

134 FERC ¶ 61,163
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

West Deptford Energy, LLC

Docket No. ER11-2936-000

ORDER ON NON-DISCLOSURE CERTIFICATES

(Issued March 3, 2011)

1. The Commission hereby explains that Commission advisory staff (including assistants to the Commissioners) will not be executing a non-disclosure agreement proposed by West Deptford Energy, LLC (WDE). Absent action by WDE, Commission advisory staff intends to begin viewing the privileged material no sooner than two business days after the issuance of this order.

I. Background

2. Under Attachment DD of its Tariff (Attachment DD), PJM Interconnection, L.L.C. (PJM) operates a capacity market, whereby resources submit offers to provide capacity into an annual Base Residual Auction (BRA). "Net short" sellers within PJM (parties who both buy and sell capacity, but who are primarily buyers) may have an incentive to use their capacity sales to lower the market price. To prevent this, Attachment DD contains a Minimum Offer Price Rule (MOPR) that addresses the potential market impact of new resources that are offered into the BRA at offer prices that are lower than their costs.¹ Under this rule, PJM develops a benchmark for each type of resource, and if a resource submits an offer that is lower than this benchmark and could create a particular impact, PJM will substitute a mitigated (i.e., higher) offer price. The tariff provides, however, that prior to the BRA, a unit owner may obtain a determination from the Commission that even if the unit's sell offer is lower than the benchmark, it "is consistent with the real levelized (year one) competitive, cost-based,

¹ PJM tariff, Attachment DD, section 5.14.

fixed, net cost of new entry" for that unit, assuming that the unit is relying solely on revenues from PJM-administered markets.²

3. WDE intends to construct a new generating station and to offer its capacity into the next BRA, scheduled for May 2, 2011. On February 22, 2011, WDE filed a request for relief under section 5.14(h)(2) asking the Commission to rule that the offer that WDE anticipates making into the upcoming auction is justified by WDE's unit-specific costs and expected revenues.³ WDE asks for Commission action on its request on or prior to April 22, 2011.

II. WDE's Request Regarding Commission Employee Access to Protected Material

4. WDE states that, to enable the Commission to determine whether its sell offer is justified by the unit's costs and expected revenues, it has provided highly sensitive, confidential bid-related material and supporting documentation. It did so by submitting both a public and a privileged (non-public) version of its February 22 Request.⁴ WDE states that releasing the information contained in the non-public version of the February 22 Request to third parties, including competitors, would have a detrimental competitive impact on WDE. It therefore asks the Commission to restrict the ability of intervenors to obtain access to the non-public version of its request.⁵ WDE

² *Id.*, section 5.14(h)(2). The tariff also provides a means for sellers to work with PJM's market monitor to avoid mitigation in this circumstance, but that provision is not at issue in this proceeding.

³ WDE states that the MOPR currently does not apply to it because it is not a net short seller, but that proceedings are pending under which the MOPR rule might change prior to the May 2011 auction (*PJM Interconnection, LLC*, Docket No. ER11-2875-000; *PJM Power Providers Group v. PJM Interconnection, LLC*, Docket No. EL11-20-000), and those pending proceedings raise an uncertainty as to whether the MOPR will apply to WDE. WDE therefore seeks relief at this time to ensure that it can participate in the May 2011 auction without triggering the mitigation of the MOPR Rule. February 22, 2011 Request for Relief (February 22 Request) at 2-3.

⁴ All citations to the February 22 Request in this order are to the public version.

⁵ February 22 Request, cover letter at 2 ("WDE further requests that the Commission . . . establish procedures to restrict access to WDE's highly sensitive bid-related information and supporting documentation only to the Commission, PJM, and the PJM Independent Market Monitor, and, at the Commission's discretion, to an independent expert, in each case subject to the enclosed Protective Order").

attaches to its February 22 Request a draft Protective Order,⁶ which includes a Non-Disclosure Certificate, and asks the Commission to adopt this Protective Order.

5. The draft Protective Order first defines the term "Participant" as "a Participant as defined in 18 CFR § 385.102(b) [(2010)]." It then defines the term "Reviewing Representative" as "a person who has signed a Non-Disclosure Certificate," and it includes "a person designated as a Reviewing Representative by order of the Commission, or a Commission employee designated by the Commission as a Decisional Authority with respect to the particular question."⁷

6. The draft Protective Order then provides that protected materials "shall be made available under the terms of this Protective Order only to Participants and only through their Reviewing Representatives" and that "Protected Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding."⁸

III. Commission Determination

7. The draft Protective Order is ambiguous as to whether it was intended to apply to advisory staff, but we find that based both on the language of the draft Protective Order and our policy, advisory staff (including assistants to the Commissioners) will not be signing the Protective Order. Advisory staff (including assistants to the Commissioners) are already subject to the Commission's and the Office of Government Ethics (OGE) regulations preventing disclosure of confidential information, which sufficiently protect WDE's interests.

8. The draft Protective Order first defines the term "Participant" as "a Participant as defined in 18 CFR § 385.102(b) [(2010)]." Section 385.102(b), in turn, states that a Participant is "(1) [a]ny party, or (2) [a]ny employee of the Commission assigned to present the position of the Commission staff in a proceeding before the Commission." We therefore read the definition of "Participant" in section 385.102(b)(2) as referring to

⁶ February 22 Request, Attachment B (Protective Order).

⁷ Protective Order, paragraphs 3(d), 3(d)(5).

⁸ *Id.*, paragraphs 4, 7.

Commission trial staff, *not* to Commission advisory staff (including Commissioners' assistants).⁹

9. The draft Protective Agreement states that a Reviewing Representative is "a person designated as a Reviewing Representative by order of the Commission, or a Commission employee designated by the Commission as a Decisional Authority with respect to the particular question." The term "Decisional Authority" is defined in 18 C.F.R. § 385.102(a) (2010) as "the Commission or Commission employee that, at the time for decision on a question, has authority or responsibility under this chapter to decide that particular question."

10. The intent for including a "Decisional Authority" in this context is unclear, since the Commission's regulations already sufficiently protect the confidentiality of information without requiring Commission advisory staff (including assistants to the Commissioners) executing the Non-Disclosure Certificate attached to the Protective Order. Commission advisory staff (including assistants to the Commissioners) are covered by the Commission's regulations in Part 388 that prohibit the disclosure of confidential information. Those regulations state that, if a party has sought privileged treatment for information, Commission staff may release that information to the public only after giving the party notice and the opportunity to comment on that release.¹⁰ Regulations promulgated by the OGE similarly prohibit all federal employees from disclosing non-public information obtained as a result of their employment.¹¹ Violation of these restrictions may result in disciplinary action up to and including removal from federal service.¹² The Commission, as a consequence, generally has not required Commission advisory staff (including assistants to the Commissioners) to sign protective

⁹ We further construe the proposed language of WDE's draft Protective Order as not applying to Commissioners, by its own terms.

¹⁰ 18 C.F.R. § 388.112(d) and (e) (2010).

¹¹ 5 C.F.R. § 2635.703(a) and (b) (2010) (A government employee may not allow "improper use of nonpublic information to further his own private interest or that of another," including "by knowing unauthorized disclosure." Such nonpublic information includes information that the employee knows "has not been made available to the general public.").

¹² See 5 U.S.C. Chapter 75 (2006).

orders,¹³ and has viewed the regulations as being sufficient to protect confidentiality.¹⁴ We see no reason to depart from that position here.

11. In light of this ruling, we recognize that WDE may choose to amend its February 22 Request, by either removing the protected materials or otherwise, or withdrawing its February 22 Request altogether. If WDE has not moved to so amend or withdraw its February 22 Request within two business days after the issuance of this order, Commission advisory staff (including assistants to the Commissioners) will begin reviewing non-public material in this proceeding.

12. The issues raised by WDE with respect to third party access to confidential materials will be addressed in a later order.

The Commission orders:

Advisory staff (including assistants to the Commissioners) will be permitted to access the protected material filed by WDE without executing the Non-Disclosure Certificate attached to the Protective Order within two business days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹³ *Chevron Pipeline Co.*, 92 FERC ¶ 61,083 (2000); *Transwestern Pipeline Co.*, 50 FERC ¶ 61,384 (1990).

¹⁴ *Tampa Electric Co.*, 133 FERC ¶ 61,023, at P 58 (2010); *Columbia Gas Transmission Corp.*, 70 FERC ¶ 61,209 (1995).