

168 FERC ¶ 61,048
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

CPV Shore, LLC

Docket No. ER19-1083-000

ORDER DENYING REQUEST FOR WAIVER

(Issued July 22, 2019)

1. On February 21, 2019, pursuant to Rule 207(a)(5) of the Commission's Rules of Practice and Procedure,¹ CPV Shore, LLC (CPV) submitted a request for a one-time waiver of Schedule 2, Section 5.1(a) of the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (Operating Agreement),² pursuant to which CPV was penalized by PJM Interconnection, L.L.C. (PJM) for making cost-based energy offers inconsistent with its effective fuel cost policy. In the alternative, CPV requests waiver of Schedule 2, Section 2.3(c) of the Operating Agreement,³ in order to allow CPV's revised fuel cost policy to have an effective date of January 3, 2018.⁴ As discussed below, we deny CPV's waiver requests.

I. Background

2. Pursuant to Operating Agreement, Schedule 2, Section 2.1, a market seller may only submit a non-zero cost-based offer into the PJM Interchange Energy Market for a generation resource if it has a PJM-approved fuel cost policy.⁵ Fuel cost policies are approved by PJM in accordance with Sections 2.2 and 2.3, and market sellers can update

¹ 18 C.F.R. § 385.207(a)(5) (2018).

² Operating Agreement, Schedule 2, § 5.1(a).

³ *Id.* § 2.3(c).

⁴ CPV Filing at 2, 10-11.

⁵ Operating Agreement, Schedule 2, § 2.1.

their fuel cost policies pursuant to Section 2.6.⁶ Section 2.3(c) of Schedule 2 of the Operating Agreement states that a market seller's previously PJM-approved fuel cost policy shall apply to all of the market seller's cost-based offers until such a time as PJM approves a new fuel cost policy.⁷ If PJM determines that a market seller's cost-based offer does not comply with its PJM-approved fuel cost policy, the market seller is subject to penalties, pursuant to Section 5 of Schedule 2 of the Operating Agreement.⁸

II. Details of Filing

3. CPV states that, on November 6, 2017, it submitted an initial fuel cost policy, which was approved by PJM and made effective that same day (Initial Fuel Cost Policy).⁹ CPV explains that, in December 2017, certain factual developments necessitated changes to CPV's Initial Fuel Cost Policy. CPV states that it immediately contacted PJM and the PJM Independent Market Monitor (IMM) about proposed revisions to its Initial Fuel Cost Policy. CPV states that it submitted a new, revised fuel cost policy to the IMM's Monitoring Analytics Information Reporting Application System on January 2, 2018, which CPV then resubmitted on January 3, 2018 to include certain minor edits requested by the IMM (Revised Fuel Cost Policy).¹⁰

4. CPV states that, in January 2018, days after submitting its Revised Fuel Cost Policy, the market experienced historic volatility related to the late-2017/early-2018 Bomb Cyclone, and CPV had to decide between: (1) offering to sell into PJM's energy market at its then-approved Initial Fuel Cost Policy, but at a cost that did not reflect its expected true costs; or (2) offering to sell according to the not-yet-approved and pending Revised Fuel Cost Policy, at a cost that would allow it to accurately reflect its expected true costs.¹¹ CPV explains that it chose to follow the not-yet-approved and pending Revised Fuel Cost Policy. According to CPV, its January 5, 2018 offers under the pending Revised Fuel Cost Policy were not selected in the real-time market. CPV states that its pending Revised Fuel Cost Policy was ultimately approved by PJM on

⁶ *Id.* §§ 2.2-2.3, 2.6.

⁷ *Id.* § 2.3(c).

⁸ *Id.* § 5.1.

⁹ CPV Filing at 5-6.

¹⁰ *Id.* at 7-8.

¹¹ *Id.* at 1, 8.

January 26, 2018 and cleared by the IMM on January 29, 2018, effective prospectively only.¹²

5. CPV states that, in November 2018, PJM informed CPV that it would be penalized for its energy offers on January 5, 2018, because the offers did not comply with its Initial Fuel Cost Policy that was effective on the day of bidding. Specifically, CPV explains that its offers violated the Operating Agreement, which required CPV to submit offers in accordance with its Initial Fuel Cost Policy until such time as the Revised Fuel Cost Policy was approved.¹³

6. CPV seeks a one-time waiver of PJM's penalty provision, Schedule 2, Section 5.1(a) and argues that, under the unique circumstances of this case, it would be unjust to impose a penalty for submitting offers not in compliance with its then-effective Initial Fuel Cost Policy.¹⁴ Alternatively, CPV requests waiver of Schedule 2, Section 2.3(c) to allow its Revised Fuel Cost Policy, which was approved by PJM on January 26, 2018, to have an effective date of January 3, 2018 (the day it was refiled after minor additional suggested edits from the IMM), in which case a penalty would not be appropriate.¹⁵ CPV argues that an effective date of January 3, 2018 is appropriate, given that: (1) the policy was vetted by both PJM and the IMM prior to submission; (2) the policy was submitted to address a change in circumstances that was ongoing; and (3) the policy was ultimately accepted by PJM and the IMM unchanged. CPV acknowledges that fuel cost policies provide important safeguards to consumers and provide structural safeguards for market sellers making cost-based offers into PJM's energy markets and, therefore, that it is important to adhere to fuel cost policy provisions. However, CPV argues that its offers were consistent with its pending Revised Fuel Cost Policy and would have reflected its true costs had it been selected in the real-time market, which is the underlying foundation of PJM's fuel cost policy provisions. CPV asserts that, had it offered into the real-time market using the Initial Fuel Cost Policy that PJM suggests it should have used, CPV does not believe it would have been selected to operate given the overall unit offers.¹⁶

¹² *Id.* at 2.

¹³ *Id.* at 2, 10 (citing Operating Agreement, Schedule 2, §§ 2.3(c), 5.1(a)).

¹⁴ *Id.* 10-11.

¹⁵ *Id.* at 2, 11.

¹⁶ *Id.* at 11.

7. CPV requests that the Commission grant its waiver requests. First, CPV argues that it acted in good faith by submitting energy offers in accordance with its pending Revised Fuel Cost Policy. CPV argues that the purpose of imposing a penalty for submitting an offer inconsistent with an approved fuel cost policy is to prevent the “deliberate misrepresentation of fuel costs,” and CPV had no intent to misrepresent its fuel costs.¹⁷ CPV states that its actions were based on an effort to more accurately reflect its expected costs if it were to be selected, which CPV argues is fully consistent with the intent of PJM’s fuel cost policy provisions. Further, CPV argues that it communicated with PJM and the IMM about the necessary changes to its Initial Fuel Cost Policy, and PJM and the IMM acknowledged that CPV’s proposed method for determining expected fuel costs for cost-based offers was appropriate.¹⁸

8. Second, CPV argues that the waiver requests are of limited scope, because it is asking either that the Commission waive a penalty imposed for one day due to unique circumstances or that the Commission waive the Operating Agreement provision regarding prospective application of fuel cost policies to allow the approval of its Revised Fuel Cost Policy to be effective as of January 3, 2018.¹⁹ CPV states that this situation will not repeat itself, because CPV’s Revised Fuel Cost Policy is now approved and the unique circumstances are unlikely to arise again.

9. Third, CPV argues that granting either waiver would resolve the concrete problem of CPV incurring a penalty for posting offers in conformance with a pending fuel cost policy, when such offers were made to ensure accurate cost-based offers reflecting true expected costs.²⁰

10. Fourth, CPV argues that, if the Commission grants either waiver, it will not have undesirable consequences, such as harming third parties. CPV states that its offers on January 5, 2018 were not accepted, and there is no indication that CPV would have been selected had its offers been consistent with its then-effective Initial Fuel Cost Policy.²¹

¹⁷ *Id.* at 12 (quoting *PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,133, at P 82 (2017)).

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 14.

²⁰ *Id.* at 14-15.

²¹ *Id.* at 15.

III. Notice of Filing and Responsive Pleadings

11. Notice of CPV's filing was published in the *Federal Register*, 84 Fed. Reg. 6,401 (2019), with interventions and protests due on or before March 14, 2019. Timely motions to intervene were filed by PJM, the IMM, Dominion Energy Services, Inc., and Old Dominion Electric Cooperative. On March, 2019, the IMM filed an out-of-time protest.²² On April 3, 2019, CPV filed an answer to the IMM's protest. On April 12, 2019, the IMM filed an answer to CPV's answer, as amended by an errata filed that same day.

A. IMM Protest

12. The IMM argues that CPV has not met the requirements for obtaining a waiver. The IMM explains that, on December 27, 2017, it agreed with CPV regarding the appropriateness of its proposed fuel cost policy revisions.²³ However, the IMM explains that both PJM and the IMM advised CPV to continue using its Initial Fuel Cost Policy until PJM approved a new one.²⁴ The IMM states that, on January 2, 2018, CPV submitted revisions to its Initial Fuel Cost Policy and, on January 3, 2018, the IMM requested additional edits to the policy and advised CPV that it must provide certain required supporting documentation: a cost-based offer numerical example and a copy of CPV's fuel supply agreement. The IMM states that, while CPV did upload the Revised Fuel Cost Policy on January 3, 2018, CPV did not upload the requested fuel supply agreement. According to the IMM, on January 26, 2018, it reminded CPV to provide the fuel supply agreement. The IMM states that, on January 26, 2018, PJM approved CPV's Revised Fuel Cost Policy. However, according to the IMM, it was not until January 29,

²² The IMM made its filing under the heading of "comments," but given that the IMM's filing advocates for denial of CPV's waiver requests, we consider it to be a protest and have referred to it and treated it as such herein.

²³ IMM Protest at 3.

²⁴ *Id.* at 3-4. According to the IMM, on December 27, 2017 the IMM communicated to CPV that "[t]he calculation of the unit's cost based offer has to be in line with the approved fuel cost policy until a new one is approved." Also according to the IMM, on December 27, 2017, PJM clarified to CPV that "[w]e will review it as soon as possible as well but until then you must use your current one until [the] new one [is] approved."

2018 that CPV uploaded the required fuel supply agreement, after which the IMM advised PJM that it had passed CPV's Revised Fuel Cost Policy.²⁵

13. The IMM argues that CPV has not shown that it acted in good faith because, despite knowing the fuel cost policy rules and the consequences of violating those rules, CPV violated them.²⁶ The IMM explains that, on January 5, 2018, CPV submitted cost-based offers that did not comply with Schedule 2 of the Operating Agreement by submitting fuel costs in its intraday offers on January 5, 2018 that exceeded the fuel costs defined by its approved Initial Fuel Cost Policy. Therefore, the IMM asserts that PJM appropriately applied the penalty to CPV for violating Schedule 2 of the Operating Agreement.²⁷

14. In addition, the IMM argues that CPV has not shown that its waiver requests: (1) are of limited scope; (2) address a concrete problem; and (3) have no undesirable consequences. The IMM argues that, if either of CPV's waiver requests is granted, it would undermine the entire process of ensuring accurate cost-based offers and would provide precedent for requests for any participant that wanted to modify its fuel cost policy after-the-fact. The IMM further states that CPV's waiver requests represent a broad attack on the approved rules that ensure that fuel cost policies are verifiable and systematic.²⁸ The IMM also states that the waiver requests, if approved, would undermine market power mitigation, and customers' confidence in market power mitigation, which is the overarching purpose of the Operating Agreement's Schedule 2 penalty provisions, and which depends on accurate and verifiable cost-based offers.²⁹

B. CPV Answer

15. CPV argues that the IMM fails to present facts to warrant denying the waiver requests.³⁰ In particular, CPV notes that the IMM fails to address the fact that CPV's

²⁵ *Id.* at 3-5.

²⁶ *Id.* at 1, 3, 5.

²⁷ *Id.* at 5.

²⁸ *Id.* at 2 (stating “[v]erifiable and systematic means that, given the information available at the time and the current approved fuel cost policy, a third party would calculate exactly the same cost-based offer as submitted by the unit owner at the time”).

²⁹ *Id.*

³⁰ CPV Answer at 1-2.

offers on January 5, 2018 reflected its actual expected and verifiable fuel costs and that the IMM agreed with CPV's proposed methodology for calculating fuel costs in its Revised Fuel Cost Policy.³¹ Further, CPV argues that the IMM ignores the realities of natural gas markets during stressed conditions and instead focuses on irrelevant information, such as the actual timeline on which the IMM approved CPV's Revised Fuel Cost Policy.³² CPV states that the question before the Commission is whether to waive the prospective-only approval provision in the Operating Agreement, which would allow for CPV's cost-based offers that adhered to its pending Revised Fuel Cost Policy.³³

16. CPV argues that the IMM advocates a strict liability approach to tariff waivers, which would lead to such waivers never being appropriate, notwithstanding clear Commission precedent granting such waivers.³⁴ Further, CPV argues that the IMM's arguments about the potential implications of granting the waiver requests are "doomsday scenarios" that are out of proportion to the unique, one-time circumstances associated with these specific waiver requests, which will not repeat.³⁵

C. IMM Answer

17. In response to CPV's argument that the IMM would have CPV use offers inconsistent with the realities of commercial natural gas markets during stressed conditions, the IMM explains that the fuel cost policy being enforced by PJM is CPV's own policy, developed by CPV, and that it is CPV, not PJM or the IMM, that has the responsibility of putting in place a systematic and verifiable fuel cost policy consistent with the realities of commercial natural gas markets and then to adhere to that policy until

³¹ *Id.* at 1-4, 8-9.

³² *Id.* at 2, 5-6 (noting that the Commission has previously cautioned the IMM that strict adherence to algorithmic methods in all circumstances may ignore "the commercial realities of how natural gas markets operate during stressed conditions") (quoting *PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,133 at P 57).

³³ *Id.* at 7.

³⁴ *Id.* at 1.

³⁵ *Id.* at 2, 8-10 (arguing that the main purpose of fuel cost policies is to ensure that a market seller's submitted cost-based offer accurately reflects that market seller's fuel costs).

changed.³⁶ The IMM explains that, according to PJM's rules, penalties are assessed based on the fuel cost policy in effect, not other policies that could have been in effect.

18. The IMM argues that whether a new fuel cost policy was pending on January 5, 2018 is irrelevant, as is the fact that CPV's revised policy was approved after that date. The IMM also argues that it is irrelevant whether the new policy is "better" than the then-effective fuel cost policy.³⁷ The IMM states that the only relevant fuel cost policy in this proceeding is the fuel cost policy in effect on January 5, 2018, which CPV violated.

19. Additionally, the IMM argues that waivers should not be used to retroactively change the effective date of fuel cost policies. The IMM states that allowing retroactive changes to fuel cost policy effective dates would defeat the purpose of fuel cost policies, which is to require market participants to explain *ex ante* how they are going to determine their fuel costs to be used in their cost-based offers, so that there is a basis to evaluate that participant's actual behavior, including in, and especially in, volatile conditions.³⁸ The IMM argues that *ex ante* approval of fuel cost policies allows the public to have confidence that participant actions are based on commercial realities, as the participant views them and defines them, not on *post facto* rationalizations.³⁹

IV. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rule of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept CPV's and the IMM's answers because they have provided information that assisted us in our decision-making process.

³⁶ *Id.* at 2.

³⁷ IMM Answer at 2.

³⁸ *Id.* at 2-3.

³⁹ *Id.* at 3.

B. Substantive Matters

22. CPV requests waiver of Schedule 2, Section 5.1(a) of the Operating Agreement concerning penalties for making cost-based energy offers inconsistent with an approved fuel cost policy or in the alternative, waiver of Schedule 2, Section 2.3(c) of the Operating Agreement, in order to allow CPV's Revised Fuel Cost Policy to have an effective date of January 3, 2018. We deny both waiver requests. The Commission has granted waiver of tariff provisions where: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.⁴⁰ The Commission uses the satisfaction of all four criteria as a guide to when it may be appropriate to grant waiver.⁴¹ If the Commission identifies a criterion that by itself makes waiver inappropriate, it need not continue to analyze other criteria before it denies waiver.⁴² As discussed below, we find that CPV has not shown that its waiver requests satisfy all of these criteria.

23. We find that CPV has not shown that it acted in good faith. On December 27, 2017, while discussing proposed revisions to its Initial Fuel Cost Policy with PJM and the IMM, both PJM and the IMM advised CPV that it must continue offering per its effective Initial Fuel Cost Policy until such time as a new fuel cost policy was approved by PJM.⁴³ On January 2, and January 3, 2018, CPV submitted multiple revisions to its Initial Fuel Cost Policy but failed to provide supporting documentation, such as its fuel supply agreement, as requested by the IMM.⁴⁴ The supporting documentation requested by the IMM was not provided until January 29, 2018. On January 5, 2018, CPV offered pursuant to its pending Revised Fuel Cost Policy. The Revised Fuel Cost Policy was not approved by PJM until January 26, 2018. CPV does not dispute this timeline and admits that it knowingly offered pursuant to the pending Revised Fuel Cost Policy, as opposed to its then-effective Initial Fuel Cost Policy as required by the Operating Agreement.⁴⁵ Also, CPV does not provide any explanation as to why it waited until January 2, 2018, to

⁴⁰ See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

⁴¹ *Sw. Pub. Serv. Co.*, 153 FERC ¶ 61,020, at P 22 (2015).

⁴² *Id.*

⁴³ IMM Protest at 3-4.

⁴⁴ *Id.* at 4.

⁴⁵ CPV Filing at 1-3.

revise its Initial Fuel Cost Policy. Nor does CPV explain why it failed to provide the requested supporting documentation, such as its fuel supply agreement, until January 29, 2018, when the Operating Agreement, Schedule 2, Section 2.2(b) requires market sellers to respond to information and documentation requests within five business days.⁴⁶ We find that these facts do not support a finding that CPV acted in good faith, and its waiver request fails.

The Commission orders:

CPV's waiver requests are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁶ Operating Agreement, Schedule 2, § 2.2(b).