



STATE OF NEW JERSEY
Board of Public Utilities
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ENERGY

IN THE MATTER OF THE LONG-TERM CAPACITY)
AGREEMENT PILOT PROGRAM ("LCAPP"))
)
) APP. DOC. NO. A-004467-10T1
)
) DOCKET NO. EO11010026

Parties of Record:

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BY THE BOARD:

Appellants-Movants, Exelon Generation Company and PSEG Power L.L.C. (the "Generators"), move before the New Jersey Board of Public Utilities ("Board") to settle the record pursuant to Rule 2:5-5(a) ("Motion"). They seek to amend, through the addition of numerous materials, the Statement of Items Comprising the Record on appeal ("SICR") filed with the New Jersey State Superior Court, Appellate Division under Docket No. A-4467-10T1. By this Order, the Board considers the Motion and orders the creation of a privilege log, the transmission of certain items to the Office of Administrative Law ("OAL"), and the filing of a Second Amended SICR.

BACKGROUND

On January 28, 2011, Governor Christie signed into law L. 2011, c. 9 (hereinafter, the "Act"), amending and supplementing L. 1999, c. 23, and establishing a long-term capacity agreement pilot program ("LCAPP") to promote the construction of qualified electric generation facilities. The Act is codified at N.J.S.A. 48:3-51, -60.1, -98.3, and -98.4, and establishes a procedure to solicit offers for a Standard Offer Capacity Agreement ("SOCA") with eligible generators.¹ A SOCA is a Board-approved financially-settled transaction agreement that provides certain eligible generators with payments from the electric public utilities for a defined amount of electric capacity over a specified term, not exceeding fifteen years. N.J.S.A. 48:3-51. The Act further mandates the Board to (1) initiate and complete a proceeding to determine an approved form of the SOCA within sixty days and (2) "award and execute" the SOCA or SOCA's within thirty days of approving its form. N.J.S.A. 48:3-98.3(a). The Act also requires the State's electric distribution companies ("EDCs")² to pay or receive refunds pursuant to an annually calculated load-ratio share of the capacity of the SOCA based upon each EDC's annual forecasted peak demand, as determined by PJM.³ N.J.S.A. 48:3-98.3(c)(9). Additionally, it requires a selected generator to participate in and clear the base residual auction ("BRA")⁴ conducted by PJM. N.J.S.A. 48:3-98.3(c)(12). To administer the LCAPP, the Act mandates that the Board must use the services of an EDCs-retained and Board-approved agent ("LCAPP Agent").⁵ The LCAPP Agent is responsible for assisting with the establishment of LCAPP so that SOCA's may be offered to develop eligible generators, prequalifying eligible generators, and recommending selected generators from eligible generator bids based upon a net benefit to ratepayers. N.J.S.A. 48:3-98.3(b)(1) to (3).

On February 10, 2011, the Board adopted a sixty-day procedural schedule to initiate and complete the proceeding. The Board also approved the EDCs-retained LCAPP Agent and directed interested parties to submit their proposed forms of a SOCA for consideration by the LCAPP Agent and the Board.

On February 22, 2011, applicants submitted pre-qualification application data sheets and attachments for evaluation by the LCAPP Agent. After the LCAPP Agent's initial review of the prequalification materials, data requests were sent to all applicants.⁶ From this information, the

¹ "'Eligible generator' means a developer of a base load or mid-merit electric power generation facility including, but not limited to, an on-site generation facility that qualifies as a capacity resource under PJM criteria and that commences construction after . . . [January 28, 2011]." N.J.S.A. 48:3-51.

² The EDCs are: Atlantic City Electric Company; Jersey Central Power & Light Company; Public Service Electric and Gas Company; and Rockland Electric Company.

³ "'PJM' means the privately-held, limited liability corporation that is a FERC-approved Regional Transmission Organization, or its successor, that manages the regional, high-voltage electricity grid serving all or parts of 13 states including New Jersey and the District of Columbia, operates the regional competitive wholesale electric market, manages the regional transmission planning process, and establishes systems and rules to ensure that the regional and in-State energy markets operate fairly and efficiently." N.J.S.A. 48:3-51.

⁴ A base residual auction is 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.

⁵ The LCAPP Agent is Levitan & Associates, Inc.

⁶ The LCAPP Agent's website also posted questions received from bidders and the LCAPP Agent's

LCAPP Agent determined nine projects were eligible. Three eligible projects withdrew their applications during the LCAPP Agent's prequalification review process. The LCAPP Agent evaluated the commercial proposals of the six remaining applicants. Following its evaluation, the LCAPP Agent recommended the selection of three qualified bidders on March 15, 2011. The LCAPP Agent's Report ("Report"), dated March 21, 2011, named the recommended generators and described the LCAPP Agent's analyses used to select them. On March 21, 2011, the Report was distributed to the Board, as well as the public via the LCAPP Agent's website. On March 24, 2011, the Board received comments on the Report from the public, including the Generators.

By Order dated March 29, 2011, the Board accepted the Report's recommendations and awarded SOCAs to the three qualified bidders, *i.e.* Hess Newark Energy Project ("Hess"); New Jersey Power Development Old Bridge Clean Energy Center ("NJPD");⁷ and CPV Woodbridge Energy Center ("CPV"). The Board also approved the final proposed form of the SOCAs and directed the EDCs to execute and submit confidential and public versions. The confidential versions included the selected generators' SOCA bid prices, while the public versions had this information redacted. The Board further ordered that the SOCA bid prices would be kept confidential for a limited period of time. However, after a generator submitted a bid in the PJM BRA, as stated in its SOCA, the Board ordered that the SOCA bid price for that generator would no longer be kept confidential and would be made publicly available. On May 20, 2011, the Board denied the EDCs' motion for reconsideration of the March 29, 2011 Order. By Order dated May 4, 2011, the Board approved the EDCs' executed SOCAs.

On May 13, 2011, the Generators jointly appealed the Board's implementation of LCAPP. In their Case Information Statement, the Generators assert the LCAPP and Board-adopted form of SOCAs are inconsistent with the plain language of the Act as well as the State's due process requirements. They also challenge the Board's March 29, 2011 Order accepting the Report and LCAPP Agent's recommendations, and the Board's May 4, 2011 Order approving execution of the SOCAs, as arbitrary and capricious. They also claim the Board's ratification of the Report, in which the LCAPP Agent rejected applications for existing generating stations is inconsistent with the Act and contrary to the public interest. On June 23, 2011, the Board filed its SICR with the New Jersey Superior Court, Appellate Division ("Appellate Division"), under Docket No. A-4467-10T1. Shortly thereafter, the Board filed an amended SICR adding an additional six items to the record.

On June 24, 2011, the EDCs jointly filed a similar appeal asserting the Board-adopted form of SOCAs are inconsistent with the plain language of the Act and the Board's selection of bidders to receive SOCAs violated the State's due process requirements. The EDCs also challenged the Board's March 29 and May 4, 2011 Orders as arbitrary and capricious. On July 21, 2011, the Board filed its SICR with the Appellate Division under Docket No. A-5192-10T1.

On September 2, 2011, the EDCs moved before the Board to settle the record pursuant to Rule 2:5-5(a). Specifically, the EDCs sought to include ten categories of documents ("EDC Items") within the record:

- (1) any written/electronic materials that were either considered or relied upon by the

answers.

⁷ New Jersey Power Development L.L.C. is a subsidiary of NRG.

- Agent or by the Board to evaluate (any) displacement of incumbent generation that (may) occur as a result of the executed/Board-approved SOCA contracts;
- (2) any written/electronic material that were either considered or relied upon by the Board to support the socio-economic benefits to the State form of the Board-approved SOCAs, including studies and evaluation of estimated job creation;
 - (3) the matrix developed by the Agent that defined the expectations and minimum requirements for factors that contribute to benefits/risks associated with each of the four LCAPP prequalification criteria and any documents submitted by bidders and considered by Agent to prepare the matrix;
 - (4) Agent Question Sets sent to all project sponsors who submitted Prequalification Applications and all responses, an electronic posting of the Agent Question Sets;
 - (5) all written/electronic materials, including workpapers, models, model runs, assumptions, input data and output data used by the Agent to create the Report;
 - (6) presentations, memoranda or briefing materials provided by the LCAPP Agent to the Board with respect to the implementation of the Act or the evaluation of the bids received through the LCAPP process;
 - (7) all bids received;
 - (8) documents used to prepare the form of SOCA and the Report, LCAPP interpretive documents prepared by Staff, and assumptions, analysis and review undertaken by the LCAPP Agent;
 - (9) confidential SOCAs; and
 - (10) Assemblyman Upendra J. Chivukula's letter to Board President Lee A. Solomon dated March 10, 2011, concerning the Board's implementation of the Act.

On November 9, 2011, the Board denied the EDCs' motion, except part of EDC Item (9) i.e. the public, redacted executed SOCAs and the EDCs' protest letters. On November 28, 2011, the Board filed an Amended SICR in the EDCs' appellate proceeding. On December 28, 2011, the EDCs appealed the Board's November 9, 2011 Order denying their motion on EDC Items (4), (6), (7), (8), (9), and (10), but did not challenge the Board's denial of EDC Items (1), (2), (3), and (5).

On March 8, 2012, the Appellate Division granted the EDCs' motion in part, denied in part, and remanded the remainder with instructions for further consideration. In re the Long-term Capacity Agreement Pilot Program, No. M-2572-11 (App. Div. Mar. 8, 2012) (slip op. at *12) ("EDC Appellate Order"). In granting, the court ordered that EDC Items (7) and (9) should be listed on the EDCs' SICR.⁸ In denying, the court excluded EDC Item (6).⁹ The court remanded EDC Items (4),¹⁰ (8),¹¹ and (10).¹²

⁸ The court rejected the Board's argument for exclusion of these Items, on the basis of confidentiality, instead finding that entry of an appropriate order, upon request, would protect the confidentiality of the information during litigation.

⁹ The court found that the EDCs had not overcome the presumption of non-disclosure and denied their motion.

¹⁰ The Appellate Division ruled that a hearing should be conducted 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. EDC Motion Order, supra, slip op. at *7

¹¹ 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 EDC Item (8) on remand for an in camera review by an

On May 11, 2012, consistent with the EDC Appellate Order, the Board ordered the transmission of the EDC Items (4), (8), and (10) to the OAL and added EDC Items (7) and (9) to the EDCs' SICR. On June 8, 2012, the Generators moved to intervene in the OAL proceedings resolving the remanded EDC Items. On June 13, 2012, the Board transmitted EDC Items (4), (8), and (10) to the OAL, as well as the Generators' motion to intervene. On July 26, 2012, in the OAL proceedings resolving the remanded EDC Items, ALJ Mumtaz Bari-Brown issued a notice of prehearing conference scheduled for October 15, 2012.

Consistent with its March 29, 2011 Order, the Board planned to publicly release SOCA bidders' bid prices following the results of the BRA. Following PJM's most recent BRA, two SOCA winners, Hess and CPV, cleared the auction. NJPD submitted a bid, but did not clear. On May 25, 2012, NJPD filed an order to show cause, with the New Jersey Superior Court, Chancery Division, General Equity Part, in Mercer County, requesting the court enjoin the Board's public release of the SOCA bid prices, set forth in Schedule F of NJPD's SOCA. This matter remains pending before Judge Paul Innes, P.J.Ch. See N.J. Power Dev., L.L.C. v. N.J. Bd. of Pub. Utils., Docket No. MER-C-47-12.

The Generators' Motion to Settle the Record

On November 7, 2011, the Generators filed the Motion. On November 17, 2011, the Board of Public Utilities' Staff ("Staff") filed Opposition. The Generators replied on November 28, 2011. On July 19, 2012, the Generators moved before the Appellate Division for a stay of the appellate proceedings.¹³ On July 10, 2012, Judge Carmen Messano, P.J.A.D., stayed the Generators' appellate proceedings until September 30, 2012, by which time the Board must decide the Generators' motion to settle the record.

In their seven-page Motion, the Generators seek "numerous items" to be included in a Second Amended SICR. (Mot. at 5). After a thorough review of the Generators' motion and reply briefs, the Board has identified five categories of items ("Generator Items") based on their broad requests:

- (1) The materials identified and requested in the EDCs' Motion to Settle the Record (Mot at 3);
- (2) The process and details of the Agent's evaluation (Mot. at 3; Reply at 7) or any items that indicate how the Agent performed its prequalification evaluation (Mot. at 3; Reply at 7), such as:
 - (a) the "Agent's interpretation of 'eligible generator'" (Mot. at 3);
 - (b) the "Agent's interpretation of what constituted 'new generation'" (Mot. at 3);

Administrative Law Judge ("ALJ"). Ibid.

¹² 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.

¹³ In the Generators' Motion to Stay the Appellate Proceedings, they asserted there should be "one, uniform record of the LCAPP proceeding," which cannot be determined until, among other things, the remand of the EDCs' motion has been completed.

- (c) a definition of "peaker" (Mot. at 3);
 - (d) "[s]pecific analytical judgments and criteria applied by the LCAPP agent and analyses the LCAPP agent made in connection with its report and recommendations" (Mot. at 6);
 - (e) any reference to the agent's analysis of the application data sheets and the extent to which they satisfied the criteria set forth in the LCAPP statute (Mot. at 6);
 - (f) the criteria which the agent used to exclude appellants' bids. (Mot. at 6); and
 - (g) the LCAPP Agent's "reasoning for rejecting as not eligible generators or any other basis" (Mot. at 6-7, Reply at 10).
- (3) Communications between the LCAPP Agent and bidders regarding application data sheets (Mot. at 3, 6), specifically:
 - (a) questions about proposed individual projects; and
 - (b) the notifications to bidders regarding the status of their bids. (Reply at 3 n.2).
 - (4) Substantive communications between the Board and the Agent and between Board Staff and the Agent (Mot. at 3, 6); and
 - (5) The materials, evaluations and analyses that the Agent relied on and referenced in the Report, but are excluded from the record (Mot. at 5).

The Generators argue their motion should be granted because they believe the Amended SICR does not include these Items, which they contend the Board considered in reaching its determinations. (Mot. at 1). They assert the record on appeal "consists of all the facts and arguments before the Board at the time of decision, not just the facts identified as forming the basis for the decision." (Reply at 3). The Generators reason that the LCAPP Agent acted with the apparent authority of the Board, thus any materials provided to the Agent should be made a part of the record. (Reply at 5). Since the Board relied on the Report, the Generators argue the exclusion of any items expressly relied on by the LCAPP Agent and referenced in the Report amounts to a denial of administrative due process. (Mot. at 5). Moreover, the Generators contend that without Generator Items (1) to (5) listed in an Amended SICR, they will be deprived of any "meaningful review" on appeal. (Mot. at 5). Although the Generators concede the confidential nature of some of the items sought to be included, they contend that they are, nonetheless, entitled to those confidential Items. (Mot. at 6).

Applicable Law

The record on appeal is defined by Rule 2:5-4(a), which states:

The record on appeal shall consist of all papers on file in the court or courts or agencies below, with all entries as to matters made on the records of such courts and agencies, the stenographic transcript or statement of the proceedings therein, and all papers filed with or entries made on the records of the appellate court.

"[A]ppellate courts will not ordinarily consider evidentiary material which is not in the record below by way of adduced proof, judicially noticeable facts, stipulation, admission or a recorded proffer of excluded evidence." Pressler & Verniero, Current N.J. Court Rules, comment 1 on R.

2:5-4 (2012). The Board's Statement of Items Comprising the Record is intended to "facilitate[] the appellant's preparation of the appendix as well as appellate court's understanding of what proofs, exhibits, stipulations and the like the agency considered in reaching its determination." Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 2:5-4 (2012).

A party may contest the record by moving to settle the record before the agency. R. 2:5-5(a). In considering previous motions to settle the record, the Board has found "it is clear that the record on appeal should include those items on file with the Board as part of our decision and parties should not add to the record, via the [Statement of Items], items not introduced below." In re N.J. Bell Tel. Co., 1993 WL 56032 at *5. Applying this principle, the Board has previously determined that all documents not on file with the Board should be excluded and that all documents requested for the purpose of effectuating discovery or that seek confidential information through the SICR process, should also be excluded. Id. at *6-7.

However, in ruling on the EDCs' motion to settle the record, the Appellate Division found that documents "submitted by an interested party to an expert consultant for its consideration in assisting the agency to reach a particular decision and that are equally available to the agency in reaching that decision should be included in the record . . ." if made available to the Board for its review and relevant on appeal. EDC Appellate Order at *6-7. The Appellate Division also acknowledged the privileged nature of the documents requested by the EDCs, but stated that meaningful review of the Board's privilege claims should be made following submission of a privilege log and an in camera review of the challenged documents. Id. at *10.

DISCUSSION

In the Motion, the Generators also seek a privilege log. (Mot. at 7). Therefore, based on the guidance provided by the EDC Appellate Order, the Board **FINDS** a privilege log should be created in this matter. The log shall consist of all privileged materials on file with the Board satisfying one or more of the Generator Items.

The Generators' Items also seek financially sensitive and proprietary information. (Mot. at 7). During the LCAPP evaluation process, the LCAPP Agent both received proprietary and confidential information from applicants and utilized its own proprietary information and expertise to provide the Report. The imprudent release of this information to competitors would represent an injustice. Interested parties should have an opportunity to establish the proprietary and confidential nature of their information. See generally Hammock v. Hoffmann-Laroche, 142 N.J. 356, 380-84 (1995) (defining the standard and procedures for establishing the confidentiality of documents). Therefore, the Board **FINDS** the issue of establishing an appropriate protective order based on good cause shown for materials found to be proprietary and confidential in nature should be transferred to the OAL.

Further, to ensure equal treatment of Generator and EDC Items transmitted to the OAL, Items transmitted for a determination of confidentiality should also be evaluated on the basis of relevance to the Generators' appeal, consistent with the Board's May 11, 2012 Order.

Generator Item (1)

Generator Item (1) incorporates by reference the EDCs' motion to settle the record and requests that "any decision made by the Board with respect to [the EDCs'] Motion should be reflected in the Board's decision regarding the instant motion." (Mot. at 4). The EDCs' motion sought ten items to be included in the EDCs' SICR. As stated above, the Board denied EDC Items (1), (2), (3), and (5) in its November 9, 2011 Order. EDC Items (1) and (2) were excluded because the Board did not rely or consider them in reaching its determination. The Board has consistently maintained that it relied on the recommendations in the Report. However, in light of the EDC Appellate Order, the Board **FINDS** it appropriate to reevaluate any materials comprising EDC Items (1) and (2) that were submitted by an interested party for consideration by the LCAPP Agent.

EDC Item (1) moved to include "any written/electronic materials that were either considered or relied upon by the Agent or by the Board to evaluate (any) displacement of incumbent generation that (may) occur as a result of the executed/Board-approved SOCA contracts." The "displacement of incumbent generation," was used in the context of the recommended SOCA portfolio's annual reduction of pollutants. Report at 4. The amount of displacement that would occur was based on the Act's requirement that the electric public utilities procure 2,000 MW and the unforced capacity of three recommended SOCA projects. See N.J.S.A. 48:3-98.3(c)(1); Report at 70-71, 76. The Board **FINDS** this fact is already clearly stated in the Report. Therefore, the Generators' motion for EDC Item (1) should be denied.

EDC Item (2) moved to include "any written/electronic material that were either considered or relied upon by the Board to support the socio-economic benefits to the State form of the Board-approved SOCAs, including studies and evaluation of estimated job creation." As stated in the November 9, 2011 Order, the Board did not rely or consider this item in reaching its determination. However, in light of the EDC Appellate Order, the Board now identifies and examines the availability of materials comprising this Item. The LCAPP Agent examined community benefits in terms of socio-economic benefits. See Report at 6. Applicants were required to submit project descriptions and operating data adequate to allow economic modeling by the LCAPP Agent. They were also required to provide a narrative using the form of Attachment 6 of the Application Data sheets. Although this information represents documents submitted by an interested party to the LCAPP Agent, it also may contain proprietary and confidential commercially sensitive information of the applicants. Public availability of the applicants' estimated construction budgets; unique plans to procure local materials; or construction and operations payroll, could result in an actual or potential economic advantage to competitors. Interested parties should have an opportunity to establish the proprietary and confidential nature of their information. Therefore, the Board **FINDS** EDC Item (2) should be transmitted to the OAL for the creation of an appropriate protective order and a determination on confidentiality and relevance.

EDC Item (3) moved, in part, for "the matrix developed by the Agent that defined the expectations and minimum requirements for factors that contribute to benefits/risks associated with each of the four LCAPP prequalification criteria." In its November 9, 2011 Order, the Board determined that this category of documentation involves privileged trade secrets of the LCAPP Agent. It would be unfair to publicly release any trade secret or proprietary information of the LCAPP Agent without an appropriate order protecting its confidentiality. Accordingly, the

Board **FINDS** this portion of EDC Item (3) should be transferred to the OAL for the creation of an appropriate protective order and a determination on confidentiality and relevance.

EDC Item (3) also requested "any documents submitted by bidders and considered by the [LCAPP] Agent to prepare the matrix."¹⁴ The Board found that any documents submitted by bidders to prepare the matrix would be confidential information protected from disclosure. The application materials, including the Application data sheets, are materials submitted by an interested party, the SOCA applicants, to the LCAPP Agent. Therefore, the Board **FINDS** this portion of EDC Item (3) should also be transferred to the OAL for the creation of an appropriate protective order and a determination on confidentiality and relevance.

EDC Item (5) moved for "all written/electronic materials, including workpapers, models, model runs, assumptions, input data and output data used by the Agent to create the Report." The Board excluded this information because it found the nature of the materials to be outside the scope of the proper administrative record on appeal. Indeed, the nature of these documents appears to be proprietary and they were used by the LCAPP Agent in providing its advice to the Board. Interested parties should have an opportunity to establish the proprietary and confidential nature of their information. Therefore, the Board **FINDS** EDC Item (5) should be transferred to the OAL for the creation of an appropriate protective order and a determination on confidentiality and relevance.

The Appellate Division recognized that EDC (6) was presumptively deliberative in nature and therefore denied the EDCs' motion for EDC Item (6). EDC Appellate Order, supra, at *9. Therefore, the Board **FINDS** that EDC Item (6) should be denied.

The Appellate Division remanded EDC Items (4), (8), and (10) for further consideration. By its May 11, 2012 Order, the Board transmitted the Items to the OAL on the question of whether to include or exclude those items from the record. Consistent with this Order, the Board **FINDS** EDC Items (4), (8), and (10) should be transmitted to the OAL on the same basis.

Also consistent with the Board's May 11, 2012 Order, EDC Items (7) and (9) should be added to the Generators' Second Amended SICR.¹⁵

Generator Item (2)

Generator Item (2) seeks to include the process and details of the Agent's evaluation or any items that indicate how the agent performed its prequalification. According to the Generators, this would include such items as: (a) the "agent's interpretation of 'eligible generator'"; (b) the "agent's interpretation of what constituted 'new generation'"; and (c) a definition of "peaker." (Mot. at 3). Staff argues definitions of these terms are either unnecessary or clearly stated in the LCAPP Agent's Report or the Act. (Opp. at 8). Indeed, the LCAPP Agent's interpretation of "eligible generator" is stated in the Report and Act. See N.J.S.A. 48:3-51; Report at 28. The Agent formulated three conditions for eligibility using the statutory definition and the legislative intent derived from "[f]ostering and incentivizing the development of a limited program for new

¹⁴ We find the Generators' request for the Application data sheets fully included within EDC Item (3).

¹⁵ The Generators also separately move to include the bids provided to the LCAPP Agent. (Mot. at 5). This request is identical to EDC Item (7). Therefore the Board already addressed this request under Generator Item (1) which incorporated EDC Item (7) by reference.

electric generation facilities will help ensure sufficient capacity to stabilize power prices" with an emphasis on the Legislature's use of the word "new." Those three conditions are: (1) Proposed project must be a base load or mid-merit electric power generation facility; (2) Proposed project must qualify as a capacity resource under PJM criteria; and (3) Proposed project must be a new electric generation facility that did not begin construction on or before January 28, 2011. Report at 28. Therefore, the Board **FINDS** the Motion for Generator Item (2)(a) should be denied.

Likewise, the Agent's interpretation of "new generation" is also explicitly set forth in the Report. The Agent Report states that that twenty-one proposed projects were eliminated because they were tied to existing generation units and therefore did not meet the condition of being a new generation facility. Report at 38. Thus, it follows that the LCAPP Agent's interpretation of new generation is a facility not tied to existing generation. Additionally, the Agent's interpretation of "peaking" is set forth by the Agent's statement that projects were classified as "peaking units" when they did not exhibit the base load or mid-merit operating regime required by the Act. Report at 38. Thus, Generator Items (2)(b) and (2)(c) are already clearly stated in the Report and Act. Therefore, the Board **FINDS** that the Motion for Generator Items (2)(b) and (2)(c) should be denied.

In their reply to Staff's opposition brief, the Generators assert they do not seek purely the definitions as used by the LCAPP Agent, but instead questioned "how those definitions were interpreted and applied by the Board and the [LCAPP] Agent in making its determination." (Reply at 10). The Generators move for inclusion of Generator Items (2)(d) "[s]pecific analytical judgments and criteria applied by the LCAPP agent and analyses the LCAPP agent made in connection with its report and recommendations" (Mot. at 6), (2)(e) "any reference to the Agent's analysis of the application data sheets and the extent to which they satisfied the criteria set forth in the LCAPP statute (Mot. at 6), (2)(f) the criteria which the Agent used to exclude appellants' bids (Mot. at 6) and (2)(g) the LCAPP Agent's "reasoning for rejecting as not eligible generators or any other basis." (Mot. at 6-7, Reply at 10).

By moving for the inclusion of Generator Items 2(d) to (2)(g), the Generators seek the individualized bases associated with the denial of their particular projects. As rejected applicants during the Prequalification Application stage of the bidding process, the Generators contend the Board rejected their "bids." But, neither of the Generators submitted bids for the LCAPP Agent's review. Instead, Exelon submitted prequalification applications for nineteen generation projects and PSEG Power submitted prequalification applications for five generation projects. The LCAPP Agent determined that all of Exelon's proposed projects were ineligible. Report at 40. The LCAPP Agent further determined that four out of five of PSEG Power's projects were ineligible, but PSEG Power then withdrew its remaining eligible project before the bidding phase of the process began. Report at 40. On these facts, the Board interprets the Generators' request to include documents exhibiting criteria used for rejecting their "bids" to mean the criteria used by the LCAPP Agent to evaluate the Prequalification Applications.

Accordingly, the Board **FINDS** the analyses and judgments of the LCAPP Agent comprising Generator Items (2)(d), (2)(f), and portions of (2)(g) are already reflected in the Report. Applicants submitted project information for prequalification in two ways: (1) by submitting

Application Data Sheets,¹⁶ and (2) by responding to Agent Question Sets. Report at 36. The Application Data Sheets and Attachments thereto were posted to the LCAPP website on February 14, 2011. The information received through these forms was then evaluated. Report at 36.

The LCAPP Agent's evaluation was completed in two phases: first, by a determination of eligibility under the Act's definitions, followed by a prequalification review of eligible bidders. Report at 28. The LCAPP Agent used three criteria to evaluate an applicant's eligibility. Report at 28. The projects that failed to satisfy these criteria were not "promoted to the prequalification review phase." Of the thirty-four submitted projects, nine were determined to satisfy the eligibility conditions, and twenty-five were determined to not satisfy one or more of the eligibility conditions. Of the twenty-five ineligible facilities, twenty-one were eliminated because they were tied to existing generation units and therefore did not meet the condition of being a new generation facility. Four projects were eliminated because they were categorized as peaking units, rather than exhibiting the base load or mid-merit operating regime required by the Act. Bidders were notified on March 3, 2011, of their eligibility status. The basis for a project being determined to be ineligible is clearly stated in Table 5 of the Report. Report at 39.

All generators that were deemed to be eligible were subsequently evaluated with respect to the prequalification criteria, that is, requiring "a showing of environmental, economic, and community benefits, and through demonstration of reasonable certainty of completion of development, construction and permitting activities necessary to meet the desired in-service date." Report at 28. The LCAPP Agent identified a set of factors that contribute to benefits or risks associated with each of the four LCAPP prequalification criteria. Report at 28. The Report identified factors contributing to each of the four LCAPP prequalification criteria, and described the definition of the color ratings for each factor. Report at 29 to 35. The LCAPP Agent developed a matrix that defined the expectations and minimum requirements for each factor. Report at 28. For each eligible project, the LCAPP Agent assigned a qualitative rating for each factor. The ratings were color-coded, each color rating was assigned a numerical value, and each factor was assigned a weighting. A weighted average score for each of the four LCAPP criteria was calculated based on the assigned ratings for each factor and the factor weightings. Accordingly, the Board **FINDS** Generator Items (2)(d), (2)(f), and the portions of (2)(g) which constitute a request for the analyses and judgments of the LCAPP Agent, is already stated in the record and should be denied.

To the extent that the Generator Items (2)(e) and (2)(g) request the LCAPP Agent's matrix and its supporting documents, the matrix and the exact methodologies associated with the matrix are a presumptively-privileged trade secret of the LCAPP Agent. These requests are similar to EDC Item (3). Therefore, as with EDC Item (3), the Board **FINDS** the Items should be transferred to the OAL for the creation of an appropriate protective order and a determination on confidentiality and relevance.

¹⁶ The Application Data Sheets collected general project data and operating data, with Applicants completing either the dispatchable or variable energy worksheet, depending on the technology type. Additional qualitative and descriptive data was collected through the Application Data Sheet Attachments, which requested information on the facility's sponsor, financing plan, permitting plan, fuel plan, operating plan, and community benefits. Report at 36.

However, the Board notes Generator Item (2)(e) also requests the extent that the projects satisfied the eligibility criteria. The Board **FINDS** that this Item includes the qualitative and quantitative results of the matrix, which could be exhibited in a form that does not compromise confidentiality or proprietary information, such as the LCAPP Agent's summary sheet for each applicant. Therefore, the Board **FINDS** the Motion for Generator Item (2)(e) should be granted and that the LCAPP Agent's summary sheets denoting the results of the matrix should be listed in the Generators' Second Amended SICR.

Generator Item (3)

The Generators move for the inclusion of "communications between the LCAPP Agent and bidders regarding application data sheets [Mot. at 3, 6], specifically questions about proposed individual projects and the notification of bidders regarding the status of their bids." (Reply at 3 n.2). Following the initial review of the submitted prequalification materials, Agent Question Sets, or data requests, were developed and sent to all project sponsors who submitted Prequalification Applications. These data requests covered a variety of topics, seeking additional information or clarification of application responses to enable LCAPP Agent to complete a thorough review of each project before making a determination regarding prequalification.

Multiple rounds of data requests were distributed. The first round of data requests were sent to two projects that were immediately identified as ineligible generators to verify that the capacity was already in place and there was no capacity expansion investment planned. The second round of data requests were sent to all thirty-two remaining projects and included questions regarding technical aspects of the projects, environmental issues, permitting, credit issues, fuel and emissions, construction progress, and community benefits. One project declined to respond and verified that it was withdrawing its application. Third, a data request was sent to one project to clarify the project sponsor and affiliates and another was sent to a second project regarding its Target Commercial Operation Date and related data. Last, the final sets of clarifying questions were sent to projects. Responses were due after the deadline for bidding. Two projects declined to respond as they had not submitted commercial proposals. Report at 38.

Generator Item (3) encompasses all of the material requested in EDC Item (4), which requested the Agent Question Sets.¹⁷ The Appellate Division remanded EDC Item (4) to the Board and the Board transferred the Item to the OAL, based on concerns that some of the information in those answers and questions is confidential. Consistent with the EDC Appellate Order and the Board's May 11, 2012 Order, the Board **FINDS** that the Item should be transferred to the OAL for a determination on whether to include the documents in the Generators' Second Amended SICR.

The Generators have also requested the notifications to applicants of their eligibility from the LCAPP Agent. These notifications were not included in the Amended SICR. Moreover, subscribers to the LCAPP website received news updates via electronic mail, which were also simultaneously posted on the News page of the LCAPP website. The Board **FINDS** these notifications should be included in the Generators' Second Amended SICR.

¹⁷ EDC Item (4) also included the "an electronic posting of the Agent Question Sets," which is already in the SICR as Item 85.

Generator Item (4)

Generators' Item (4) moves to include substantive communications between the Board and the Agent and between Board Staff and the Agent into the SICR. (Mot at 3, 6). This request is similar to EDC Item (8), which asked for all documents exchanged among the LCAPP Agent, the Board, and Staff. In its November 9, 2011 Order, the Board found that the information was protected by attorney-client privilege, the LCAPP interpretative documents were protected by deliberative process, and that the methodologies to prepare the report were protected from disclosure as trade secrets of the LCAPP Agent. The Appellate Division agreed that these internal documents of the Board would be presumptively privileged. EDC Appellate Order, supra, at *10. However, the court stated it could not conduct a meaningful review without an identification of those documents. Ibid. In response, the Board transmitted the question of including documents under EDC Item (8) in the EDCs' SICR to the OAL. In the interest of administrative and judicial economy, the Board **FINDS** that the communications should be listed in a privilege log.¹⁸

Generator Item (5)

Generator Item (5) moves to include the materials, evaluations and analyses that the Agent relied upon as referenced in the Report, but which were excluded from the record. This request seeks LCAPP Agent materials, evaluations and analyses similar to and already included in EDC Items (1), (2), (3), (5), (6), and (8), as well as Generator Items (1) to (4). Therefore, the Board will not re-address those items previously mentioned above.

Following a thorough review of all the materials, evaluations and analyses referenced in the Agent's report, the following items are identified as items the Agent relied upon in creating its Report, but were not included in Generator Items (1) to (4) or listed in the SICR:

- The fact that LS Power filed competitively sensitive cost-related information in support of its February 22, 2011 application to FERC (Report at 64);
- LS Power's March 15, 2011 Notice of Withdrawal of its February 22, 2011 application at FERC (Report at 65);
- the North American Electric Reliability Corporation's projected loss of between 46 GW and 76 GW due to derates and retirements of coal-and-oil/gas-fired steam units nationwide by 2018, with variation depending on whether the final rules can be considered moderate or strict (Report at 51);
- the Brattle Group's looking only at coal-fired plants, projecting the retirement of between 50 GW and 65 GW by 2020 (Report at 51-52);
- ICF International also looking only at coal-fired plant including the potential impact from federal regulation of greenhouse gas emissions under a cap-and-trade program (Report at 52);
- Credit Suisse consideration of the impact of clean air regulations on coal-fired plants in the U.S. based on the plant sizes and existing emissions controls (Report at 60);
- wind data used by the Agent from the National Oceanic and Atmospheric Administration's National Data Buoy Center or other public sources of wind data (Report

¹⁸ The LCAPP Agent methodologies in EDC (8) are equivalent to the Generator Items (2)(e) and (2)(g).

- at 56);
- some wind data from special studies such as the Eastern Wind Integration and Transmission Study and actual plant performance data (Report at 56); and
- the results of the 2013/14 BRA (Report at 57).

These materials are largely publicly available materials. They are statistical and data-related reports or other information relied on by the Agent to inform its forecasting of the energy market. This information was not on file with the Board during the LCAPP Agent's evaluation process. Although these materials were equally available to the Board at the time of its determinations, the items must be relevant to the issues on appeal. See United Hosps. Med. Ctr. v. State, 349 N.J. Super. 1, 8 (App. Div. 2002) (declining to consider a new issue not identified in the appellants' notice of appeal and case information statement); Kent v. Cnty. of Hudson, 97 N.J. Super. 90, 95 (App. Div. 1967) ("The asserted inadequacy of the record for purposes of appeal can be appraised only in terms of the grounds available for presentation on appeal.").

These materials are not relevant to the Generators' appeal, because the Generators do not dispute the accuracy of the data used to LCAPP Agent. Even though, the Generators assert that, because the Board relied on the LCAPP Agent and the Report, the Board's exclusion of items expressly relied on by the LCAPP Agent and referenced in the Report amounts to a denial of administrative due process (Mot. at 5), the Generators had the ability to dispute the validity of this information during the LCAPP process.¹⁹ See Ocean Med. Imaging Assocs. v. N.J. Dep't of Health and Human Servs., 396 N.J. Super. 477, 480 (App. Div. 2007) (denying motion to supplement record because appellants had an opportunity to comment on and dispute agency findings), certif. denied, 194 N.J. 265 (2008). The Generators, like all interested parties, were provided with formal notice of public hearings, an opportunity to participate in the creation of the proposed form of SOCA, opportunity to be heard on multiple letters and motions for stays and reconsideration, and to submit comments to the Agent's report. Therefore, the Board **FINDS** these materials as described in Generator Item (5) should be denied.

The following items are not listed in the SICR, but appear based on their description to be presumptively subject to privilege or a protective order. Those items are:

- key elements that were customized specifically for the proceeding to reflect market dynamics across PJM and neighboring market areas (Report at 48);
- the Agent's use of proprietary modeling that replicates the functionality of the RPM (Report at 56);
- the Agent's estimated changes in the Capacity Emergency Transfer Objective and the Capacity Emergency Transfer Limit for the Eastern Mid-Atlantic Area Council ("EMAAC") and Mid-Atlantic Area Council ("MAAC") to ascertain which Locational Deliverability Areas ("LDAs") would set the Resource Clearing Prices ("RCPs") for the NJ EDCs as well as to locate the Variable Resource Requirement curves (Report at 59);
- the Agent's assumption that the market adds several thousand MW of new supply, primarily gas turbines (GTs), as indicated in Figure 11 (Report at 60);
- the lower escalation rate is used to account for expected technology progress over the forecast period, thereby reducing the cost of constructing a GT peaking plant over the

¹⁹ Comments to the LCAPP Agent's Report were received from the Generators, as well as other interested parties, some which questioned the benefits of the Report and are included as SICR Items 64 through 72.

- study period in real terms (Report at 60);
- the Agent's establishment of those Variable Resource Requirement curves for each year of the study period and the RCPs forecasted based on supply of capacity resources available with the LDAs (Report at 59);
- the majority of new resources added to the supply mix over the forecast period being simple-cycle gas turbines, along with some Demand Response/Energy Efficiency ("DR/EE"), wind and Combined Cycle ("CC") plants, solar, biomass, and other resource types also being added to the generation mix in comparatively small amounts described at figure 11 showing the addition of GT, wind, CC, DR/EE resources over the study period (Report at 59);
- other information on generic CC facility construction costs and operations costs (Report at 77);
- IMPLAN's standard regional economic input-output model estimates licensed to the Agent (Report at 77);
- IMPLAN's assumptions reflecting the local economy has full employment so that new jobs attract workers to the area and part of their income is spent on major items such as housing and autos (Report at 78);
- the Agent's comparison of options based on the Present Value ("PV") of the Standard Offer Capacity Price ("SOCP") schedule and the option with the lowest such PV sum being selected for each generator (Report at 68);
- through the technical lens of incremental benefit versus incremental cost, the Agent's representation that the benefit-to-cost ratio for the last six years remains greater than 1.0 from a ratepayer perspective on an expected value basis (Report at 68);
- the Agent's recommendation that the 15-year term for the generator rather than the 9-year term and Board Staff and Counsel's concurrence (Report at 68);
- Unit Net Load Cost ("UNLC") calculations for each of the five eligible generators with the list then being sorted by increasing UNLC to provide a "supply curve" of generators (Report at 68);
- a MarketSym simulation performed for each of the two portfolio cases to determine Total Energy Market Price Benefit being combined with the sums of the relevant generator Total Gross SOCA Costs and Total Net SOCA Costs to obtain portfolio Total Net Load Cost (Report at 69);
- the Agent's evaluation of generators' portfolio based on the Agent's forecast of BRA capacity prices of relevant to New Jersey, the Agent's evaluation of generators' portfolio based on the SOCAs providing a no-cost hedge on capacity prices over the 15-year term of each SOCA (Report at 70);
- the Agent's evaluation of generators' portfolio based on the results of procurement with the Agent noting that a hypothetical portfolio greater than the 2,000 MW procurement limit set forth in the LCAPP would result in higher fixed payment obligations that are not offset by RCP credits and potential energy market benefits (Report at 70); and
- the MarketSym model used to simulate the energy market also tracks emissions of sulfur dioxide, nitrogen oxide, and carbon dioxide on a unit-specific basis (Report at 73).

The LCAPP Agent's use of criteria, forecasts, analyses, and evaluations is presumptively confidential trade secrets exempt from disclosure. If publicly released, the LCAPP Agent's proprietary information, such as its unique employment of analyses, evaluations, and methodologies, could result in an actual or potential economic advantage to competitors. The LCAPP Agent and other interested parties should have an opportunity to establish the proprietary and confidential nature of their information. Therefore, the Board **FINDS** these items

should be transferred to the OAL for an appropriate protective order to be based on good cause shown and for a determination of confidentiality and relevance.

CONCLUSION

The Board HEREBY ORDERS the creation of a privilege log.

The Board HEREBY ORDERS that the Motion regarding Generator Items (1) to (5) is DENIED in part, GRANTED in part, and TRANSMITTED in part as follows.

The Board ORDERS that the Motion for Generator Item (1) is DENIED regarding EDC Items (1) and (6).

The Board ORDERS that the Motion for Generator Item (1), including EDC Items (2), (3) and (5), be TRANSMITTED to the OAL for the creation of an appropriate protective order and a determination on confidentiality and relevance.

The Board ORDERS that the Motion regarding Generator Item (1) is GRANTED on EDC Items (4), (8), and (10), consistent with the reasoning of the EDCs' Appellate Order and the Board's May 11, 2012 Order. The Board ORDERS those Items be transmitted to the OAL for a determination on whether they shall be included in the SICR, pending the outcome of the Generators' motion to intervene in the EDC proceeding currently before the OAL. A privilege log is to be submitted to the OAL for review and assistance in its obligation.

The Board ORDERS that the Generator Item (1) request by incorporation of EDC Items (7) and (9) is GRANTED. The Board FURTHER DIRECTS Staff to prepare a Second Amended SICR to be filed with the Superior Court, Appellate Division, under the appropriate docket.

The Board ORDERS the Motion for Generator Items (2)(a) to (2)(d), (2)(f), and a portion of (2)(g) is DENIED.

The Board ORDERS the Motion for Generator Items (2)(e) and (2)(g), which constitute the matrix and the exact methodologies associated with the matrix, be TRANSMITTED to the OAL for the creation of an appropriate protective order and a determination on confidentiality and relevance.

The Board ORDERS the Motion for Generator Items (2)(e) is GRANTED and DIRECTS Staff to prepare a Second Amended SICR which lists the qualitative and quantitative results of the matrix.

The Board ORDERS that Generator Item (3), inclusive of EDC Item (4), be TRANSMITTED to the OAL for an in camera determination of confidentiality.

The Board ORDERS that the remainder of the Motion for Generator Item (3) is GRANTED and DIRECTS Staff to prepare a Second Amended SICR which lists the LCAPP Agent's notifications to bidders and the public.

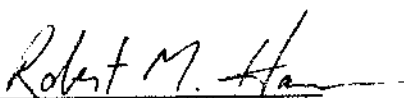
The Board ORDERS that Generator Item (4), the substantive communications between the Board and the Agent and between the Board Staff and the Agent, are to be listed in a privilege log.

The Board ORDERS that Generator Item (5), the Report referenced documents associated with the materials, analyses and evaluations of the Agent, is DENIED in part as not relevant to the Generators' appeal. The Board FURTHER ORDERS that the Motion for Generator Item (5), which comprises presumptively privileged or financially sensitive proprietary information be TRANSMITTED to the OAL for the creation of an appropriate protective order and a determination on confidentiality and relevance.


By this Order, the Board deems the SICR on appeal to be settled. The effective date of this Order is September 23, 2012.

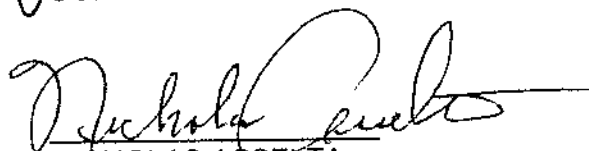
DATED: 9/17/12

BOARD OF PUBLIC UTILITIES
BY:


ROBERT M. HANNA
PRESIDENT


JEANNE M. FOX
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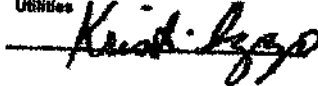

NICHOLAS ASSELTA
COMMISSIONER


MARY-ANNA HOLDEN
COMMISSIONER

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



IN THE MATTER OF THE LONG-TERM CAPACITY AGREEMENT PILOT PROGRAM
("LCAPP")
APP. DOC. NO. A-004467-10T1
DOCKET NO. EO11010026

SERVICE LIST

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