

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Cricket Valley Energy Center, LLC and
Empire Generating Center, LLC
v.
NYISO

Docket No. EL21-7

Protest of Public Citizen, Inc.

On October 14, the owners of two natural gas power plants located in NYISO filed a complaint under Section 206 of the Federal Power Act. The complaint claims that state policies promoting a proliferation of zero emission power resources—including retention of existing nuclear and the addition of as much as 9,000 MW of new offshore wind generation—will unfairly suppress capacity prices. The power plant owners assert that they will experience financial hardship from these lower capacity prices, but provide no detailed balance sheet data to verify the contention. The two owners ask FERC to declare these low prices to be unjust and unreasonable, and have the Commission initiate market rule changes that would increase capacity prices in ways that would conveniently result in larger financial payments for their natural gas power plants.

The Commission should dismiss the complaint. First, both complainants' facilities have received roughly \$200 million in direct cash subsidies from state and local governments to construct and operate their facilities—negating whatever (dubious) claim they have that certain zero emission generation resources receive unfair subsidies. Second, the alleged financial difficulties described by the complainants are a feature facing natural gas power plants across all markets in the U.S. and are not unique to NYISO.

While it's clear that these owners of the two natural gas power plants do not have a strong appetite for risk, it is not a responsibility of ratepayers to cough up higher capacity payments as proposed by the complainants. The NYISO risk-based power market began in response to a petition by Enron Corp. that New York regulators

unanimously approved in 1996, thereby subjecting merchant power plant owners to significant risk in exchange for opportunities to earn far higher profits than had been allowed under cost of service regulation.¹ It is not just and reasonable to guarantee cost recovery for the owners of power plants only when they claim financial hardship, while allowing them unregulated and unlimited profits when times are good.

Neither owner has supplied the detailed balance sheet data required to certify their supposed uneconomic performance. The complaint is meritless and should be dismissed.

About Public Citizen, Inc.

Established in 1971, Public Citizen is a national, not-for-profit, non-partisan, research and advocacy organization representing the interests of household consumers. Public Citizen is active before FERC promoting just and reasonable rates, and supporting efforts for utilities to be accountable to the public interest. Our financial details are located on our web site.² We intervened October 16.

The Complainants

The filing offers few details about the owners of the two natural gas power plants that filed the complaint, and is (unsurprisingly) totally silent on the roughly \$200 million they received in subsidies from state and local governments.

Empire Generating Center LLC

Empire Generating is a 653 MW natural gas power plant in Rensselaer, NY. The private equity firm Energy Capital Partners bought Empire Generating in July 2007 during the late stages of the project's development and construction, and it began commercial operation in September 2010.³ Energy Capital Partners closed the sale of Empire Generating to a consortium in March 2017—most likely because Energy Capital

¹ www.citizen.org/article/comments-ny-public/

² www.citizen.org/about/annual-report/

³ www.ecpartners.com/portfolio/empire-gen-holdings-inc

Partners recognized that the facility's value had significantly changed in the face of low-cost renewables. Indeed, the new owners were forced to declare bankruptcy just two years later on May 19, 2019, with a collection of creditors applying for permission under Section 203 of the Federal Power Act to emerge with equity control.⁴

Empire Generating has five owners: Greenwich, CT-based Black Diamond Capital Management (51.5%), Los Angeles-based Ares Management Corp. (34.4%), Greenwich, CT-based Starwood Property Trust, Inc. (10.3%), New York-based MJX Asset Management LLC (3.5%), and an entity only identified as "Goldman", which may be The Goldman Sachs Group (0.3%).⁵ In addition to owning Empire Generating, Ares Management Corp. owns seven landfill gas power plants in NYISO, and 14% of the 761 MW natural gas Linden cogeneration facility in New Jersey that directly interconnects with NYISO. The complaint does not reference these additional Ares Management Corp. power holdings in NYISO.

The fact this consortium of four private equity firms and one bank emerged from Empire Generating's bankruptcy demonstrates that the NYISO market is working as designed. Bankruptcies are extremely common in all FERC-jurisdictional power markets, with new owners taking over bankrupt assets in an effort to run the facility more efficiently than her predecessor. U.S. corporate bankruptcy laws are designed to prioritize and accommodate the financial needs of whatever new owner emerges from the process.

A new owner acquiring a power plant out of bankruptcy is obtaining the asset at a steep discount relative to other means of acquisition. Therefore, the costs to operate Empire Generating are less than comparable facilities. As a result, it is reasonable to assume that the five Empire Generating owners enjoy a financial advantage relative to comparable competitors. Operating a unit out of bankruptcy could be considered its own form of subsidy. Of course, complainants have forced us into these assumptions since they have failed to provide any detailed balance sheet data as part of their complaint.

⁴ Docket No. EC19-99.

⁵ June 24, 2020 *Updated Market Power Analysis*, FERC Docket No. ER11-3861-015.

The five Empire Generating owners are blaming the NYISO market for the underperformance of their newly-acquired asset. But perhaps the focus should be less on NYISO market rules and more on the fact that the five Empire Generating owners appear to have badly miscalculated the risk associated with their new acquisition. Or perhaps the plan all along was to emerge from bankruptcy and challenge NYISO market rules in an effort to direct additional financial payments to themselves. Regardless, millions of hard working New York families should not be financially responsible because four private equity funds and a bank did a poor job managing risk.

While the owners of Empire Generating rail against their perception of subsidies for zero emission resources, their facility has been the recipient of generous state and local largess. In 2010, a special **\$81.5 million** state tax credit from the State of New York was provided to Energy Capital Partners as a direct cash subsidy for the power plant's construction, with the state piling an additional \$5.4 million state tax credit to clean up the former industrial site on which the facility is located.⁶ So absent the special subsidies, Empire Generating may have never been built.

In addition to the \$86.9 million in state tax credits, Empire Generating negotiated a sweetheart property tax deal with the Rensselaer County Industrial Development Agency in 2007 which allows Empire Generating to provide promised payment-in-lieu of taxes (PILOT) in exchange for the Agency relieving it of much of its property tax liability—taxes that would normally fund public schools. Despite the fact that the PILOT payments represent a significant subsidy compared to if Empire Generating were subject to full property tax liability, Empire Generating petitioned the Agency in 2019 to shave more than \$10.5 million off its promised PILOT property tax agreement. While the Rensselaer County Industrial Development Agency approved a Stipulation Agreement in December 2019 that extends the current PILOT program, the PILOT payments are not guaranteed because the contract lacks any financial assurance on future payments should Empire face financial problems—and it is unclear whether Empire will continue its efforts to seek a multi-million dollar subsidy in the form of

⁶ Brian Nearing, "Rensselaer power plant owners seek multimillion-dollar tax cuts," *The Albany Times Union*, April 23, 2019, www.timesunion.com/business/article/Rensselaer-power-plant-owners-seek-13788729.php

reduced payments to the local school district.⁷ Indeed, a 2018 report by the Office of the New York State Comptroller concluded that Empire’s generous PILOT tax agreement was one of only a handful of “Significant Exemptions for Business Purposes and Private Power-Generating Facilities” in the entire state.⁸ Empire’s cries of “unfair subsidies” appears to be an example of the pot calling the kettle black.

Cricket Valley Energy Center LLC

Cricket Valley Energy Center LLC operates a more than 1,000 MW natural gas power plant in Dover, NY, which began construction in 2017 and just became operational this year. It is owned by a group of foreign entities, including the national government of Japan, which controls nearly 11% of the power plant—which means a foreign government has paid for a share of the complaint.

The October 14 complaint features a section *Description of Complainants* which, in its depiction of Cricket Valley Energy Center LLC, directs the reader to Footnote 7 which details dockets of interest regarding the ownership of Cricket Valley Energy Center LLC, including the Commission order granting market-based rate authority.⁹ The FERC order notes “that Cricket Valley is jointly owned by Advanced Power AG, which is owned by four individuals, and Chubu Electric Power Co. Inc. and TEPCO Fuel and Power, Incorporated.” [at page 2].

A 50/50 venture between Tokyo Electric Power Company (the Japanese national government controls 25% of Tokyo Electric Power Company) and Chubu Electric Power Co., Inc. controls 86.57% of Cricket Valley, with Switzerland-based Advanced Power AG owning 13.4%.¹⁰

The identities of the four owners of Advanced Power are concealed from the public in the original March 8, 2019 application for market-based rate authority—marked privileged in confidential Attachment E, *Advanced Power AG’s Upstream Owners*. Cricket Valley justifies the non-public treatment of the identities of the four

⁷ www.discoverrenewables.com/wp-content/uploads/2019/12/Resolution-Approving-Execution-of-Stipulation-Agreement-Empire-Generating-Project.pdf

⁸ www.osc.state.ny.us/files/local-government/publications/pdf/property-tax-exemptions.pdf

⁹ Docket No. ER19-1215-001, *Cricket Valley Energy Ctr., LLC*, issued May 7, 2019.

¹⁰ June 29, 2020 *Updated Market Power Analysis*, at pages 4-5, Docket No. ER19-1215-002.

owners of Advanced Power, noting that the names of the owners are “highly sensitive commercial information that is not generally available to the public” (at page 2).

But the Advanced Power public web site lists its four “Founding Shareholders” as Dr. Martin Giesen, Thomas E. Spang, Peter Ramm and Martin Bashall.¹¹ These individuals are the likely four owners of Advanced Power, which would appear to contradict the companies claim that their identities are “highly sensitive commercial information.” When Cricket Valley cannot recognize the distinction between “highly sensitive commercial information” and freely-available information on a public web site, than it is unsurprising the company is struggling to earn income in excess of its costs and debt service.

The foreign owners of Cricket Valley, while attacking what they claim to be unfair subsidies provided to zero emission resources, have been the recipients of over \$100 million in tax breaks from New York government. A September 2018 *Audit Report* by the Office of the Dutchess County Comptroller reveals that Cricket Valley obtained over **\$100 million** in property tax exemptions.¹² Again, Cricket Valley’s claim that zero emission resources receive unfair subsidies ignores their own nine figure subsidy courtesy of New York taxpayers.

Respectfully submitted,

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¹¹ <https://advancedpower.ch/team/board-of-directors/>

¹² <http://test1.dutchessny.gov/Departments/Comptroller/Docs/Audit-Report-on-Dutchess-County-LDC-IDA-September-27-2018.PDF>, at page 23.