persuade it to take precipitous action, including exiting the PJM capacity market in favor of the ICCM resource adequacy proposal--or the pending FRR proposals. It is doubtful that ICCM could be adopted under existing state and federal law and, even if it could, ICCM would result in an unwarranted, seismic shift in the State’s energy paradigm fraught with uncertainties and risk.

Given the widely anticipated shift in federal energy policies, which would result in the close alignment of FERC policies with those of the Governor’s Energy Master Plan, there is simply no longer a need to consider procurement alternatives to offset the MOPR and facilitate development of clean energy technologies. Clearly, we are seeing the light at the end of the tunnel and this should provide comfort that we will not have to risk the leap into the regulatory unknown represented by ICCM and FRR.

We urge the State to allow events in Washington to run their course as the direction is clear and favorable to New Jersey. Sometimes abiding the events in Washington is the best course, particularly when the motivating force for action is rooted in FERC Orders that will have a short shelf life. Waiting a bit longer is certainly the easiest and least risky course and the one

that appears most advisable in the circumstances.

Respectfully submitted,

Steven S. Goldenberg
Giordano, Halleran & Ciesla, PC
125 Half Mile Road
Red Bank, New Jersey 07701
sgoldenberg@ghclaw.com

Paul F. Forshay
Eversheds Sutherland
700 Sixth Street, NW, Suite 700
Washington, DC 20001
paulforshay@eversheds-sutherland.com

Dated: March 5, 2021

Docs #4932884-v1