



STATE OF NEW JERSEY
Board of Public Utilities
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ENERGY

IN THE MATTER OF THE LONG-TERM)
CAPACITY AGREEMENT PILOT PROGRAM)

ORDER

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)
) APP. DOCKET NOs. A-005192-10T1,
) M-002572-11

)
)
) BPU DOCKET NO. EO11010026

Parties of Record:

- Marc B. Laskey, Esq.** for Appellant, Jersey Central Power & Light Company
- James C. Meyer, Esq.** for Appellant, Rockland Electric Company
- William J. O’Shaughnessy, Esq.** for Appellant, Public Service Electric & Gas Company
- Philip J. Passanante, Esq.** for Appellant, Atlantic City Electric Company
- Colleen A. Foley, Esq.** for Respondent, Exelon Generation Company
- John A. Hoffman, Esq.** for Respondent, Hess Newark LLC
- Leslie G. London, Esq.** for Respondent, LS Power Development
- Sean J. Kirby, Esq.** for Respondent, Competitive Power Ventures
- David R. King, Esq.** for Respondent, NRG Energy Inc.
- Kevin McNulty, Esq.** for Respondent, NAEA Ocean Peaking Power, LLC
- Howard O. Thompson, Esq.** for Respondent, PPL Companies
- Stefanie A. Brand, Esq.,** Director, New Jersey Division of Rate Counsel

BY THE BOARD:

This Order is issued by the New Jersey Board of Public Utilities (“Board”) in conformance with the opinion of the New Jersey Superior Court, Appellate Division (“Appellate Division”) in its March 8, 2012 Order (“Order”) on a motion to settle the statement of items comprising the record on appeal (“SICR”) filed by Appellant-Movants, the State’s four Electric Distribution Companies -- Atlantic City Electric Company, Jersey Central Power & Light Company, Public Service Electric and Gas Company, and Rockland Electric Company (collectively, “EDCs”), under administratively closed Appellate Division Docket No. A-005192-10T1, M-002572-11.

BACKGROUND

On January 28, 2011, Governor Chris Christie signed into law P.L. 2011, c.9, amending and supplementing P.L. 1999, c. 23, which establishes a long-term capacity agreement pilot program ("LCAPP") to promote the construction of qualified electric generation facilities. This Act has since been codified at N.J.S.A. 48:3-51, -60.1, -98.3 and -98.4. The Act set explicit deadlines for various actions that needed to be performed to develop and award the Standard Offer Capacity Agreements ("SOCAs") envisioned by the Act.

By Order dated February 10, 2011, the Board adopted a sixty-day schedule to initiate and complete a proceeding to comply with the Act. The Board also approved the EDCs-retained LCAPP Agent, Levitan & Associates, Inc. The Board further directed interested parties to submit proposed forms of a SOCA for consideration by the LCAPP Agent and the Board.

By Order dated March 29, 2011, the Board accepted the LCAPP Agent's recommendations in its LCAPP Agent Report ("Report") dated March 21, 2011 and approved the Final Proposed Form of SOCA. The Board awarded the SOCAs to three qualified generation facilities identified by the LCAPP Agent: Hess Newark Energy Project ("Hess"), NRG Old Bridge Clean Energy Center ("NRG"), and CPV Woodbridge Energy Center ("CPV"). The Board directed the EDCs to submit their confidential version of the executed SOCAs ("confidential SOCAs"), including the respective generators' SOCA bid prices. The Board also directed the EDCs to submit a final public version of executed SOCAs (the "public SOCAs") in a redacted form so as not to disclose the respective winning generators' SOCA bid price. The Board further ordered that the SOCA bid prices submitted would not be publicly disclosed and the SOCA bid prices would remain confidential for a limited period of time, which would expire once the generator had bid into the PJM Base Residual Auction ("BRA"),¹ to ensure that no party was at a competitive disadvantage through the disclosure of confidential bid information.

By Order dated May 4, 2011, the Board approved the executed SOCAs as LCAPP compliant. On that date, the Board restated its intention to keep the SOCA bid prices confidential until the generator submitted a bid into the BRA as set forth in its SOCA, at which point the SOCA bid price for that generator will be made publicly available and will no longer be treated as confidential information. On May 20, 2011, the Board denied the EDCs' motion for reconsideration of the March 29, 2011 Order.

PROCEDURAL HISTORY

On June 24, 2011, the EDCs jointly filed an appeal of the Board's February 10, 2011 Order implementing the LCAPP Act, the March 29, 2011 Order accepting the Report and LCAPP Agent's recommendations, the May 4, 2011 Order approving execution of the SOCAs, and the May 20, 2011 Order denying reconsideration. On July 21, 2011, the Board filed its SICR with the Appellate Division under Docket No. A-005192-10T1.

¹ "Base residual auction" means the auction conducted by PJM, as part of PJM's reliability pricing model, three years prior to the start of the delivery year to secure electrical capacity as necessary to satisfy the capacity requirements for that delivery year. N.J.S.A. 48:3-51. PJM is a privately-held, limited liability corporation that is a FERC-approved Regional Transmission Organization, further defined at N.J.S.A. 48:3-51, that manages the regional, high-voltage electricity grid.

Following the filing of the Board's SICR, the EDCs filed a motion with the Board to settle the record on September 2, 2011. This motion sought to supplement the record with ten categories of documents ("Items"). On November 9, 2011, the Board issued an order largely denying the requests. On November 28, 2011, the Board filed a First Amended SICR to include the public versions of the SOCA and the EDCs' protest letters with the Appellate Division.

On December 23, 2011, the EDCs filed a motion with the Appellate Division to settle the SICR, thus appealing portions of the Board's November 9, 2011 Order. Briefly, the EDCs sought to include the following Items on appeal: Item 4, the Agent Question Sets sent to all project sponsors who submitted Prequalification Applications and all responses; Item 6, any written/electronic presentations, memorandum or briefing materials provided by the Agent to the Board with respect to the implementation of the LCAPP Act or the evaluation of the bids received through the LCAPP process; Item 7, all bids received; Item 8, all other documents considered by the Board or the Agent in preparing the form of SOCA or the Agent's Report, including without limitation, all documents prepared by Staff and provided to the Agent considering the interpretation of the LCAPP Act, the assumptions used in modeling of costs and/or benefits under the Agent's Report and scope of the analysis or review undertaken by the Agent; and Item 10, a letter from Assemblyman Upendra J. Chivukula to Board President Lee A. Solomon dated March 10, 2011, concerning the Board's implementation of the LCAPP Act. On January 11, 2012, the Board filed its appellate brief in opposition.

On March 8, 2012, the Appellate Division granted in part, denied in part, and remanded with instructions for further consideration in part, the motion. The Appellate Division ordered that Items 4, 8, and 10 be subject to a remand hearing at the Office of Administrative Law ("OAL") for a determination of whether those Items should be included or excluded from the SICR. The Appellate Division granted the EDCs' request to include Items 7 and 9 and found that entry of an appropriate order, upon request, would protect the confidentiality of the documents during litigation. The Appellate Division excluded Item 6 from the SICR.

DISCUSSION

As noted, Item 4 sought inclusion in the SICR of the Agent Question Sets sent to all project sponsors who submitted Prequalification Applications and all associated responses. The Appellate Division ruled that a hearing should be conducted before the OAL to determine whether the question sets and responses were ever made available to the Board for its review, and the extent to which the question sets and responses were relevant to the Board's review. Order at 7.

The EDCs also sought

all other documents considered by the Board or the Agent in preparing the form of SOCA or the Agent's Report, including without limitation, all documents prepared by Staff and provided to the Agent considering the interpretation of the LCAPP Act, the assumptions used in modeling of costs and/or benefits under the Agent's Report and scope of the analysis or review undertaken by the Agent.

[Id. at 10.]

The EDCs identified this request for documents as Item 8. The Appellate Division found that most documents requested were presumptively-privileged and that the EDCs had shown no compelling need for the documents, but required the Board to produce a privilege log listing all responsive documents to Item 8 on remand for an in camera review by an ALJ. Ibid.

The EDCs further sought Assemblyman Chivukula's letter to Board President Solomon dated March 10, 2011. Id. at 12. The EDCs identified this letter as Item 10. The Appellate Division ruled that the Board should produce the letter if it was received on or about the time it was dated or present information at a remand hearing clarifying the time of its receipt by the Board. Ibid.

On Items 4, 8, and 10, the Appellate Division remanded "for further consideration with instructions to transmit the remainder of the matter to the OAL for a contested-case hearing or such other proceedings as are necessary to resolve the issues raised herein." Id. at 12-13. The court further stated that it did not retain jurisdiction. Ibid. Based upon the Order of the Appellate Division, the Board HEREBY FINDS that the Appellate Division has directed the Board to initiate a proceeding, through the OAL, for the purpose of reviewing Items 4, 8, and 10 to determine if they should be included in the SICR. Accordingly, the Board HEREBY TRANSFERS to the OAL the question of the inclusion of Items 4, 8, and 10 into the record, based upon the claims of confidentiality and relevance. Towards that end, the Board HEREBY DIRECTS the Division of Law, on behalf of the Board, to develop and submit a privilege log to the OAL for review and assistance in its obligation.

The EDCs also sought to include in the SICR documents containing highly confidential, proprietary information of businesses in competition. Specifically, through Item 7, the EDCs sought all bids received by RC Cape May Holdings, LLC (BL England), Middlesex Power Partners LLC (Sayreville Energy Center), West Deptford Energy, LLC (LS Power), NRG, Hess and CPV, as identified on page 42 of the LCAPP Agent's Report. Through Item 9, the EDCs sought inclusion of the confidential versions of the SOCAs executed by the EDCs with the winning bidders, NRG, Hess and CPV. In the Matter of the Long-Term Capacity Pilot Program – Order on Motion to Settle the Record, dated November 9, 2011, App. Dkt No. A-005192-10T1, BPU Dkt No. EO11010026 at 4. The Appellate Division granted the request and found that the EDCs were not challenging the confidential nature of the materials. It ruled that "[e]ntry of an appropriate order, upon request, would protect [the materials'] confidentiality during this litigation (and) as a consequence, the Board lacks any reasonable justification for excluding the bids or unredacted SOCAs from the record." Order at 12. Accordingly, the Board HEREBY AMENDS the SICR to include both Items 7 and 9 in a Second Amended SICR.

While the Appellate Division did not direct the Board to release the items, simply to list them, the Board has no intention of undermining the letter or the spirit of the Order. Yet, any release of confidential bid information prior to the BRA would represent a gross injustice to a fair, competitive bidding process and could result in manipulation of the auction by entities seeking commercial advantage in their bid positions. The Board notes that even the Appellate Division agreed; in the Order, the court explicitly notes that

Appellants do not challenge the Board's conclusion that the bid prices should temporarily be shielded from public disclosure, and they pledge to keep them confidential. Entry of an appropriate order, upon request, would protect their confidentiality during the litigation.

[Ibid.]

The Board believes that the public, as well as other interested parties, should be temporarily screened from this information until the bid price information has been disclosed through the bid process. The Board understands that the unredacted SOCAs have been released to the litigants in a concurrent federal litigation, PPL EnergyPlus, LLC v. Solomon, et al., U.S.D.C. Docket No. 2:11-cv-00745-PSG-ES ("PPL v. Solomon"), through discovery production on an "ATTORNEYS EYES ONLY" basis. Initially, on October 31, 2011, the federal court entered a Protective Order during the discovery phase in PPL v. Solomon. Later, on December 14, 2011, the federal court entered a Stipulation and Consent Order Concerning the Production of Unredacted Standard Offer Capacity Agreements. The December 14, 2011 Stipulation and Consent Order provided that the unredacted SOCAs will be produced as "ATTORNEYS EYES ONLY" pursuant to the October 31, 2011 Protective Order except that the unredacted SOCAs shall not be disclosed by the receiving party to anyone other than those individuals and entities identified in Par. 6, subparagraphs (a)-(e) and/or (g)(h) of that Protective Order, and same would not be disclosed to any in-house counsel for any Plaintiff as it was acknowledged that in-house utility Plaintiffs already had access to the unredacted SOCAs by their party-litigant status. The Stipulation and Consent Order executed by the parties and limited intervenors, NRG and New Jersey Power Development, LLC, provided that if any party sought to include proprietary information, including the SOCAs, before such information became public upon completion of the PJM BRA, then the party shall make a twenty-four hour advance notice of intent to disclose proprietary information, the party shall make its best efforts to file under seal, and the party shall cooperate to contest objections to materials being filed under seal and resist efforts to require disclosure of proprietary information to the public or non-identified entities upon the order. On or about January 12, 2012, the federal court then entered an Amended Stipulation and Consent Order Concerning the Production of Unredacted Standard Offer Capacity Agreements, thereby adding intervenor CPV as a signatory to the Stipulation and Consent Order.

Regarding procedures for release of the confidential information, the Board believes that the federal Stipulation and Consent Order sets forth an appropriate manner for release in this case of the unredacted SOCAs and confidential bid information. The Board further understands that entities who were not parties to the federal litigation were afforded the opportunity to be heard regarding their alleged confidential and proprietary interests concerning the unredacted SOCAs. A similar opportunity to be heard should be provided to BL England, LS Power, and Sayreville regarding their confidential bid information. To the extent that the parties in this matter are willing to accept the same terms of the federal Stipulation and Consent Order, the Board will entertain approval of the entry of an appropriate consent order governing a similar confidentiality agreement here. If, instead, the parties oppose such a method, they are directed to provide notice to the Board, in writing, within ten (10) days from the effective date of this Order. Any opposing entities are directed to copy all interested parties on their written notice to the Board. In the event timely notice is received within ten (10) days, the Board will TRANSMIT the question of issuance of an appropriate confidentiality order, designed to ensure that confidential bid pricing is not released to any entity with ability or desire to use or misuse the information in

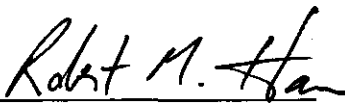
a commercial manner, to the OAL for initial resolution. In the event no timely notice is received, the Board HEREBY DIRECTS the parties and interested parties to submit a consent order or other form of documentation in conformance with the federal Stipulation and Consent Order to form the basis for release of the unredacted SOCA's and bid information.

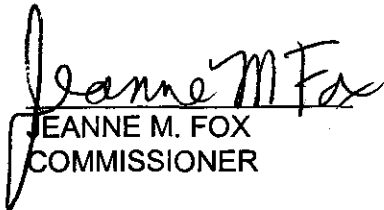
The Board retains jurisdiction on this matter, and will act upon the initial decisions of the OAL to ensure full compliance with the Order of the Appellate Division.

The effective date of this Order is May 14, 2012.

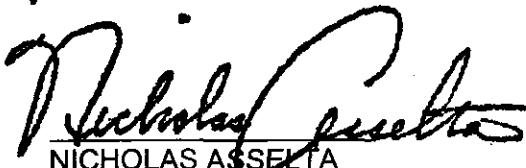
DATED: 5/11/12

BOARD OF PUBLIC UTILITIES
BY:


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PRESIDENT


JEANNE M. FOX
COMMISSIONER


JOSEPH L. FIORDALISO
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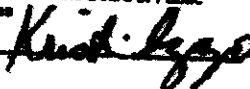

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MARY-ANNA HOLDEN
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ATTEST:


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 THE LONG-TERM CAPACITY AGREEMENT PILOT PROGRAM
APPELLATE DOCKET NO. A-5192-10T1
BPU DOCKET NO. EO11010026

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