

#### **Disclaimer**

As a preliminary matter, PJM's governing documents are controlling in this matter and the Federal Energy Regulatory Commission (FERC) is the ultimate authority that interprets such governing documents. As such, only FERC's determination on whether a particular state program constitutes a *State Subsidy* is binding. The opinions herein do not constitute legal advice as to whether or not any state default service auction is a *State Subsidy* and are based on PJM's current understanding of the existing rules related to the various state default procurement auctions. Accordingly, each Capacity Market Seller must evaluate the respective state default procurement auctions for themselves as it is possible that FERC may rule in a manner that differs from PJM's opinion. Ultimately, each *Capacity Market Seller* is responsible for ensuring that it correctly certifies whether its *Capacity Resource* is subject to a *State Subsidy* and to ensure that its offer complies with the Tariff, irrespective of any non-binding opinions contained in this document.

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## **BACKGROUND**

In its Order on Rehearing in the Minimum Offer Price Rule (MOPR) docket EL16-49, FERC determined that state default service auctions are a *State Subsidy*. PJM, in its Second Compliance Filing, set out to propose tariff language that would allow for the continuation of normal commercial activity in state default service auctions while safeguarding against auctions that would distort the competitiveness of the Base Residual Auction (BRA). In FERC's recent Order on Compliance, it agreed with PJM's proposed tariff language setting out the criteria for carving out state default service auctions from the definition of *State Subsidy*.

## **STATE DEFAULT SERVICE AUCTIONS AS A STATE SUBSIDY**

As a default position, state default service auctions are a *State Subsidy* pursuant to the FERC Order on Rehearing and PJM's now accepted tariff language. However, pursuant to that same tariff language, a state default service auction can be excluded from the definition of *State Subsidy*, and thereby avoid MOPR applicability if it fulfills certain criteria.

First, the state default service auction must be subject to oversight by a consultant or manager who is independent of the market participants in those auctions, and who certifies that the auction was conducted through a non-discriminatory and competitive bidding process. FERC specifically ruled in its Order on Compliance that neither PJM, nor the Independent Market Monitor (IMM) would serve in a role to certify the conduct that occurs within these auctions. Thus, it is important that these auctions continue to be certified by an independent party.

Further, the state default service auction: (i) must not place any conditions based upon: ownership (except supplier diversity requirements or limitations), location (except to meet PJM deliverability requirements), affiliation, fuel type, technology (except RPS requirements which are already separately subject to MOPR), or emissions; (ii) must not create a result that would have the winning supplier and the local distribution company enter into a contract where a specific resource or resource type is to be utilized to satisfy the winning supplier's obligation; and (iii) the state's retail customers must have the option to elect a competitive retail supplier and effectively by-pass any supply charges that are a result of the state default service auction awards.

## **STATE SUBSIDIZED RESOURCES STILL SUBJECT TO MOPR AND EXEMPTIONS**

It is important to note that any capacity resource receiving a state subsidy that would otherwise be subject to the MOPR would still be subject to the MOPR and its exemptions despite the default service tariff language discussed above. For instance, *new* (as of December 19, 2019) renewable resources that generate renewable energy certificates will continue to be subject to the MOPR. The now accepted tariff language for state default service auctions will not alter this. In the PJM footprint, the primary interplay between state default service auctions and the possibility of being deemed a *State Subsidy* will most likely be based upon how the state handles implementation of

renewable portfolio standards (RPS). Thus, again, it's important to be reminded that simply because a default service auction survives MOPR scrutiny, individual resources may still be subject to the MOPR.

## INITIAL ANALYSIS OF TARIFF LANGUAGE ON STATE DEFAULT SERVICE AUCTIONS

The following is an initial analysis of the applicability of PJM's tariff language based on PJM's understanding of individual state default service auction rules as they exist today. Ultimately, it is the responsibility of individual *Capacity Market Sellers* to appropriately certify whether the underlying *Capacity Resource* is subject to a *State Subsidy*. There are a few outlier issues that PJM is discussing with specific states, but these issues can be easily remedied such that the corresponding auctions should meet the criteria in the tariff language that will allow for the auctions to avoid being deemed a *State Subsidy*.

- **Illinois:** The Illinois Power Agency conducts separate auctions for default service procurement and the procurement to satisfy renewable portfolio standards (RPS) and other clean energy endeavors. The default service auctions are competitive, non-discriminatory, fuel-neutral and otherwise appear to satisfy PJM's criteria for avoiding MOPR application. Thus, Illinois' default service auctions, as comprised today, should not be deemed a *State Subsidy* subject to the MOPR based on PJM's understanding of Illinois' default service auctions.
- **Delaware:** In Delaware, a default service auction is run to procure power for the default service load in the Delmarva service territory. Delmarva separately procures renewable energy credits (RECs) for RPS compliance for default service customers. The default service auction is competitive, non-discriminatory, fuel-neutral and otherwise appears to satisfy PJM's criteria for avoiding MOPR application. Thus, Delaware's default service auction, as comprised today, should not be deemed a *State Subsidy* subject to the MOPR based on PJM's understanding of Delaware's default service procurement auction.
- **Ohio:** Similarly, in Ohio, the four distribution utilities have historically been responsible for procuring RECs to satisfy Ohio's RPS requirements. The four distribution utilities procure RECs outside of the default service auctions that are run to procure power for the default service loads in their respective service territories. The default service auctions are competitive, non-discriminatory, fuel-neutral and otherwise appear to satisfy PJM's criteria for avoiding MOPR application. Thus, Ohio's default service auctions, as comprised today, should not be deemed a *State Subsidy* subject to the MOPR based on PJM's understanding of Ohio's default service auctions.
- **Pennsylvania, New Jersey and Maryland:** In each of these states, it is almost entirely the obligation of winning suppliers in state default service auctions to comply with RPS for default service customers. Thus, these suppliers will typically include the costs of complying with RPS in their bid prices for default service auctions. While there is some interplay then between the default service auctions in these states and RPS, the interplay does not impact the competitiveness and fuel-neutrality of the auctions themselves. If all of the suppliers have to comply with RPS, then each is subject to the same competitive parameters. Furthermore, none of the tranches themselves are "green" tranches. These suppliers are merely bidding in the cost of doing business within that particular state (i.e., the same level of RPS is required under the state default procurement auctions as for any other load serving entity in the state). It is the resources themselves that will be subject to the MOPR rules associated with RPS. The default service auctions themselves, however, should not be deemed a *State Subsidy* subject to the MOPR. The auctions are competitive, non-discriminatory, fuel-neutral and otherwise appear to satisfy PJM's criteria for avoiding MOPR application based on PJM's current understanding of these state default service auctions.

- District of Columbia:** Outside of having the same supplier RPS compliance dynamics as Pennsylvania, New Jersey and Maryland, the District also has a 5% renewable carve-out whereby 5% of the default service load is to be served by renewable power via a PPA transaction that occurs outside of the default service auction. FERC, in para. 75 of its Order on Compliance, addressed this rubric and has determined that the default service auction itself, which would serve 95% of the District's default service load, would not be deemed a state subsidy subject to the MOPR so long as the two processes for the 95% and 5% are separate and distinct. That 95% auction is competitive, non-discriminatory, fuel-neutral and otherwise appears to satisfy PJM's criteria for avoiding MOPR application.

## FOOTNOTE 134 AND FURTHER DIALOGUE

PJM views footnote 134 of the FERC Order on Compliance as cautionary to states who wish to utilize state default service auctions to advance fuel-specific policy objectives. The footnote specifically uses the words "appear" and "may," and states that FERC is not making any determination in the Order about New Jersey's BGS or any other state default service auction. While the Federal Energy Regulatory Commission has the authority to make the final determination of whether a state default service auction is a *State Subsidy* subject to the MOPR, PJM and the IMM may provide viewpoints to *Capacity Market Sellers* on their views of whether a state default service auction is a *State Subsidy*. As stated above, it does not appear that any state default service auction in the footprint, as constituted today (other than the District's 5% renewable carve-out), will be subject to the MOPR based on PJM's current understanding of these state default service auctions. In the event that a state decides that it wants to utilize default service procurement to carry out specific energy policies that may be perceived as non-competitive, resource specific, etc., advance notice and dialogue with PJM and the IMM would be prudent so as to heed the concerns raised by the FERC in footnote 134.