

148 FERC ¶ 61,096  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, John R. Norris,  
Tony Clark, and Norman C. Bay.

CPV Shore, L.L.C.

Docket No. ER14-2105-001

CPV Maryland, L.L.C.

Docket No. ER14-2106-001  
(not consolidated)

ORDER REJECTING FILINGS

(Issued August 5, 2014)

1. In this order, we address certain state-sponsored capacity agreements submitted for our review on June 2, 2014, as amended on June 6, 2014,<sup>1</sup> by CPV Shore, LLC (CPV Shore) and CPV Maryland, LLC (CPV Maryland) (collectively, CPV), pursuant to section 205 of the Federal Power Act (FPA)<sup>2</sup> and Part 35 of the Commission's regulations.<sup>3</sup> For the reasons discussed below, we find that the CPV Agreements cannot be accepted as valid contracts, given the decisions reached in the two federal court proceedings in which these agreements have been successfully challenged.<sup>4</sup> Accordingly, we reject CPV's filings.

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<sup>1</sup> The amended rate schedules supercede the originally-filed rate schedules.

<sup>2</sup> 16 U.S.C. § 824e (2012).

<sup>3</sup> Unless otherwise noted, below, we refer to the agreements filed in Docket No. ER14-2105-000 as the New Jersey Agreements. We refer to the agreements filed in Docket No. ER14-2106-000 as the Maryland Agreements. Collectively, we refer to these agreements as the CPV Agreements or "contracts."

<sup>4</sup> See *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372 (D. NJ. 2013) (New Jersey District Court Order), *appeal pending sub. nom. PPL Energy Plus, LLC v. Solomon*, Nos. 13-4330 and 13-4501 (3d Cir. Filed Nov. 5, 2013); *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp. 2d (D. Md. 2013) (Maryland District Court Order), *aff'd*,

(continued...)

## I. Background

2. CPV states that the CPV Agreements were executed pursuant to state-sponsored initiatives. Specifically, CPV states that the New Jersey Agreements were developed and approved pursuant to a New Jersey Board of Public Utilities (New Jersey Board) Request for Proposals (RFP) process intended to ensure that the chosen supplier would receive an assured revenue stream to support its construction of new in-state capacity.<sup>5</sup> CPV states that, pursuant to this RFP process, the New Jersey Board accepted CPV Shore's bid to construct a new 663 megawatt (MW) combined cycle generation facility in Woodbridge, New Jersey and subsequently directed that the New Jersey Agreements be executed by four New Jersey electric distribution companies (EDCs).<sup>6</sup>

3. CPV adds that the Maryland Agreements, known as Pricing Contracts for Differences, were developed and approved pursuant to a Maryland Public Service Commission (Maryland Commission) RFP process intended to ensure that the chosen supplier would receive an assured revenue stream to support its construction of new in-state capacity.<sup>7</sup> CPV Maryland states that, pursuant to this RFP process, the Maryland Commission accepted CPV Maryland's bid to construct a new 661 MW combined cycle generation facility in the Southwest Mid-Atlantic Area Council locational deliverability area and thereafter directed that the Maryland Agreements be executed by three Maryland EDCs.<sup>8</sup>

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Nos. 13-2419, 13-2424, 2014 WL 24458800 (4th Cir. June 2, 2014) (Fourth Circuit Order).

<sup>5</sup> See Long-Term Capacity Agreement Pilot Program (LCAPP Act). N.J.S.A. §§ 48:3-51, 48:3-98.2-4.

<sup>6</sup> The four New Jersey EDCs are: (i) Rockland Electric Company (Rockland); (ii) Public Service Electric and Gas Company (PSEG); (iii) Jersey Central Power & Light Company; and (iv) Atlantic City Electric Company (Atlantic City).

<sup>7</sup> See *In the Matter of Whether New Generating Facilities Are Needed to Meet Long-Term Demand for Standard Offer Service*, Notice of Comment Period on Request for Proposals for New Generating Facilities, Maryland PSC Case No. 9214 (Dec. 29, 2010).

<sup>8</sup> The three Maryland EDCs are: (i) Baltimore Gas and Electric Company (BG&E); (ii) Delmarva Power & Light Company (Delmarva); and (iii) Potomac Electric Power Company (Pepco).

4. CPV states that under the price terms set forth in the CPV Agreements, financial settlements alone are contemplated, as referenced to wholesale market clearing prices, as established by PJM Interconnection, L.L.C. (PJM). CPV asserts that, as such, these price terms do not require, or involve, the delivery of capacity or energy to any EDC. Instead, CPV states that the New Jersey Agreements entitle CPV Shore to receive, over a 15-year term, an assured revenue stream, consisting of an established MW-day rate multiplied by the facility's capacity, net of such revenues that CPV Shore would receive from its participation in PJM's capacity market.<sup>9</sup> CPV adds that the Maryland Agreements entitle CPV Maryland to receive, over a 20-year term, an assured revenue stream, consisting of a fixed and inflation indexed price multiplied by the facility's capacity, net of such revenues that CPV Maryland would receive from its participation in PJM's energy and capacity markets.<sup>10</sup>

5. CPV acknowledges that, in the two federal court proceedings cited at note 3, *supra*, the validity of the CPV Agreements has been successfully challenged. Specifically, CPV acknowledges the courts' findings that the CPV Agreements interfere with the wholesale capacity market auctions overseen by PJM, under PJM's Commission-approved tariffs, and are thus preempted under the authorizing provisions of the FPA. CPV argues, however, that these rulings remain subject to rehearing and/or further appeals, concerning its still-pending litigation position that the CPV Agreements are not subject to the FPA.

6. CPV states that, in the meantime (and to expedite the construction of its projects), it is requesting that the Commission accept the CPV Agreements as just and reasonable, pursuant to FPA section 205 and the Commission's order granting CPV market-based rate authorization.<sup>11</sup> CPV argues that accepting the CPV Agreements as Commission-

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<sup>9</sup> Thus, if the actual revenues received from sales of energy and capacity in PJM are less than the benchmark price specified in the New Jersey Agreements, the New Jersey EDCs would be required to pay CPV Shore the difference; if these revenues exceed the benchmark price specified in the agreements, CPV Shore would be required to pay the New Jersey EDCs the difference.

<sup>10</sup> Thus, if the actual revenues received from sales of energy and capacity in PJM are less than the amount specified in the Maryland Agreements, the Maryland EDCs would be required to pay CPV Maryland the difference; if these revenues exceed the amount specified in the agreements, CPV Maryland would be required to pay the Maryland EDCs the difference.

<sup>11</sup> *CPV Shore, LLC and CPV Maryland, LLC*, 142 FERC ¶ 61,081 (2013).

authorized market-based rate agreements is appropriate, given the Commission's analogous treatment of agreements entered into by suppliers and EDCs for EDC-loads that have not selected a third-party, open access supplier. CPV asserts that under these arrangements, known as Basic Generation Service, in New Jersey, or Standard Offer Service, in Maryland, the supplier that has submitted the winning RFP bid will routinely rely on its market-based rate authority when selling energy to the EDC. CPV argues that here, as in these provider-of-last-resort cases, the New Jersey Board and the Maryland Commission have developed and implemented a competitive solicitation process and required that their respective EDCs be parties to the agreements.

7. CPV also addresses the review standard applicable to its filings. Specifically, CPV states that the CPV Agreements, even if jurisdictional, need not have been filed with the Commission, under CPV's market-based rate authorization, given CPV's assertion that these agreements (as discussed above) are analogous to provider-of-last-resort agreements. CPV asserts that transactions under such agreements must be reported by the seller in its Electric Quarterly Reports, but need not be filed for a separate review and approval, because they are regarded by the Commission as arms-length contracts between willing buyers and sellers.

8. CPV states that, regardless, the CPV Agreements may be reviewed and approved here as just and reasonable, under the review standards developed by the Commission for affiliate transactions in *Allegheny Energy Supply Co., LLC*.<sup>12</sup> Specifically, CPV argues that, under *Allegheny*, the CPV Agreements may be regarded as just and reasonable, given that the competitive solicitation processes overseen by the New Jersey Board and the Maryland Commission satisfy the four principles established by the Commission in *Allegheny*.<sup>13</sup> CPV adds that while it is not affiliated with the EDCs, the logic underlying the Commission's adoption of the *Allegheny* standards is equally applicable here.

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<sup>12</sup> 108 FERC ¶ 61,082 (2004) (*Allegheny*); see also *Boston Edison Co. re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991).

<sup>13</sup> *Allegheny*, 108 FERC ¶ 61,082 at PP 23-35. The four *Allegheny* principles are: (i) transparency, a requirement that the solicitation process be open and fair; (ii) definition, a requirement that the product, or products sought through the competitive solicitation, be precisely defined; (iii) evaluation, a requirement that the evaluation criteria be standardized and applied equally to all bids and bidders; and (iv) oversight, a requirement that an independent third-party should design the solicitation, administer bidding, and evaluate bids prior to selection. *Id.*

9. CPV also argues that its request that the CPV Agreements be approved, as just and reasonable market-based rate agreements, cannot be defeated by the argument that these agreements, in any way, interfere with the wholesale prices as established in PJM's capacity market auctions. CPV relies, in this regard, on the Commission's prior finding that PJM's bidding rule for new capacity market entrants, i.e., the Minimum Offer Price Rule, is intended to ensure the reasonableness of wholesale interstate prices in PJM's capacity auctions, but "does not interfere with states or localities that, for policy reasons, seek to provide assistance for new capacity entry[.]"<sup>14</sup> CPV adds that it has complied (and will comply) with all applicable PJM rules when submitting bid offers into PJM's capacity auctions, or selling energy to PJM.<sup>15</sup> CPV argues that, regardless, PJM's capacity market auctions are not the sole mechanism, or market, under which capacity can be bought or sold.

10. CPV requests that the Commission accept the CPV Agreements for filing, effective August 2, 2014, and grant all waivers, as may be required.

## **II. Notice of Filings and Responsive Pleadings**

11. Notice of CPV's filings was published in the *Federal Register*, 79 Fed. Reg. 28,508 (2014), with interventions and protests due on or before June 27, 2014. Notices of intervention and timely motions to intervene were filed, in Docket No. ER14-2105-000, by the entities noted in Appendix A to this order. Timely motions to intervene were filed, in Docket No. ER14-2106-000, by the entities noted in Appendix B to this order. In addition, late-filed interventions, in Docket No. ER14-2106-000, were submitted by the Maryland Commission, on July 8, 2014, and Southern Maryland Electric Cooperative, Inc. (SMECO), on July 9, 2014.

12. Protests were submitted in both proceedings by the Indicated Parties<sup>16</sup> (PPL, et al.), Monitoring Analytics, LLC, acting as PJM's independent market monitor (IMM), the

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<sup>14</sup> See CPV Maryland Filing at 4, n.8 (citing *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 89 (2011)); see also CPV Shore Filing at 21.

<sup>15</sup> CPV notes that in May 2012, CPV Maryland offered to sell capacity into PJM's Base Residual Auction, for the 2015-16 delivery year, based on a minimum offer price approved by PJM in a unit-specific review proceeding. CPV adds that the PJM capacity clearing price for that auction exceeded the amount reflected in CPV Maryland's offer. In addition, CPV states that, for both the 2016-17 and 2017-18 delivery years, CPV Maryland has submitted clearing bids.

<sup>16</sup> The Indicated Parties, in Docket No. ER14-2105-000, are comprised of the following entities: PPL EnergyPlus, LLC; PPL Brunner Island, LLC; PPL Holtwood,

(continued...)

Electric Power Supply Association (EPSA), the Edison Electric Institute (EEI), and the PJM Power Providers Group (P3). Answers were submitted by CPV, in Docket No. ER14-2105-000, on June 27, 2014 and July 14, 2014. Answers were submitted by CPV, in Docket No. ER14-2106-000, on June 27, 2014 and July 14, 2014, and by the Maryland Commission on July 14, 2014.<sup>17</sup>

#### A. Protests

13. Intervenors argue that the CPV Agreements do not exist and never became effective, given the federal court rulings cited above, which have not been stayed.<sup>18</sup> With respect to the Maryland Agreements, PPL, et al. note that, under section 5.1(b), the “agreements shall not become effective until 30 days after the final resolution of [all] legal proceedings related to [the Maryland Agreements].”<sup>19</sup> With respect to the New Jersey Agreements, PPL, et al. argue that, under section 8.1.2, the EDCs are permitted to terminate the agreements “if a court invalidates or declares unconstitutional the [LCAPP] Act or portion thereof requiring or specifying some performance, right or obligation of [the EDC] or [CPV].” PPL, et al. assert that each of the EDCs has terminated its respective agreements.

14. P3 challenges CPV’s assumption that a contract that has been declared void, invalid, and unenforceable may nonetheless be accepted by the Commission. EPSA and EEI concur, characterizing CPV’s filings as an attempted end-run on the federal court

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LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; Lower Mount Bethel Energy, LLC; PPL New Jersey Solar, LLC; PPL New Jersey Biogas, LLC; PPL Renewable Energy, LLC (collectively, PPL); Pepco Holdings, Inc.; Atlantic City; Calpine Corporation (Calpine); Essential Power, LLC and Essential Power OPP, LLC; Lakewood Cogeneration, L.P.; PSEG; PSEG Power LLC; and Rockland. In Docket No. ER14-2106-000, the Indicated Parties are comprised of the following entities: PPL; Pepco Holdings, Inc; Delmarva; Pepco; Calpine; Essential Power, LLC Essential Power Rock Springs, LLC; PSEG Power LLC; and BG&E.

<sup>17</sup> Given the similarities of the arguments presented in each proceeding, we summarize the responsive pleadings on a joint basis, below, unless otherwise noted.

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

<sup>19</sup> PPL, et al. further note that, under section 5.1(c), the agreements become “null and void *ab initio* as soon as that legal proceeding results in a “final and nonappealable decision” having “the effect of . . . rendering impossible or illegal performance of [the Maryland Agreements] by Buyer or Supplier as executed on the Execution Date.”

rulings invalidating the CPV Agreements. EPSA adds that a Commission order rejecting CPV's filing is also appropriate, consistent with the Commission's precedent as applicable to contract disputes.<sup>20</sup>

15. PPL, *et al.* also argue that CPV's filing should be rejected on the grounds that it fails to comply with the Commission's regulations, at 18 C.F.R. § 35.3, which requires that a rate schedule or tariff filing be made not less than 60 days nor more than 120 days prior to the date on which the electric service is to commence and become effective. PPL, *et al.* add that, under 18 C.F.R. § 35.5, a filing must be rejected when it is deficient in form or a substantive nullity.<sup>21</sup> PPL *et al.* argue that there is no Part 35 filing right as to agreements that have not become effective, have been declared by a federal court to be illegal, and cannot ever become effective so long as those rulings stand.

16. PPL, *et al.* also argue that, because the CPV Agreements were executed by the EDCs under protest, they cannot be treated as contracts entered into between willing buyers and sellers. PPL, *et al.* add that, regardless, these agreements cannot be characterized as just and reasonable, given the Commission's representations before the U.S. Court of Appeals for the Third Circuit (on review of the New Jersey Agreements), that state-ordered capacity agreements have a price-suppressing and distortive effect on PJM's wholesale capacity market prices.<sup>22</sup>

17. Intervenors also challenge CPV's assertion that the CPV Agreements can be accepted by the Commission, under the *Allegheny* standards. PPL, *et al.* argue that this review standard was developed by the Commission to prohibit self-dealing by affiliated companies and thus is not relevant here.<sup>23</sup> EPSA adds that, under the Commission's

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<sup>20</sup> EPSA Protest, in Docket No. ER14-2105-000, at 4 (citing *Villages of Edgerton & Montpelier, OH v. Ohio Power Co.*, 49 FERC ¶ 61,165, at 62,161 (1989)).

<sup>21</sup> *See, e.g.*, PPL, *et al.* June 27, 2014 Protest in Docket No., ER14-2106-000 at 5 (citing *Municipal Light Board v. FPC*, 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. den.*, 405 U.S. 989 (1972); *Ohio Edison Co.*, 43 FERC ¶ 61,316, at n.7 (1988) (finding that the Commission is required to reject a rate filing that is a nullity)).

<sup>22</sup> *Id.* at 6 (citing *PPL EnergyPlus, LLC, et al. v. Solomon, et al.* Nos. 13-4330, 13-4501, Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae (3d. Cir., submitted March 20, 2014, p.9)).

<sup>23</sup> PPL, *et al.* argues that, regardless, the CPV agreements fail to satisfy the four requirements set forth in *Allegheny*, addressing transparency, definition, evaluation, and oversight. *See also* IMM protest, in Docket No. ER14-2106-000 at 2; EPSA protest, in Docket Nos. ER14-2105-000 and ER14-2106-000, at 7.

guidelines, no market-based rate contract, other than an affiliate contract, is to be filed with the Commission.<sup>24</sup>

18. Finally, the IMM argues that the CPV Agreements are not compatible with the design of PJM's capacity market, which relies on competitive markets and assigns development risks to investors. The IMM asserts that, as such, these agreements cannot be regarded as just and reasonable. In addition, the IMM argues that CPV has not shown why CPV Maryland, or CPV Shore, should be permitted to receive above-market revenues that are not available to other market participants.

## **B. Answers**

19. In its answer, CPV clarifies that it is neither asking the Commission to override any federal court decision, or determine the ultimate effectiveness or enforceability of the CPV Agreements. CPV states, rather, that it is only asking the Commission to determine that the rates, terms and conditions of the CPV Agreements, to the extent they do ultimately go into effect, via either a future appellate ruling, or pursuant to further state administrative or legislative process, are just and reasonable under FPA section 205.

20. CPV also responds to PPL, *et al.*'s argument that the CPV Agreements do not exist, given the current posture of the federal court litigation, as summarized above.<sup>25</sup> CPV argues that these orders are not final and therefore cannot serve as the basis for the Commission's rejection of CPV's filings. CPV adds that pending judicial proceedings do not prevent the Commission from considering matters within its jurisdiction.<sup>26</sup>

21. CPV also asserts that even assuming the court's rulings are upheld, or become final, a determination by the Commission that the CPV Agreements rates are just and reasonable would cure any alleged constitutional infirmity and moot the underlying litigation. CPV also responds to PPL, *et al.*'s argument that, under sections 5.1(b) and (c) of the Maryland Agreements (addressing the effects of judicial review), these agreements have been rendered substantive nullities. CPV argues that because the Maryland District

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<sup>24</sup> EPSA Protest, in Docket Nos. ER14-2105-000 and ER14-2106-000, at 8 (citing *Westar Energy, Inc.*, Docket No. ER06-1429-000 (Oct. 10, 2006) (unreported) (“[A]greements under market-based rate tariffs shall not be filed with the Commission.”)).

<sup>25</sup> *See supra* note 3.

<sup>26</sup> CPV Shore June 27, 2014 Answer at 7 (citing *Electric Generation LLC*, 99 FERC ¶ 61,307, at P 24 (2002)).

Court Order has not become final, the Maryland Agreements cannot be characterized as substantive nullities.

22. CPV also responds to the argument that the New Jersey EDCs have terminated the New Jersey Agreements. CPV argues that it has contested these asserted terminations, under the dispute procedures set forth in the New Jersey Agreements, and that the New Jersey EDCs themselves have acknowledged on the record that the New Jersey Agreements would be reinstated with full force and effect in the event of a reversal of the New Jersey District Court Order.

23. CPV adds that, even if all or portions of the CPV Agreements are ultimately held to be unconstitutional in a final, non-appealable decision, the CPV Agreements may be amended. Specifically, CPV argues that the New Jersey Agreements, at section 13.10, expressly provide for their amendment to preserve the intent of the parties by substituting provisions to replace those deemed not to be enforceable. CPV adds that the Maryland Agreements, at section 12.7, expressly provide for their amendment to preserve the intent of the parties via a substitute provision for the one deemed unenforceable. CPV further argues that pending judicial proceedings do not prevent the Commission from considering matters within its jurisdiction.

24. CPV also responds to intervenors' arguments that the Commission's *Allegheny* standards are inapplicable, here, and/or have not been satisfied. CPV argues that these standards have been applied by the Commission to determine the justness and reasonableness of rates and terms in non-arms-length transactions that result from competitive processes. CPV adds that while the Commission typically has applied these principles to affiliate transactions, they are equally applicable here, where even though the EDCs have entered into the CPV Agreements under protest, and therefore did not involve a willing buyer and willing seller, they nonetheless can be shown via a market-based test to reflect just and reasonable rates.

25. The Maryland Commission, in its answer, responds to PPL, *et al.*'s argument that the standards developed by the Commission in *Allegheny* are intended to target potential self-dealing by affiliated companies and thus cannot be applied here. The Maryland Commission agrees that the Maryland Agreements do not present the type of "sweetheart deals" that may exist between utilities and affiliates, given that they were executed as the culmination of an open, transparent, and competitive administrative process. The Maryland Commission argues that, as such, the Commission would be within its authority to accept the Maryland Agreements pursuant to CPV's market-based rate authority, even absent application of the *Allegheny* standards. Regardless, the Maryland Commission asserts that the Maryland Agreements could also be accepted on the grounds that they satisfy the *Allegheny* standards. Specifically, the Maryland Commission argues that the *Allegheny* standards are satisfied here, given the transparent, open and competitive solicitation that it administered, with evaluation by an independent expert.

### III. Discussion

#### A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceedings in which these pleading were filed. In addition, given the early stage of these proceedings and the absence of undue prejudice or delay, we grant the unopposed late-filed interventions of the Maryland Commission and SMECO, in Docket No. ER14-2106-000.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers filed by CPV Maryland and the Maryland Commission, in the proceedings in which they were filed, because they provided information that assisted us in our decision-making process.

#### B. Determination

28. In considering whether the rates, terms, and conditions in a contract are just, reasonable, and not unduly preferential or discriminatory under the FPA the contract must first be a valid contract.<sup>27</sup> The Commission must reject a rate filing that is a nullity.<sup>28</sup> For the reasons discussed below, we find that the CPV Agreements are no longer valid and thus fail to satisfy this threshold test. Accordingly, we reject CPV's filings.

29. CPV argues that the CPV Agreements constitute valid arms-length contracts between willing buyers and willing sellers, based on state procurement initiatives as overseen by the New Jersey Board and the Maryland Commission, respectively.

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<sup>27</sup> *Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 115 FERC ¶ 61,375, at P 32 (2006) ("If the [power sales] Agreement is not valid and binding, the Commission need not consider whether the just and reasonable standard or the public interest standard should apply."); *Independent Oil & Gas Ass'n of W. Virginia.*, 18 FERC ¶ 61,289, at 61,608 (1982) ("[A]s a threshold matter, the Commission must determine the contractual validity of a rate filing before deciding whether the filing constitutes a just and reasonable rate[.]").

<sup>28</sup> *Ohio Edison Co.*, 43 FERC ¶ 61,316, at 61,881, n. 7 (1988) (citing *Municipal Light Board v. FPC*, 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert denied*, 405 U.S. 989 (1972)).

Intervenors argue, to the contrary, that these state initiatives have been invalidated by the courts. Intervenors argue that the EDCs named in the CPV Agreements were, and remain, unwilling buyers, i.e., that the rates, terms, and conditions set forth in the CPV Agreements were imposed on the EDCs and that these state-imposed obligations are no longer binding on the EDCs, given the federal court rulings invalidating the CPV Agreements.

30. We agree with intervenors that the contracts before us are not valid, and therefore are a substantive nullity and cannot be accepted. These contracts were entered into pursuant to state programs that have now been declared invalid by two Federal District Courts and the U.S. Court of Appeals for the Fourth Circuit. The courts also found that the contracts themselves are invalid.<sup>29</sup> In addition, pursuant to the terms of the contracts, the Maryland Agreements are terminated upon a finding of unconstitutionality, which occurred here, and the EDCs have terminated the New Jersey Agreements.<sup>30</sup> While these federal court rulings may be subject to continued litigation, as CPV points out, the relevant orders have not been stayed. For these reasons, the contracts themselves are not valid contracts, are a substantive nullity, and must be rejected.<sup>31</sup>

31. We also reject CPV's corollary argument that, even assuming that all or a portion of the New Jersey and Maryland mandates are invalidated by the courts in final, non-appealable orders, the CPV Agreements can nonetheless be accepted here, in an amended form, given that they expressly provide for their amendment to preserve the intent of the parties. CPV has not demonstrated that the CPV Agreements have been amended by the parties, pursuant to the provisions relied on by CPV, in a manner that would allow them to continue as presently written.

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<sup>29</sup> Maryland District Court Order at 1 (stating that the contracts are "illegal and unenforceable"); New Jersey District Court Order at 2 (stating that the contracts "are void *ab initio*, invalid, and unenforceable").

<sup>30</sup> Section 5.1 of the Maryland Agreements states that in the event of a legal proceeding that "reverses or modifies, in full or in part, [the Maryland Agreements] ... this agreement shall automatically become null and void *ab initio*. Maryland Agreements, § 5.1(c); the New Jersey Agreements state that the occurrence at any time of any of the following events constitutes a termination event: "If a court invalidates or declares unconstitutional the Act or portion thereof requiring or specifying some performance, right, or obligation of [the EDC] or [CPV Shore]." New Jersey Agreements, § 8.1.2.

<sup>31</sup> See *supra* n.26 and n.27.

32. Finally, we need not reach CPV's remaining arguments in support of its filings, given our threshold finding, above, that there are no valid agreements before us. Specifically, we need not address whether the Commission's *Allegheny* standards apply to the CPV Agreements, or have been satisfied here. Nor are we required to address whether the rates, terms and conditions set forth in the CPV Agreements interfere with the operation of PJM's capacity market auctions, or are otherwise just and reasonable.

The Commission orders:

CPV's filings are hereby rejected, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

Appendix A

**List of Intervenors**  
**In Docket No. ER14-2105-000**

Calpine Corporation  
Duke Energy Corporation  
Electric Power Supply Association  
Essential Power, LLC, et al.  
Exelon Corporation  
FirstEnergy Service Company  
Monitoring Analytics, LLC (IMM)  
NRG Companies  
New Jersey Board of Public Utilities  
New Jersey Division of Rate Counsel  
PJM Interconnection, L.L.C. (PJM)  
PJM Power Providers Group  
PPL EnergyPlus, LLC, et al.  
PSEG Companies  
Pepco Holdings, Inc., et al.  
Rockland Electric Company

Appendix B

**List of Intervenors**  
**In Docket No. ER14-2106-000**

Calpine Corporation  
Duke Energy Corporation  
Edison Electric Institute (EEI)  
Electric Power Supply Association (EPSA)  
Essential Power, LLC, et al.  
Exelon Corporation  
FirstEnergy Service Company  
Maryland Public Service Commission \*  
Monitoring Analytics, LLC (IMM)  
NRG Companies  
NextEra Energy Resources, LLC  
PJM Interconnection, L.L.C. (PJM)  
PJM Power Providers Group (P3)  
PPL Companies  
PSEG Companies  
Pepco Holdings, Inc.  
Southern Maryland Electric Cooperative, Inc. \*

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\*late-filed intervention