

134 FERC ¶ 61,189  
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 PROCEDURES FOR TREATMENT OF PROTECTED INFORMATION  
AND  
NOTICE OF DATE FOR COMMENTS AND PROTESTS

(Issued March 14, 2011)

1. In this order, the Commission hereby denies a request by West Deptford Energy, LLC (WDE) to deny intervenors in this proceeding the opportunity to view protected material submitted by WDE in support of its filing pursuant to a Protective Agreement. The Commission directs WDE to comply with the procedures of Rule 206(e) of the Commission's Rules of Practice and Procedure<sup>1</sup> with regard to the provision of its privileged material to intervenors, and to provide intervenors with a protective agreement consistent with this order no later than two business days of the date of this order and then to provide its privileged material to intervenors no later than one business day of intervenors' execution of non-disclosure certificates. The Commission also directs WDE to provide the Commission with a statement of the date on which its Protective Agreement is provided to intervenors, and also to provide the Commission with the names and contact information of the entities who have signed non-disclosure certificates. The Commission further requires that any parties who wish to file protests or comments on the substance of WDE's request do so on or before March 28, 2011.

**I. Background**

2. PJM Interconnection, LLC (PJM) operates the Reliability Pricing Model (RPM) capacity market, whereby resources submit offers to provide capacity into an annual Base Residual Auction (Auction). "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 to the PJM tariff

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<sup>1</sup> 18 C.F.R. § 385.206(e) (2010).

contains a Minimum Offer Price Rule (MOPR) that addresses the potential market impact of new resources that are offered into the Auction at offer prices that are lower than their costs.<sup>2</sup> Under this rule, PJM develops benchmarks for combustion-turbine and combined-cycle units, and if a resource submits an offer that is lower than this benchmark, under certain circumstances PJM will substitute a mitigated (i.e., higher) offer price. The tariff provides, however, that prior to the Auction, 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, fixed, net cost of new entry" for that unit, assuming that the unit is relying solely on revenues from PJM-administered markets.<sup>3</sup>

3. WDE intends to construct a new generating station and to offer its capacity into the next Auction, scheduled for May 2, 2011. On February 22, 2011, WDE filed a request for relief under section 5.14(h)(2) of Attachment DD asking the Commission to make a determination that the offer that WDE anticipates making into the upcoming auction is justified by WDE's unit-specific costs and expected revenues. 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,<sup>4</sup> and those pending proceedings raise an uncertainty as to whether the MOPR will apply to WDE. WDE therefore seeks a determination at this time to ensure that it can participate in the May 2011 auction without triggering the mitigation of the MOPR Rule.<sup>5</sup> WDE asks for Commission action on the substance of its request on or before April 22, 2011.

## **II. WDE's Request To Limit Access to Protected Material**

### **A. WDE's Request**

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 sensitive, confidential bid-related material and supporting documentation with its request.<sup>6</sup> WDE states that

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<sup>2</sup> PJM tariff, Attachment DD, section 5.14.

<sup>3</sup> *Id.*, section 5.14(h)(2).

<sup>4</sup> PJM Interconnection, LLC, Docket No. ER11-2875-000 (PJM Filing); PJM Power Providers Group v. PJM Interconnection, LLC, Docket No. EL11-20-000 (P3 Complaint).

<sup>5</sup> February 22, 2011 Request (February 22 Request) at 2-3.

<sup>6</sup> WDE submitted both a public and a privileged (non-public) version of its  
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releasing this information to third parties (including competitors, customers, and states) prior to the Auction could severely and adversely impact WDE's competitive position, create a risk of market manipulation and collusion, and damage the competitive markets the Commission seeks to foster. WDE states that it is seeking a determination on the discrete question of whether its unit-specific minimum Sell Offer in the upcoming Auction is supported by the unit's own specific costs and expected revenues, and that the limited scope of those factual issues presented by that request supports the restriction of access to that information to third parties. Additionally, WDE notes that it has gone to great lengths to withhold from the public version of this filing only bid- and cost-related information that is of a highly sensitive nature, and that its request and supporting affidavit have been drafted so as to restrict access to as little information as possible. WDE therefore asks the Commission to restrict access to confidential information in this proceeding to the Commission, PJM and PJM's Independent Market Monitor (IMM), and asks the Commission to require PJM and the IMM to execute the Non-Disclosure Certificate attached to the draft Protective Agreement that WDE provides.<sup>7</sup>

5. WDE states that it recognizes that intervenors are routinely allowed access to confidential information under a Protective Agreement after signing a non-disclosure certificate. It notes, however, that the Commission has previously found that "[a]though the Commission has a model protective order, protective orders are to be drafted in light of the facts in a particular case."<sup>8</sup> WDE also acknowledges that there is no precedent for how the Commission should treat confidential information submitted under section 5.14(h)(2) of Attachment DD of PJM's tariff, and it is not aware of any instance in which the Commission has ever addressed the question of whether a Protective Agreement adequately protects confidential data in advance of a competitive auction.<sup>9</sup> It argues,

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

<sup>7</sup> February 22 Request, Attachment B (Protective Agreement).

<sup>8</sup> *Westar Energy, Inc. and ONEOK Energy Services Co., L.P.*, 115 FERC ¶ 61,034 at P 9 (2006) (*Westar*).

<sup>9</sup> WDE states that in *Sithe New Boston, LLC*, 100 FERC ¶ 61,106 (2002) (*Sithe New Boston*), a generator was required to disclose specific cost information to market participants (with the protection of a protective agreement), but notes that this was after the cost-of-service rates of the generator under an ISO New England Inc. Reliability Must Run Agreement had been set for a hearing. WDE also acknowledges *State of Illinois ex rel. Madigan v. Exelon Generation Co., LLC*, 119 FERC ¶ 61,107 (2007) (*Illinois AG*), in which the Commission required the release of auction data subject to a protective agreement, but argues that this occurred after the auction had concluded and parties were

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however, that it is critical to the integrity of the market that detailed unit-specific cost information be afforded greater protection than the Commission ordinarily allows, and that the confidentiality of commercially sensitive bid and cost information prior to an auction goes to the heart of "protection of competition, not competitors."<sup>10</sup> WDE states that providing intervenors (including competitors, states and customers) with access to pre-auction bid information, even subject to a Protective Agreement, would set a dangerous precedent and violate the Commission's policy of preventing the disclosure of granular, non-aggregated bid and offer data that can be linked to a particular market participant.<sup>11</sup> According to WDE, the Commission consistently has held that revealing specific bids and bidding strategies to competitors and other market participants could put parties at a competitive disadvantage, and has placed limitations on the release of even non-bid information that could be used to calculate the underlying prices, bids, reference prices, and costs.<sup>12</sup>

6. WDE states that the Commission has recognized that the release of detailed bid and cost data could result in market-damaging collusion.<sup>13</sup> WDE states that under current

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responding to claims of market manipulation. February 22 Request at 16 n.24.

<sup>10</sup> February 22 Request at 14, *citing Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) (internal citations omitted).

<sup>11</sup> February 22 Request at 17 n.25, *citing PJM Interconnection, L.L.C.*, 132 FERC ¶ 61,123, at P 75 (2010); *New York Indep. Sys. Operator (NYISO)*, 129 FERC ¶ 61,103, at P 30 (2009) ("[G]enerator or equipment specific data, and transmission system information which is commercially valuable, necessary to participation in the marketplace, and not yet public is confidential. This includes bidding strategies that have not yet been made public, generator reference prices, and generator costs"); *New York Indep. Sys. Operator*, 125 FERC ¶ 61,005, at P 10 (2008); *New York Indep. Sys. Operator*, 118 FERC ¶ 61,201, at P 23-25 (2007).

<sup>12</sup> February 22 Request at 17 n.26, *citing NYISO*, 129 FERC ¶ 61,103 at P 30 (2009).

<sup>13</sup> February 22 Request at 17, *citing Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. and Regs. ¶ 31,281, at P 432 (2008); *PJM Interconnection, L.L.C.*, 129 FERC ¶ 61,250, at P 202- 203 (2009) (Order No. 719 requires that bid and offer data be released only after a lag time has elapsed and with market participant identities masked to guard against "the ability of market participants to exercise market power" and to "avoid participant harm and the possibility of collusion"); *San Diego Gas & Elec. Co.*, 101 FERC ¶ 61,186, at P 12 (2002) (CAISO tariff "requires [the ISO] to keep confidential virtually all information relating to

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Regional Transmission Organization (RTO) tariffs, non-aggregated bid and offer data may be released only without identifying the bidder and only after a period of time has elapsed since the auction, and that, given that the release of bid, bidding strategy, and detailed cost information cannot occur without triggering significant concerns about market impacts and collusion after an auction takes place, the Commission should not allow competitors and other third parties access to the confidential information in this filing even before the Auction.<sup>14</sup> WDE further notes that in PJM, third parties are prohibited from accessing a capacity seller's RPM data, including pricing-related information, and that bidding and detailed cost information may not be disclosed to other market participants by the IMM, including in circumstances in which a seller submits a bid that triggers additional mitigation under the MOPR;<sup>15</sup> further, when PJM does make bid information available after auctions, PJM takes steps to ensure that no market participant can identify the bidding entity by posting only aggregated market data.<sup>16</sup>

7. WDE states that if its bid-related information were submitted to PJM or the IMM for a determination as to whether its minimum Sell Offer is justified, rather than to the

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individual bids"); *San Diego Gas & Elec. Co.*, 95 FERC ¶ 61,115, at 61,364 (2001) ("The amount particular competitors bid is generally considered confidential business information. Disclosure of such information may lead to a reduction in competition because it will allow competitors to learn what their competitors are bidding and could lead to collusion or coordination."); *Central Hudson Gas & Elec. Co.*, 86 FERC ¶ 61,062, at 61,204 (1999) (explaining that the basis for keeping bid data confidential for six months is to prevent collusive behavior); *PJM Interconnection, L.L.C.*, 86 FERC ¶ 61,247, at 61,890 (1999).

<sup>14</sup> WDE states that in 2010 the PJM IMM raised this concern in a Commission filing seeking to ensure greater protection of RPM bid data that it alleged PJM was releasing that could reveal the identity and offers of specific generation units, and that PJM voluntarily agreed in the future to refrain from posting RPM data, even in non-aggregated, tabular form, until at least six months after an auction. February 22 Request at 18, *Citing PJM Interconnection, L.L.C., Supplemental Answer of PJM Interconnection, L.L.C. Rendering Moot Motion to Cease and Desist of PJM's Independent Market Monitor, Docket Nos. ER09-1063-000 and ER09-1063-003* (filed Apr. 6, 2010).

<sup>15</sup> February 22 Request at 18-19, *citing PJM Tariff § 1.5.01, PJM Tariff Attachment M-Appendix, § 1.A.*

<sup>16</sup> February 22 Request at 19, *citing PJM Manual 33, Administrative Services for the PJM Interconnection Operating Agreement, at 22* (effective July 22, 2010).

Commission, no other market participants would have any input in the decision-making process or access to the supporting data. It therefore argues that the Commission should impose similarly strict limitations on access to bidding and cost information when the Commission, as opposed to an RTO or market monitor, makes the determination as to whether a minimum Sell Offer justifies an exemption from the MOPR's benchmark. WDE further notes that the Commission has expressed concern with the release of confidential information to state regulatory commissions where it is unclear how the state would keep the information confidential and how the information would be used,<sup>17</sup> and that this concern is also present here, given the focus of the PJM and P3 filings<sup>18</sup> on state initiatives to encourage the development of generation.

8. Finally, WDE states that it believes that the Commission, together with PJM and its IMM, have sufficient resources and expertise to evaluate its request. It suggests, however, that if the Commission deems it necessary or appropriate, it could require WDE to retain an independent expert, to be approved by the Commission, to help the Commission evaluate WDE's unit-specific costs and expected revenues, with the expert's fees to be paid by WDE.

**B. Notice of Filing, Interventions, Responsive Pleadings, and Answers**

9. On February 23, 2011, the Commission issued a notice for intervention in this proceeding, and comments specifically on WDE's request for protection of confidential bid-related information and for special procedures, with interventions, comments and protests due on or before March 4, 2011.<sup>19</sup>

10. Dominion Resources Services, Inc.; FirstEnergy Solutions Corp.; Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.; the New Jersey Division of Rate Counsel; PJM's IMM, Monitoring Analytics, LLC; NextEra Energy Generators; JPMorgan Ventures Energy Corporation; Exelon Corporation; Edison Mission Energy; Commonwealth Chesapeake Company, LLC; Calpine Corporation; GenOn Parties; the PJM Industrial Customer Coalition; PJM; PPL Electric Utilities Corp., *et al.* (PPL); the Electric Power Supply Association (EPSA); P3; and Shell Energy North America (US) (Shell) filed timely motions to intervene. The Public Service Commission of Maryland, the New Jersey Board of Public Utilities (NJBPU), and the Pennsylvania Public Utility Commission filed Notices of Intervention. P3, PPL, Shell

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<sup>17</sup> February 22 Request at 20, *citing Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163 at P 561 (2004).

<sup>18</sup> *See* note 3 above.

<sup>19</sup> 76 *Fed. Reg.* 13,180 (2011).

and EPSA filed protests or comments opposing WDE's request.<sup>20</sup> PSEG Energy Resources & Trade LLC (PSEG) and the Hess Corporation submitted motions to intervene out of time. On March 7, 2011 WDE filed an answer to the protests.

**C. Protests and Answer**

11. PPL, EPSA, P3 and Shell oppose WDE's request to deny access to its protected information to intervenors in this case.

12. PPL states that WDE's request would impair the rights of interested parties to represent and protect their rights before the Commission, and WDE has not shown why the Commission's standard protective agreement, including limitations on providing information to competitive duty personnel, would not adequately protect WDE's confidential information while accommodating the rights of interested parties.

13. PPL and P3 state that if the Commission is deprived of an adequately-developed record in this case and WDE is thereby able to offer its unit into the auction at a bid that does not reflect its true costs and establishes the clearing price in that manner, other sellers will be compensated based on that bid. They assert that the harm to both other sellers and the market from such an outcome would be significant; therefore, they argue that other parties must be able to effectively review and challenge WDE's request. Additionally, P3 states that WDE's request comes within the context of pending proceedings involving the buyer market power protections of PJM's tariff, and P3 is concerned that the State of New Jersey may use WDE's resource to suppress capacity market auction outcomes. P3 further suggests that discrepancies between WDE's representations to the Commission and its other actions or statements (such as the fact that WDE's parent corporation urged the state of New Jersey to provide WDE a guaranteed capacity payment that is significantly higher than PJM's calculation of the net Cost of New Entry for the West Deptford region, and that WDE's claim that it can finance its unit on terms that will allow greater leverage than the 50/50 capital structure used in PJM's benchmark is inconsistent with representations by WDE's parent to the NJBPU) require resolution before the Commission can rule on WDE's request.<sup>21</sup> PPL further asserts that the Commission has recognized the fundamental rights of parties to participate in proceedings that directly affect them, citing to the Commission's rule that an intervenor may show that it has "an interest which may be directly affected by the

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<sup>20</sup> P3 styled its pleading as an answer to WDE's request for special procedures. Since P3 is expressing its opposition to WDE's request, we will treat the pleading as a protest. Shell states that it adopts the protest filed by EPSA.

<sup>21</sup> P3 Answer at 3-5.

outcome of the proceeding."<sup>22</sup> PPL asserts that parties cannot meaningfully exercise this right of intervention without necessary information.

14. PPL states that the Commission should thus balance WDE's interest in confidentiality with parties' right to participate meaningfully in this proceeding, as it has done in *Mojave Pipeline Co.*<sup>23</sup> and *Pacific Gas Transmission Co.*<sup>24</sup> EPSA and PPL argue that WDE has made no showing as to why all of its confidential information should be withheld from parties, as was required by the Commission in its balancing test in *Mojave*, and WDE has failed to show why its information should be kept confidential.<sup>25</sup> PPL further notes that in many of the cases cited by WDE, the Commission in fact permitted access to confidential information, so long as an intervenor agreed to be bound by a protective agreement,<sup>26</sup> and that in cases where the Commission protected certain information from disclosure in contested proceedings, those protections were limited to excluding the release of information not directly related to parties' direct interests. PPL also states that the Commission has rejected proposed limitations on providing information where that limitation would unduly prejudice participants or unduly disadvantage litigants in pursuing legitimate arguments.<sup>27</sup>

15. P3 argues that use of an appropriate protective agreement would address all of WDE's concerns regarding confidentiality, and that WDE has in fact provided a common variant on the Commission's Model Protective Order that precludes access by "competitive duty personnel." P3 notes that this language was used in litigation in which competitively sensitive data as to the costs of every generator attached to the California Independent System Operator (CAISO) grid was subject to discovery, even though that same data would also be used to develop future energy and ancillary services offers in

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<sup>22</sup> Rule 214(b) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(b) (2010).

<sup>23</sup> 38 FERC ¶ 61,249 (1987) (*Mojave*).

<sup>24</sup> 44 FERC ¶ 61,209 (1988) (*Pacific Gas Transmission*).

<sup>25</sup> EPSA states that much of the information submitted by WDE may not be confidential, citing to WDE's use of the calculation of the Energy and Ancillary Services (EAS) Offset, which EPSA states is derived from models commonly used in the electric industry.

<sup>26</sup> PPL Protest at 9, *citing Westar*, 115 FERC ¶ 61,034 at P 10-11.

<sup>27</sup> PPL Protest at 10, *citing Illinois AG*, 119 FERC ¶ 61,107 at P 18 and *Pacific Gas Transmission*, 44 FERC ¶ 61,209 at 61,766.

CAISO markets. In order to prevent competitive harm, the protective agreement was modified to preclude anyone actually transacting in the relevant markets from gaining access to the data; however, others within those companies, such as inside counsel and non-lawyers who did not transact, could review the data.<sup>28</sup> P3 further states that the burden is on the party seeking to safeguard information to show that a protective agreement does not adequately protect its interests, and WDE has not met that burden.

16. With regard to the appropriate protective agreement, P3 states that the Commission should issue the least restrictive order that will accomplish the purpose of protecting against the harm of disclosure, and, consistent with this principle, presiding administrative law judges have adopted revisions to the Commission's Model Protective Order that restrict competitive market duty personnel from having access to information. P3 states that competitive duty personnel are those engaged in "competitive duties," usually the marketing, sale, or purchase of relevant products, services or facilities, or overseeing the same.<sup>29</sup> EPSA states that it would be willing to execute a similar protective agreement.<sup>30</sup>

17. P3 also takes issue with WDE's suggestion that the Commission hire an independent expert at WDE's expense to evaluate WDE's request. P3 states that it is unclear what expert would be chosen, whether more than one expert would be needed and who (WDE or the Commission) would select the expert. P3 states that the normal litigation process before the Commission offers a better solution. P3 further states that "it is inappropriate for a party to decline to produce data under a reasonable protective agreement based on the speculative possibility that another party . . . might violate the terms of the protective order. . . . The Commission thus rightly assumes that parties will obey protective orders[.]"<sup>31</sup>

18. In its answer, WDE continues to assert that disclosure of its confidential information presents an unacceptable risk of harm both to WDE and to the PJM capacity market generally, for which there would be no meaningful possible relief such as refunds, and that the potential harm from such disclosure outweighs the value to the Commission's decision-making process of disclosing the confidential information. WDE states that, contrary to the assertions of intervenors, due process considerations support WDE's

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<sup>28</sup> P3 Answer at 2, referring to "the California Refund Case" (referring presumably to *San Diego Gas & Electric Co., et al.*, Docket No. EL00-95-045, *et al.*).

<sup>29</sup> *Id.* at 11, citing *N. Border Pipeline Co.*, 113 FERC ¶ 63,041, at P 23 (2005).

<sup>30</sup> EPSA Protest at 10.

<sup>31</sup> P3 Answer at 11.

request. It states that in *Mathews v. Eldridge*,<sup>32</sup> the Supreme Court set forth the applicable balancing test for regulators and courts to determine whether additional procedures are required in an administrative proceeding. WDE states that *Mathews* requires evaluation of three factors:

- (1) the private interest that will be affected by the agency action;
- (2) (a) the risk of an erroneous deprivation of this interest through the procedures used, and (b) the probable value, if any, of the additional process requested to the accuracy of the agency's decision; and
- (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional procedural requirement would entail.<sup>33</sup>

19. WDE asserts that the private interest affected here, its confidential bid data, is one of the most valuable economic assets of a generator competing in a bid-based auction market, and is critically important to WDE. It further states that the risk of an erroneous deprivation of this interest through the disclosure of such confidential information to competitors is significant. WDE notes that, given the large number of intervenors in this proceeding, it is possible that its confidential data may inadvertently be released; it also states that regardless of whether or not this occurs, there will be suspicion that the bid data has been released, which could undermine public confidence in the auction and its results. On the other hand, WDE argues, permitting market participants to access this information will not provide any increment of increased accuracy to the Commission's ability to make a reasoned decision, as the Commission's staff, PJM and the IMM (along with an independent expert, if necessary) are fully competent to make the limited determination that WDE has requested (as, indeed, the IMM would make without the participation of other parties in other circumstances). Finally, WDE argues that the Commission has the highest interest in maintaining the competitiveness and integrity of the RPM, and also has a duty to ensure that applicants exercising their rights under Commission-approved tariffs do not suffer an erosion of those rights due to burdensome administrative procedures. Thus, WDE asserts, the applicable due process framework requires that WDE's confidential information remain protected.<sup>34</sup>

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<sup>32</sup> 424 U.S. 319 (1976) (*Mathews*).

<sup>33</sup> *Mathews*, 424 U.S. at 335.

<sup>34</sup> WDE Answer at 11-14. WDE also cites *Goldberg v. Kelly*, 397 U.S. 254 (1970)  
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20. WDE notes that it is asking for a limited fact-specific determination as to whether its offer in the upcoming Auction is justified by its unit-specific costs and revenues, not a fully-litigated cost-of-service proceeding, and asks the Commission not to convert it into such a proceeding. It also asserts that in justifying its minimum Sell Offer in its February 22 Request, WDE calculated only its expected revenues from PJM-administered markets, and expressly excluded any revenues it might receive from other sources, such as revenues through a long-term contract under a state-sponsored program; thus, WDE argues, this issue has no bearing on WDE's request for relief here. WDE further notes that incumbent generators (such as P3's members) have a financial incentive to exclude new low-cost generation from participating in the upcoming Auction and potentially lowering the clearing price, and that it would be inappropriate for the Commission to permit incumbents to use procedural roadblocks and delay as a barrier to the participation of new resources in the Auction.

21. WDE notes again that if the IMM, rather than the Commission, were determining whether WDE's offer required mitigation, the IMM would make that determination without revealing confidential WDE information and without input from other parties, and P3's proposed MOPR revision would continue this procedure. WDE reiterates that in *NYISO*, the Commission did not require the provision of confidential data to parties in circumstances similar to these (i.e., the application of a mitigation measure by a Regional Transmission Organization (RTO)), and also states that, with regard to the California Refund Case to which P3 refers, the Commission only required the provision of confidential data after the sales that were the subject of discovery had occurred.<sup>35</sup> WDE asserts that although the data supplied to participants in the California refund proceedings was indeed highly confidential, it "did not rise" to the level of the data here, involving a bid that will be submitted in a future auction.<sup>36</sup>

### **III. Discussion**

#### **A. Procedural Issues**

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notices of intervention and the timely, unopposed

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(concluding that procedures should be adapted to the limited nature of the controversies to be resolved and recognizing "the importance of not imposing . . . procedural requirements beyond those demanded by rudimentary due process").

<sup>35</sup> WDE Answer at 5, *citing San Diego Gas & Elec. Co.*, 114 FERC ¶ 61,070, at P 1-3 (2006).

<sup>36</sup> WDE Answer at 5.

motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2010), we will grant the late-filed motion to intervene, given those parties' interest in this proceeding, the early stage of this proceeding, and the absence of undue prejudice or delay.

23. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept WDE's answer because it has provided information that assisted us in our decision-making process.

### **B. Analysis**

24. The Commission denies WDE's request to limit access to its confidential material to the Commission and its advisory staff, PJM, and the IMM.

25. Fairness requires that in a Commission adjudicatory proceeding, entities which have intervened properly in a proceeding and are parties to that proceeding be permitted to participate meaningfully in that proceeding. In this regard, the outcome of this proceeding could have a significant effect on those parties who are capacity suppliers who intend to offer capacity into PJM's upcoming Auction, as well as on customers who will pay the price that the Auction will set for capacity. Under RPM, all of the capacity resources accepted in the auction are paid the auction clearing price. A supplier whose offer price is below a competitive price that reflects its actual costs could impact other suppliers in two ways: first, some suppliers whose resources would otherwise have been accepted in the auction may not be accepted, and second, if the impact is a lower auction clearing price, those suppliers whose capacity resources are accepted in the auction could receive a lower price than would otherwise be the case.<sup>37</sup> Other participants in PJM, including capacity suppliers and customers, therefore have an economic interest in the question of whether WDE's offer into the May Auction genuinely reflects its costs.

26. We also recognize that WDE has a legitimate interest in appropriately protecting the confidentiality of its data. Contrary to the allegations of intervenors, WDE has identified the competitive harm that could occur to it as a result of an inappropriate release of its confidential information. An unconstrained release of information relating to WDE's costs and its development of its offer could "severely and adversely impact WDE's competitive position and ability to participate in the [Auction]."<sup>38</sup>

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<sup>37</sup> See generally PJM tariff, Attachment DD.

<sup>38</sup> February 22 Request at 14.

27. WDE has not shown, however, why the Commission's normal procedure of requiring such information to be disclosed to parties pursuant to a Protective Agreement that requires disclosure only to certain individuals who sign the agreement<sup>39</sup> is not an appropriate balancing of those competing concerns. In *Mojave*, the Commission addressed discovery disputes that "place[d] a party's right to discover relevant information against another party's desire not to disclose confidential and proprietary information to a competitor."<sup>40</sup> The Commission first noted that a party objecting to discovery of particular material had "the burden of demonstrating that the discovery request should be denied or limited." While the Commission recognized that material could be treated confidentially if "the documents will give the party seeking discovery an unfair business advantage,"<sup>41</sup> the Commission also stated that:

Since in most instances a protective order can protect against harmful disclosure, *a party claiming that confidential material should be withheld entirely will be expected to show that a protective order will not adequately safeguard its interests* and that this concern outweighs the need for the material to develop the record.<sup>42</sup>

28. The Commission then noted that "no one protective order will be appropriate for every case," and that "[i]n crafting a protective order the goal is to issue the least restrictive order that will accomplish the purpose of protecting against the harm of disclosure."<sup>43</sup>

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<sup>39</sup> Rule 206(e) of the Commission's Rules of Practice and Procedure states: "if a complainant seeks privileged treatment for any documents submitted with the complaint, the complainant must submit ... a proposed form of protective agreement." 18 C.F.R. § 385.206(e) (2010).

<sup>40</sup> *Mojave*, 38 FERC at 61,842.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (footnote omitted, emphasis added). *See also Bradwood Landing, LLC*, 116 FERC ¶ 61,125, at P 3 (2006).

<sup>43</sup> *Id.* *See also Westar*, 115 FERC ¶ 61,034 at P 9, *citing Mojave*, 38 FERC at 61,842; and *Pacific Gas Transmission Co.*, 44 FERC ¶ 61,209, at 61,766 (1988) (*Pacific Gas Transmission* (PGT)) ("PGT asserts that the opposing parties could fully defend [their position] without knowing the particulars of negotiations with potential customers, and such sensitive matters as PGT's internal rate of return . . . . On the other hand, excluding discovery of such documents might unduly hamstring the litigants in pursuing what might

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29. The Commission finds that a Protective Agreement consistent with this order will meet the legitimate needs of the parties who should be able to view the entire submittal by WDE in order to be able to respond,<sup>44</sup> as well as safeguard WDE's interest in maintaining confidentiality. WDE stated in its request, without any additional explanation (other than speculation that state commissions may not protect confidential material<sup>45</sup>), that it seeks "additional protections against the release of confidential information to end users, retail electric providers or the regulators of retail electric service."<sup>46</sup> This limitation is inconsistent with permitting intervening parties<sup>47</sup> the ability to participate in this case in an informed manner, and we therefore reject it. WDE has not demonstrated that these parties are any more likely to disclose confidential information than other parties. As stated above, a reasonably crafted Protective Agreement can ensure the safety of WDE's confidential information, while simultaneously allowing all parties to participate meaningfully in these proceedings.<sup>48</sup>

30. The Commission is obligated to balance the interests of a party seeking confidential treatment for information with the interests of parties seeking access to that information, and WDE, as the party requesting confidential treatment, has the burden of showing that an appropriate protective agreement will not adequately safeguard its interests. WDE has not met this burden. WDE has provided no persuasive arguments as to why it believes that the provisions above are not sufficient to maintain the confidentiality of its information. The confidential nature of the information does not justify an absolute prohibition on any dissemination.

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be a legitimate argument. The ALJ should balance the potential harm of disclosure against the need of the opposing parties for the information").

<sup>44</sup> As noted above at P 15-16, both PPL and P3 indicate that they are willing to execute WDE's proposed Protective Agreement.

<sup>45</sup> See P 7 above.

<sup>46</sup> February 22 Request at 16 n.21.

<sup>47</sup> Intervenors include the NJBPU, the Public Service Commission of Maryland, the Pennsylvania Public Utility Commission, and the PJM Industrial Customer Coalition.

<sup>48</sup> Given the sensitivity of the material involved here, WDE may draft a protective agreement that precludes access to competitive duty personnel. *Illinois AG*, 119 FERC ¶ 61,107 at P 9 of the approved protective order; *AERO Energy*, 118 FERC ¶ 61,047 (2007); *Northern Border*, 113 FERC ¶ 63,041 at P 23 (2005).

31. WDE asserts that disclosure of its information prior to the PJM Auction would be particularly damaging, and notes that in the California Refund Case, cited by P3, similar confidential information was not disclosed until after the auction.<sup>49</sup> While we agree that confidential bid information is competitively sensitive, similar information previously has been filed as confidential subject to protective agreements,<sup>50</sup> and the Commission followed the balancing test of *Mojave* to protect the interests of all parties. Additionally, while WDE speculates, in its answer, that in a proceeding with a large number of intervenors, confidential information may inadvertently be disclosed, it does not make any specific allegations suggesting that any particular parties or individuals might violate the Protective Agreement, or explain otherwise why it believes that these provisions are insufficient to protect its interests. WDE does not cite to, nor is the Commission aware of, any cases in which protective agreements were violated, which would suggest that protective agreements are generally sufficient to protect parties' confidentiality.<sup>51</sup> As WDE correctly notes, if in other circumstances the IMM were making a determination based on WDE's competitive data, it would do so on a confidential basis. But the IMM is not an administrative agency, and in any event, any challenge to such a determination at the Commission would result in a proceeding in which parties would equally be entitled to access the data provided to the Commission.<sup>52</sup> WDE chose to seek a determination from the Commission, and we will follow our precedent in *Mojave* and *Westar* to balance the rights of all parties in this case. Further, as an administrative agency, we are bound by the Administrative Procedure Act, under which, in any adjudication, "[t]he agency shall give all interested parties opportunity for . . . the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of

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<sup>49</sup> WDE Answer at 5 n.11.

<sup>50</sup> *BJ Energy LLC v. PJM Interconnection, LLC*, 127 FERC ¶ 61,182, at P 19 (2009) (the Commission "has the ability to require disclosure of otherwise confidential information to the parties in a case, with a protective agreement, when such information is necessary for the parties' to participate in the proceeding"); *PJM Interconnection, LLC*, 107 FERC ¶ 61,105 (2004), *order on Reh'g* 108 FERC ¶ 61,187, at P 50 (2004) (Commission established procedures to permit access to confidential material under a protective agreement); *PJM Interconnection, LLC*, Docket No. ER05-10-000 (May 6, 2005) (Notice issued requiring confidential material relating to regulation service to be provided pursuant to a confidentiality agreement).

<sup>51</sup> Moreover, as WDE's draft Protective Agreement provides, any violation of that Protective Agreement and of any Non-Disclosure Certificate executed under it constitutes a violation of an order of the Commission, for which WDE could seek sanctions.

<sup>52</sup> See note 50 above.

the proceeding, and the public interest permit,"<sup>53</sup> and the other parties to this case cannot "consider the facts" of WDE's submission when they are unable to know what those facts are.

32. WDE argues that it is requesting a limited fact-specific ruling, rather than seeking, in effect, to open a cost-of-service rate case. But this is a distinction without a difference in this case: if WDE's unit is able to participate in the May Auction, its bid (whether its original Sell Offer or a mitigated bid) has the potential to affect the outcome of the auction and the price paid to all capacity suppliers. The information included with WDE's application is not peripheral to the issues in this case; such information is critical to the analysis of whether WDE has justified its request for a determination from the Commission pursuant to section 5.14(h)(2) of Attachment DD of PJM's Tariff. The Commission must therefore balance parties' need for access to this data with the potential for harm from a violation of the protective agreement, as it did in *Mojave* and subsequent cases.

33. WDE's citation to *Mathews*, to support the position that due process does not require giving intervenors access to WDE's confidential data, is inapposite. *Mathews* involved a recipient of Social Security disability benefits whose benefits were terminated. The Supreme Court found that Eldridge had received sufficient due process without an evidentiary hearing. The Court noted, however, that "some form of hearing is required before an individual is finally deprived of a property interest,"<sup>54</sup> and took note of the fact that while "[t]he disability recipient is not permitted personally to examine the medical reports contained in his file . . . [t]his restriction is not significant, since he is entitled to have any representative of his choice, including a lay friend or family member, examine all medical evidence,"<sup>55</sup> and "the disability recipient's representative [is allowed] full access to all information relied upon by the state agency."<sup>56</sup> This is the opposite situation of the one that WDE seeks to impose here, in which counsel and experts working for parties with a significant interest in this matter would be entirely unable to access precisely the information on which WDE is relying in its request. We additionally note, with regard to the three-step *Mathews* test discussed at P 18 above, that even if steps 1 (the private interest that will be affected by the agency action) and 2(a) (the risk of an erroneous deprivation of this interest through the procedures used) are construed as

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<sup>53</sup> 5 U.S.C. § 554(c)(1) (2006).

<sup>54</sup> *Mathews*, 424 U.S. at 333, citing *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

<sup>55</sup> *Mathews.*, 424 U.S. at 338 n.18.

<sup>56</sup> *Id.* at 345-46.

supporting WDE's position, steps 2(b) and 3 do not. With regard to step 2(b) (the probable value, if any, of the additional process requested to the accuracy of the agency's decision), it is our view that participation by other parties, informed by access to WDE's confidential information, could potentially provide highly relevant and useful information to the Commission in its decision-making process. Thus, with regard to step 3 (the government's interest, including the function involved and the fiscal and administrative burdens that the additional procedural requirement would entail), informed participation by other parties works in favor of, rather than against, the government's interest.

34. Nor are the cases cited by WDE in which the Commission denied access to confidential material on point. In *New York Independent System Operator, Inc.*,<sup>57</sup> no party sought access to the confidential material in question, and in *NYISO*,<sup>58</sup> the Commission was ruling on mitigation measures that NYISO proposed to impose on certain generators, and the parties who sought disclosure of confidential matters in that case did so not on the basis of their direct economic interest, but on the more general basis that greater transparency would benefit consumers and the market.<sup>59</sup> The confidential information withheld from parties was not critical to preserve their due process rights in the case and did not prevent them from making arguments in support of their position to the Commission.<sup>60</sup> In these cases, as in the cases cited by WDE in which

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<sup>57</sup> 125 FERC ¶ 61,005 (2008).

<sup>58</sup> 129 FERC ¶ 61,103 (2009).

<sup>59</sup> *NYISO*, 129 FERC ¶ 61,103 at P 19-23 ("Consumer Protection Board argues that New York's electric consumers and NYISO's market participants are entitled to know the extent to which unnecessary costs were incurred and the identity of the companies that caused the problem. . . . The New York Commission argues that . . . the Commission should release details regarding the extent and magnitude of the anticompetitive behavior so that market participants can fully understand the magnitude of the harm to consumers. . . . TransCanada Power Marketing states [the information] would provide market participants transparency into how NYISO interprets and implements its Services Tariff and would give market participants insight into market rules and potential NYISO actions . . . . APPA contends that a well-functioning market requires open and transparent information and the public release of bidding information in a timely manner, especially where allegations of market power are concerned. . . . NYAPP states that . . . this blanket request [for confidentiality] is unduly prejudicial to the other interested parties in the case and it runs counter to the trust and transparency required for competitive markets"). Further, the parties seeking disclosure in *NYISO* did not request the Commission to issue a protective agreement.

<sup>60</sup> See *Akzo N.V. v. U.S. International Trade Com.*, 808 F.2d 1471, 1484 (Fed. Cir. (continued)

the Commission delayed the release of confidential data until after an auction,<sup>61</sup> the Commission did not have to balance the specific, immediate economic interests of both the parties seeking disclosure and the party seeking confidentiality that is present here, where both parties have an interest in the accurate resolution of WDE's request prior to the May auction; thus, the Commission must balance and seek to accommodate both of those interests, as required by *Mojave*.

35. It is, therefore, our view that a protective agreement consistent with this order will sufficiently protect WDE from the competitive harm that it fears. We therefore deny WDE's request to limit access to the privileged version of its February 22 Request and supporting material solely to the Commission, PJM and PJM's IMM. In order to enable the speedy resolution of this matter, we direct WDE to comply with the procedures of Rule 206(e) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206(e) (2010) with regard to the provision of its privileged material to intervenors, and to provide intervenors with a protective agreement consistent with this order no later than two business days of the date of this order and then to provide its privileged material to intervenors no later than one business day of intervenors' execution of non-disclosure certificates. The Commission also directs WDE to provide the Commission with a statement of the date on which its Protective Agreement is provided to intervenors, and also to provide the Commission with the names and contact information of the entities who have signed non-disclosure certificates.

#### **IV. Notice of Comments or Protests on Substance of WDE's February 22 Request**

36. The Commission will require any parties who wish to file protests or comments on the substance of WDE's request for relief to do so on or before March 28, 2011.

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1986) (in reviewing an unfair competition case, the court stated that "it is obvious that that confidential information -- relating to Du Pont's business, activities, plans and expectations -- should not be made available (unless, perhaps, where absolutely necessary for a fair hearing) to a direct competitor like Akzo. That such full access was not absolutely necessary to appellants' making of their own case is shown by the crucial fact that Akzo was at all times perfectly free to offer its own market projections as well as to reveal its own activities, forecasts, and interpretations. Both sides could present to the Commission their own information on those matters without knowing those of the other side's").

<sup>61</sup> *San Diego Gas & Elec. Co.*, 95 FERC ¶ 61,115 (2001); *Central Hudson Gas & Elec. Co.*, 86 FERC ¶ 61,062 (1999); *PJM Interconnection, L.L.C.*, 86 FERC ¶ 61,247, at 61,890 (1999).

The Commission orders:

(A) The Commission hereby denies WDE's request to limit access to the privileged version of its February 22 Request and supporting material solely to the Commission, PJM and PJM's IMM, as discussed above.

(B) The Commission hereby directs WDE to comply with the procedures of Rule 206(e) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206(e) (2010) with regard to the provision of its privileged material to intervenors, as discussed in the body of this order, and to provide intervenors with a protective agreement consistent with this order no later than two business days of the date of this order and then to provide its privileged material to intervenors no later than one business day of intervenors' execution of non-disclosure certificates.

(C) The Commission hereby directs parties who wish to file protests or comments on the substance of WDE's February 22 Request to do so on or before March 28, 2011.

(D) The Commission hereby directs WDE to file with the Commission a statement of the date on which its Protective Agreement is provided to intervenors, and also to provide the Commission with the names and contact information of the entities who have signed non-disclosure certificates.

By the Commission.

Kimberly D. Bose,  
Secretary.