

173 FERC ¶ 61,129
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee and Richard Glick.

Virginia Electric and Power Company

Docket No. ER20-2759-000

ORDER ON WAIVER REQUEST

(Issued November 6, 2020)

1. On August 27, 2020, pursuant to Rules 207(a)(5) and 212 of the Commission's Rules of Practice and Procedure¹ and section 309 of the Federal Power Act (FPA),² Dominion Energy Services, Inc., on behalf of Virginia Electric and Power Company, d/b/a Dominion Energy Virginia (Dominion), submitted a request for a waiver of, or remedial relief from, the requirements of the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (OATT) and the PJM Reliability Assurance Agreement (RAA) related to PJM's calculation of the equivalent demand forced-outage rate (EFORd) of certain Dominion resources for the period of October 1, 2019 to September 30, 2020. As discussed below, we grant Dominion a limited waiver to allow PJM to omit certain pandemic-related outage data for the period March 22, 2020 through September 30, 2020 when calculating the final EFORd values for the resources identified by Dominion, in anticipation of the Third Incremental Auction for the 2021/2022 delivery year.

I. Background

2. Following the Base Residual Auction³ for a delivery year three years in the future, PJM conducts three Incremental Auctions in which both PJM and market participants submit buy bids and sell offers for that same delivery year. With respect to buyers, one purpose of the Incremental Auctions is to allow resources to procure additional capacity to meet their supply obligations for the delivery year. A resource might need to do this in the Third Incremental Auction because the resource's final EFORd value calculated by

¹ 18 C.F.R. §§ 385.207(a)(5), 385.212 (2020).

² 16 U.S.C. § 825h.

³ We note that capitalized terms not defined herein are defined in the PJM OATT or RAA.

PJM is higher than anticipated.⁴ EFORd is a measure of the probability that a resource will not be available due to forced outages or forced deratings when there is a demand on the resource to generate energy.⁵ A resource's EFORd is higher than expected when the resource experiences forced outages to a greater extent than expected during the defined measurement period. Capacity that resources can supply after accounting for their forced outages (by using the EFORd value) is called "unforced capacity."⁶ This is the capacity by which resources meet their supply obligations.

3. The Third Incremental Auction occurs in the February before the June 1 start of the delivery year. According to both the OATT and PJM Manual 18, by November 30 of the year preceding the delivery year, PJM will establish the final EFORd values it will apply to capacity resources in the Third Incremental Auction.⁷ Relevant here is the 2021/2022 delivery year, for which the Third Incremental Auction is scheduled to begin February 22, 2021, and for which EFORd values need to be calculated by November 30, 2020.

4. According to RAA, Schedule 5, and OATT, Attachment DD, section 5.6.1(c)(iii), PJM's calculation of the EFORd values to be applied to capacity resources in the Third Incremental Auction will be based on the outages experienced by resources in the 12-month period ending the September 30 that precedes the auction.⁸ Thus, for the upcoming Third Incremental Auction, PJM is obligated to use outage data from October 1, 2019 to September 30, 2020.

⁴ See PJM, Intra-PJM Tariffs, OATT, Attach. DD, § 5.4 Reliability Pricing Model Auctions (5.0.0), § 5.4(d) ("The need to purchase replacement Capacity Resources may arise for any reason, including but not limited to . . . [an] EFORd increase . . .").

⁵ PJM Manual 22: Generator Resource Performance Indices, § 3.1 (2020).

⁶ Specifically, the RAA defines "Unforced Capacity" as "installed capacity rated at summer conditions that is not on average experiencing a forced outage or forced derating, calculated for each Capacity Resource on the 12-month period from October to September without regard to the ownership of or the contractual rights to the capacity of the unit." PJM, Intra-PJM Tariffs, RAA, art. 1 – Definitions (31.0.2).

⁷ PJM, Intra-PJM Tariffs, OATT, Attach. DD, § 5.6 Sell Offers (11.0.0), §5.6.1(c)(iii) ("[t]he EFORd applied to the Third Incremental Auction will be the final EFORd established by [PJM] six (6) months prior to the Delivery Year."); PJM Manual 18: PJM Capacity Market, § 4.2.5 (2020).

⁸ PJM, Intra-PJM Tariffs, RAA, Schedule 5 (2.0.0); PJM, Intra-PJM Tariffs, OATT, Attach. DD, § 5.6 Sell Offers (11.0.0).

5. RAA, Schedule 5(B), precludes the exclusion of outside management control (OMC) events from EFORd calculations. OMC events are defined by the North American Electric Reliability Corporation (NERC) and include events such as terrorism and acts of nature.⁹ NERC added pandemics to the list of OMC events in April 2020.¹⁰

II. Filing

6. Dominion filed a request for limited waiver of, or remedial relief from, RAA, Schedule 5, and OATT, Attachment DD, sections 5.6.1. and 6.6, for certain Dominion capacity resources.¹¹ Dominion claims that these resources experienced extended forced outages directly as a result of the pandemic-related health and safety restrictions adopted by the Commonwealth of Virginia and implemented by Dominion. Dominion requests that the Commission: (1) waive the requirement that PJM include in Dominion's EFORd calculation for the Third Incremental Auction the forced-outage periods that were a direct result of the pandemic for the period of October 1, 2019 to September 30, 2020; or (2) grant remedial relief pursuant to FPA section 309 to ensure that the unforced capacity of the resources is not impacted by Dominion's inability to bring the resources back online earlier due to the pandemic.¹² Dominion states that if the Commission grants the requested relief, Dominion commits to working with PJM in determining the resulting impact on the resources' EFORd calculation.¹³

7. Dominion states that the pandemic prevented it from bringing the resources back online in a timely manner from planned, maintenance, or forced outages. First, Dominion states that Virginia's restrictions prevented it from promptly remedying the

⁹ NERC, 2020 Generating Availability Data System Data Reporting Instructions, January 2020 at Appendix K: Outside Management Control, https://www.nerc.com/pa/RAPA/gads/DataReportingInstructions/GADS_DRI_2020.pdf (describing and listing OMC codes).

¹⁰ See NERC, "Pandemic Cause Code and Examples for GADS Reporters," https://www.nerc.com/pa/RAPA/gads/DataReportingInstructions/GADS_Pandemic_2020_0428.pdf (describing NERC's creation of a new cause code for the pandemic).

¹¹ Transmittal at 1. Dominion also requests waiver of any other PJM OATT provisions that may be deemed applicable to its request and the relief sought. *Id.* at 1 n.4. Dominion filed both a public version of its transmittal and a version for which it seeks privileged treatment. All citations to the transmittal are to the public version. In the privileged version Dominion identifies the resources for which it seeks relief.

¹² *Id.* at 17.

¹³ *Id.* at 9 n.24.

cause of some of the resources' existing forced outages, thereby extending those outages. Second, Dominion states that Virginia's restrictions prevented it from resolving the other resources' ongoing planned or maintenance outages and therefore extended these outages into PJM's Peak Period Maintenance Season, which began June 8, 2020. Dominion states that, because it was unable to bring these resources online before that time, under PJM rules, PJM treated those resources as if they were in forced outages.¹⁴

8. Dominion elaborates that, on March 24, 2020, the governor of Virginia issued an executive order that, among other restrictions, banned gatherings of 10 or more people effective March 24, 2020, and that in response to these "Phase 1" restrictions, Dominion implemented social distancing, a remote work directive, 24x7 rotating shifts, scaled-back maintenance teams, and other restrictions. Dominion states that although regions of Virginia entered Phase 2 at different times, Dominion returned to maintenance operations under the "new normal" effective June 8, 2020.¹⁵

9. Dominion further explains that, although Virginia deemed electric utilities essential businesses, from March 22, 2020 (the beginning of Phase 1) through June 8, 2020 (the beginning of Dominion's implementation of Phase 2 and the easing of restrictions), nonessential workers and contractors working to bring certain Dominion resources in outages back online were unable to safely remain onsite, significantly extending the duration of the outages. Dominion states that it was largely prevented from working to bring certain resources back online due to the inability to social distance and the unavailability of lodging and necessary materials and supplies to support workers and contractors.¹⁶ Dominion also notes the inability of contractors to travel and obtain meals and lodging.¹⁷

10. Dominion states that absent a waiver, the amount of unforced capacity these resources can supply in the 2021/2022 delivery year will artificially decrease, forcing Dominion to secure replacement capacity in the Third Incremental Auction to meet its capacity supply obligations even though its resources have a demonstrated capability to meet its capacity needs. Dominion argues that such a result is contrary to the public interest and would increase the cost to Dominion's wholesale and retail customers.¹⁸

¹⁴ *Id.* at 2, 7-8.

¹⁵ *Id.* at 5-7 & n.14 (citing *Dibble Aff.* at 7).

¹⁶ *Id.* at 6-7 (citing *Dibble Aff.* at 7).

¹⁷ *Id.*, *Dibble Aff.* at 3.

¹⁸ *Id.* at 2, 9 (citing *Dibble Aff.* at 17).

11. Dominion argues that its waiver request meets the Commission's four waiver criteria. First, Dominion argues that its waiver request is made in good faith, necessitated by the pandemic, and not due to Dominion's own acts or omissions. Second, Dominion argues that the request is limited in scope as it is a one-time waiver for a short period of time. Third, Dominion argues that waiver would address a concrete problem by preventing the unforced capacity of certain resources being artificially decreased. Finally, regarding whether the waiver does not have undesirable consequences, Dominion argues that waiver will maintain the *status quo* and that no PJM market participant should expect to benefit from the pandemic by selling replacement capacity to Dominion.¹⁹

12. Dominion also notes that, on March 19, 2020, the Commission issued a notice stating that "entities may seek waiver of the Commission's orders, regulations, tariffs and rate schedules, as appropriate, to address needs resulting from steps they have taken in response to the coronavirus."²⁰ Dominion also notes that, on April 2, 2020, the Commission issued a policy statement stating that "[e]ntities regulated by the Commission have had to take unprecedented actions in response to the emergency conditions, including directing staff to work remotely for an extended period, which may disrupt, complicate, or otherwise change their normal course of business operations." Dominion notes that the Commission recognized that due to the pandemic, "regulated entities may need to implement new procedures, update and/or suspend existing procedures, and take other measures to safeguard the business continuity of their systems."²¹

III. Notice and Responsive Pleadings

13. Notice of PJM's filing was published in the *Federal Register*, 85 Fed. Reg. 55,008 (Sept. 3, 2020), with interventions and protests due on or before September 17, 2020. Timely motions to intervene were filed by Calpine Corporation, LS Power Associates, L.P., Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM (Market Monitor), Old Dominion Electric Cooperative (ODEC), PJM, and PJM Power Providers Group (P3).

¹⁹ *Id.* at 12-14.

²⁰ *Id.* at 11 (citing Extension of Non-Statutory Deadlines, Docket No. AD20-11-000, Notice Granting Extension of Time (March 19, 2020)).

²¹ *Id.* at 11-12 (citing *Business Continuity of Energy Infrastructure*, 171 FERC ¶ 61,007, at P 1 (2020)).

14. On September 17, 2020, PJM and ODEC filed comments, and P3 filed a protest. On September 24, 2020, Dominion filed a motion for leave to answer and answer. On October 9, 2020, the Market Monitor filed a motion for leave to answer and answer.

A. Comments and Protest

15. PJM states that it is “willing to support” Dominion’s waiver request if Dominion submits additional facts to establish: (1) a direct causal connection between the pandemic and Dominion’s inability to return the resources from outage; and (2) a good faith effort by Dominion using commercially reasonable efforts to maintain its schedule.²² PJM is concerned that, without this evidence, granting Dominion’s waiver request would leave the Commission with “no limiting principle surrounding such waiver requests from market impacts.”²³ PJM argues that such a ruling would “justify blanket waivers” to virtually all units in the PJM region. PJM states that, if the Commission is inclined to grant such broad relief without unit-specific evidence, then it should provide a blanket nationwide waiver rather than deal with numerous individual waiver requests.²⁴

16. PJM argues that Dominion provides no unit-specific facts to support the claim that honoring the Virginia governor’s orders rendered impossible the timely completion of the maintenance outages or the use of commercially viable mitigation measures. PJM also argues that Dominion provides no evidence of whether the outage delays could have been avoided through reasonable efforts. PJM asserts that the general governmental restrictions on which Dominion relied are insufficient, and that the Commission should require Dominion to demonstrate that the Virginia executive orders and emergency declarations did not provide options for Dominion’s regulated utility operations, contractors, or supply chain vendors to complete essential tasks while still protecting worker safety.²⁵

17. PJM argues that Dominion has not shown that its waiver request is limited in scope. PJM contends that even if Dominion shows causation between the pandemic-

²² PJM Comments at 3. PJM also states, “To be clear PJM is not opposed to this waiver, but requests that the Commission require Dominion to submit additional information to support it.” *Id.* at 5.

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ *Id.* at 3-4.

related restrictions and the outage extensions, the pandemic may have future impacts. Therefore, PJM states, Dominion should address what steps it is taking going forward.²⁶

18. PJM also describes its communications with generators in general during the pandemic. PJM states that a document posted on its website explains that pursuant to RAA, Schedule 5(B), PJM does not allow the exclusion of NERC OMC outages from the calculation of EFORd values, and that unit owners seeking to have pandemic-related work delays excluded from PJM's EFORd calculation should submit a waiver request to the Commission.²⁷

19. PJM also states that it responded to stakeholder requests for a waiver of the limitations in the PJM manuals for the Peak Maintenance Period. In other words, PJM explains, it encouraged unit operators to seek additional flexibility for when they conducted their outages. PJM states, however, that in response to requests for PJM to relax the outage scheduling rules to permit the scheduling of planned outages in the summer period months, PJM made clear in discussions with stakeholders that there could be reliability concerns for summer operations if PJM granted such requests.²⁸

20. ODEC filed comments in support of the waiver request but argues that the waiver should apply to the entirety of the subject resources, including co-owners' share of the resources. ODEC states that PJM establishes a single EFORd for a generation resource. However, when a single resource has separate owners for portions of the resource, those portions are treated separately for purposes of participation in PJM's capacity auctions. ODEC states that, for the same reasons as set forth in Dominion's waiver request, waiver of the EFORd calculation requirements is warranted for the entirety of the resources that are the subject of the waiver request. Otherwise, ODEC states, the portion of the resource owned by another entity will be subject to the EFORd requirement, and the resource owner will face the same unnecessary procurement of additional capacity and resulting costs to be borne by load.²⁹

21. P3 opposes the waiver request, arguing that "retroactive relief" would be discriminatory to all other generators that faced similar conditions and that the

²⁶ *Id.* at 4.

²⁷ *Id.* at 3 (citing "PJM COVID-19 Working Reference Document Approach to Business Rule Issues," <https://www.pjm.com/-/media/committees-groups/pandemic/postings/pjm-coronavirus-waiver-approach.ashx?la=en>).

²⁸ *Id.*

²⁹ ODEC Comments at 10-11.

circumstances facing Dominion were not unique. P3 states that if the Commission considers such a waiver, it should be for all generators going forward.³⁰

B. Answers

22. Dominion disagrees with PJM's assertion that Dominion did not show a causal link between the pandemic and the extended outages. Dominion argues that PJM appears to be asking the Commission to evaluate the specific decisions related to each resource to adjudicate whether Dominion made the right public health choices, placing an unwarranted burden on the Commission. Dominion argues that it should not be penalized for taking actions to protect the health and safety of its workers, contractors, and the public.³¹

23. Dominion supports ODEC's request for the waiver to apply to the entirety of the subject resources, including co-owners' share of the resources.³²

24. In response to P3's argument that waiver would be discriminatory to all other generators, Dominion argues that other generators presumably did not need relief, so the harm that P3 alleges is non-existent or speculative. Dominion asserts that its request should be judged on its merits and the unique facts and circumstances of its request.³³

25. The Market Monitor argues that Dominion's waiver request is not limited in scope because Dominion's logic could extend to all forced outages, and thus no limiting principle applies. The Market Monitor explains that many circumstances exist under which generation owners could argue that the forced outage experienced during the prior year will not be repeated during the delivery year.³⁴ The Market Monitor also argues that Dominion has not shown that waiver would address a concrete problem because Dominion has not shown that the PJM market rules did not operate as intended. The Market Monitor notes that the rules intentionally do not allow for events outside of management control to be excluded from EFORd calculations and assign the risks to unit operators.³⁵ Finally, the Market Monitor argues that granting the waiver request would

³⁰ P3 Protest at 5.

³¹ Dominion Answer at 3-5.

³² *Id.* at 2.

³³ *Id.* at 5-6.

³⁴ Market Monitor Answer at 2-3 (citing P3 Protest at 4).

³⁵ *Id.* at 3.

have undesirable consequences because it would result in subjective, discriminatory, and inconsistent application of the rules.³⁶

IV. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2020), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept Dominion's and the Market Monitor's answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

28. As discussed below, we grant Dominion a limited waiver of PJM tariff provisions to allow PJM to omit the pandemic-related outage data identified by Dominion when calculating the final EFORd values for the resources identified by Dominion, in anticipation of the Third Incremental Auction for the 2021/2022 delivery year.³⁷ Specifically, we grant waiver of the applicable provisions in RAA, Schedule 5, and in OATT, Attachment DD, sections 5.61 and 6.6, as well as any other tariff provisions that PJM may deem applicable to the relief sought.

29. As a preliminary matter, contrary to P3's assertion that Dominion's waiver request is retroactive, we find that Dominion's waiver request is prospective. Dominion is seeking a waiver of PJM's future obligation to calculate the EFORd values for the period of October 1, 2019, to September 30, 2020, to be applied to capacity resources in the Third Incremental Auction that begins February 22, 2021.

30. The Commission has granted waiver of tariff provisions where: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming

³⁶ *Id.* at 4 (citing P3 Protest at 4).

³⁷ *See* Transmittal, Dibble Aff. at 10-17 (describing the pandemic-related outage extensions associated with Dominion's waiver request).

third parties.³⁸ We find that the circumstances of Dominion's waiver request satisfy these criteria.

31. First, we find that Dominion acted in good faith. Dominion has sufficiently demonstrated that the outage extensions directly resulted from the impact of the pandemic and Dominion's efforts to ensure the health, safety, and welfare of its workers and contractors, and were in accordance with state mandates. We decline to second-guess the decisions Dominion made in this respect.

32. Second, we find that the requested waiver is limited in scope because it is a one-time revision to the EFORD calculation for certain, specifically identified resources in only the Third Incremental Auction for the 2021/2022 delivery year. We disagree with the Market Monitor's argument that the requested waiver is not limited in scope because the risk that a range of factors may impair the operation of a generating unit is very broad, will persist indefinitely, and could extend to forced outages taken for any reason. As stated above, we find that the extended outages during the time period for which we grant waiver here were the direct result of the unforeseen circumstances of the unprecedented COVID-19 pandemic, and our grant of waiver is based on those unique facts and circumstances. Also, to reiterate, our grant of waiver is limited to Dominion's identified outage data for the Third Incremental Auction for the 2021/2022 delivery year.

33. Third, we find that granting the requested waiver addresses the concrete problem of Dominion's low unforced capacity values as a result of Dominion's response to the pandemic and related state mandates, which, absent waiver, will require Dominion to procure unnecessary capacity in the Third Incremental Auction, raising costs for Dominion's customers. The Market Monitor contends that Dominion has not shown a concrete problem exists because the market rules operated as intended, that is, RAA, Schedule 5(B), does not allow for the exclusion of OMC events from EFORD calculations, that the decision not to allow excuses was intentional, and that unit operators must manage assigned risks in accordance with the established rules. We find the arguments regarding the intent of these market rules unpersuasive here, where Dominion's waiver request raises the existence of, and addresses, a concrete problem, i.e., the impacts of the unforeseen circumstances of the COVID-19 pandemic. We also note that, on its website, PJM instructed unit owners seeking to have pandemic-related work delays excluded from PJM's EFORD calculation to submit a waiver request to the Commission.

34. Finally, we find that granting the waiver will not have undesirable consequences, such as harming third parties. P3 and the Market Monitor claim that granting the waiver

³⁸ See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

request would result in undesirable consequences by unfairly discriminating against other operators that elected to manage plant outages during the pandemic without extensions, or delayed outages with the accompanying risks associated with such delay. Auction participants may file a similar waiver request, if those entities believe such requests are appropriate.

35. We decline to extend the grant of waiver to any other entities with an ownership interest in any of the resources identified by Dominion, as ODEC requests. If those entities believe such a waiver is appropriate, they may file a waiver request with the Commission.

The Commission orders:

Dominion's waiver request is hereby granted to allow PJM to omit the pandemic-related outage data identified by Dominion when calculating the final EFORd values for the resources identified by Dominion, in anticipation of the Third Incremental Auction for the 2021/2022 delivery year, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.