UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, Homer City Generation, L.P., NRG Power Marketing LLC, GenOn Energy Management, LLC, Carroll County Energy LLC, C.P. Crane LLC, Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean Energy, LLC and Panda Power Generation Infrastructure Fund, LLC,	)	Docket Nos. EL16-49-000
v.	)	
PJM Interconnection, L.L.C.	)	
PJM Interconnection, L.L.C.	)	ER18-1314-000 ER18-1314-001
PJM Interconnection, L.L.C.	)	EL18-178-000 (Consolidated)

MOTION FOR SUPPLEMENTAL CLARIFICATION OF PJM INTERCONNECTION, L.L.C.

PJM Interconnection, L.L.C. ("PJM"), pursuant to Rule 212 of the Federal Energy Regulatory Commission's ("Commission") procedural rules,[1] submits this *Motion for Supplemental Clarification* of the Commission's June 29, 2018 order in this proceeding.[2]

[1] 18 C.F.R. § 385.212.

[2] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) ("June 29 Order"), *reh'g pending.* On July 30, 2018, PJM sought clarification and rehearing of the June 29 Order. The issues PJM raised in such request remain pending and are not to be superseded by this Motion for Supplemental Clarification.

Through this Motion PJM sets forth its intention to run the Base Residual Auction ("BRA")[3] for the 2022/2023 Delivery Year in August of this year ("August 2019 BRA") under the currently-effective tariff provisions (*i.e.*, the existing capacity market rules) and, in addition, PJM seeks confirmation that, to the extent the Commission has not established a replacement rate prior to the August 2019 BRA, any replacement rate it later establishes would be applied prospectively and would not require PJM to rerun the August 2019 BRA.

In support, PJM shows as follows:

I. BACKGROUND AND PLANS FOR UPCOMING AUCTION

A. Procedural Status

On April 9, 2018, PJM submitted the Capacity Repricing Proposal and, in the alternative, an extension of the Minimum Offer Price Rule ("MOPR")[4] to address supply-side state subsidies and their impact on determining just and reasonable prices in the PJM capacity market. In its June 29 Order, the Commission rejected both the Capacity Repricing Proposal and the proposed MOPR extension, but found, pursuant to FPA section 206,[5] that PJM's tariff is unjust and unreasonable because it fails to protect the capacity market from the price-suppressive impacts of out-of-market support to new and existing capacity resources.[6] However, the Commission did not fix a new rate at that time and instead instituted a paper hearing for parties to "address the just and reasonable replacement rate."[7]

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[3] Capitalized terms not defined herein shall have the meaning as contained in the PJM Open Access Transmission Tariff ("Tariff"), the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. ("Operating Agreement"), or the Reliability Assurance Agreement Among Load Serving Entities in the PJM Region.

[4] *Capacity Repricing or in the Alternative MOPR-Ex Proposal: Tariff Revisions to Address Impacts of State Public Policies on the PJM Capacity Market of PJM Interconnection*, L.L.C., ER18-1314-000 (Apr. 9, 2018).

[5] 16 U.S.C. § 824e.

[6] June 29 Order at P 5.

[7] *Id.* at P 172.

Pursuant to the paper hearing procedures, parties submitted various comments on the alternative approaches for addressing the issues, including the Commission's suggested proposals around MOPR and a Fixed Resource Requirement alternative. The Commission has, as of the date of this filing, not issued a subsequent order in the proceeding. Thus, no replacement rate is yet in effect. Moreover, the Commission approved PJM's request to run the 2019 BRA in August instead of May, 2019.[8] PJM seeks to harmonize these Orders and provide certainty to the marketplace by indicating its intention to run the August 2019 BRA under the existing rules and, in addition, seeks this clarification, consistent with applicable law as detailed below, to provide certainty to the marketplace given the lack of a replacement rate.

B. Absent A Commission Order to the Contrary, PJM Will Conduct the August 2019 BRA Pursuant to the Currently Effective Rules

Because the Commission has not yet established a replacement rate and PJM has commenced its BRA processes, PJM will operate the August 2019 BRA under its currently effective filed rate, notwithstanding the Commission's determination that it is unjust and unreasonable.[9] Simply, without a replacement rate, or any order of the Commission otherwise, as demonstrated below, applicable law directs that PJM to operate under the existing Tariff. PJM already has begun the pre-auction processes as those processes leading up to the auction require preparation and submittals beginning months in advance.[10] The rules currently in effect are those MOPR rules from December 2013 that were required to be reinstated as a result of the

[8] *PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,153 (2018).

[9] This position is consistent with PJM's March 11, 2019 informational letter. *See Informational Filing on PJM's Plan in Preparation for the 2022/2023 Base Residual Auction*, Docket Nos. EL16-49-000, ER18-1314-001, EL18-178-000 (Mar. 11, 2019) At that point in time, PJM advised Capacity Market Sellers and the Commission that it would operate a dual path of accepting information under the both the existing rules and the proposed rules. Based on feedback we received on the dual path approach, PJM has since suspended that approach.

[10] *See* note 15, *infra*.

NRG remand order[11] in January, 2018 as contained in Tariff, Attachment DD, section 5.14(h).[12] As shown in Section II.B. below, this course of action by PJM is entirely in keeping with the filed rate doctrine as no replacement rate has been set by the Commission at this time.

II. THE COMMISSION SHOULD CLARIFY THAT IT WILL NOT REQUIRE RERUNNING OF THE AUGUST 2019 BRA

A. Certainty is Necessary for the Upcoming BRA

PJM has considered various options on how to move forward in light of the current circumstances where (i) its current rules have been found to be unjust and unreasonable, (ii) there is no replacement rate in effect, and (iii) it is preparing for its three-year forward capacity auction that requires market participants, particularly new entrants to make certain irrevocable commitments – both in the jurisdictional market and related commercial agreements (e.g., equipment purchases, construction contracts). In weighing its options, PJM's underlying goal has been to promote certainty. By certainty, PJM seeks to retain the forward nature of the auction which is critical to investment and retirement decisions by resource owners, ensure the rules are known before running the auction, and uphold market confidence that the results of the auction will not be later disturbed.

When establishing RPM, PJM explained, and the Commission recognized, that a forward capacity market would provide the forward price signals to incent investment far enough in

[11] *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017), *order on remand, PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252 (2017).

[12] *PJM Interconnection, L.L.C.*, Compliance Filing Concerning PJM's Minimum Offer Price Rules, Docket No. ER13-535-005 (Jan. 9, 2018). Under those rules, all new Generation Capacity Resources are subject to a MOPR floor price – albeit the Net Asset Class Cost of New Entry that is used in the MOPR floor price is set at zero for nuclear, coal, IGCC, hydroelectric, wind or solar facilities. While there is no longer self-supply or competitive entry exemptions, there is a unit-specific exception process for resources which can show their costs are lower than the established MOPR floor price.

advance for such new entry to come in to service by the relevant Delivery Year.[13] To attract capital, new resources rely on clearing an auction to establish the viability of the resource in PJM's competitive market. Establishing which resources clear the auction in advance provides load-serving entities and their customers predictability in their capacity charges. Knowing which resources have cleared on a forward basis also is important for state standard offer service programs, as the Joint Consumer Advocates pointed out to the Commission just last week.[14]

It is critical for all market participants – load, supply, states, consumer advocates, PJM, investors, et al. – to have confidence that the outcome of the auction is not subject to change. While critical for all market participants, uncertainty can be especially challenging to new entrants that must make material related commercial commitments in order to satisfy their capacity market obligations. Among any market design objectives, confidence in the finality of the auction results should be regarded as a necessary prerequisite. Accordingly, the PJM capacity market and the broader PJM community making commercial decisions based on this market, would benefit tremendously from any confidence the Commission can offer that outcomes and expectations settling with the close of the August 2019 BRA will not be subject to disruption or rerunning of results.

Accordingly, the Commission should clarify that its intention under these unusual circumstances is to craft a prospective replacement rate and not make the results of the August

[13] *See, e.g., PJM Interconnection, L.L.C.* at 8-9, Docket No. ER05-1410-000 and EL05-148-000 (Aug. 31, 2005); *PJM Interconnection, L.L.C., Initial Order on Reliability Pricing Model*, 115 FERC ¶ 61,079 at PP 21, 24 (2006); *PJM Interconnection, L.L.C., Order Denying Rehearing and Approving Settlement Subject to Conditions*, 117 FERC ¶ 61,331 at P 47 (2006).

[14] *PJM Interconnection, L.L.C. and Calpine Corporation, et al., v. PJM*, Docket Nos. EL18-178-000, ER18-1314-000 & 001, and EL16-49-000, (Consolidated), Letter of the Joint Consumer Advocates at 2 (filed Apr. 2, 2019).

2019 BRA subject to refund.[15] In any event, PJM wishes to make clear to the stakeholder community that even without Commission action on this motion (or denial of this Motion requesting clarification that the Commission would not order refunds of the results of the August, 2019 BRA based on its prior ruling in this docket), PJM will proceed under the current rules because, as noted, it is obligated to follow its filed rate.[16]

B. Applicable Law Does Not Compel the Commission to Order Rerunning of the August 2019 BRA as Part of its Remedy in this Case.

1. The replacement rate should be implemented prospectively.

When the Commission finds pursuant to Section 206(a) of the FPA that rules affecting a rate, charge or, classification of service to be unjust and unreasonable, it is required to fix the same to be *thereafter* observed.[17] In other words, it may not set the new rules to be effective retroactively. In *Electrical District No. 1*, the court considered whether once a current rule is found to be unjust and unreasonable it would be unlawful for it to continue in effect, but found that is not the expectation:

> The moment of required and authorized Commission action … is to be determined not on the basis of an abstract principle such as "once unlawfulness is known agency action must be taken," but rather on the basis of the procedures that the statute establishes for adjusting unlawful rates. And those procedures are not at all ambiguous: "Whenever the Commission . . . shall find that any rate. . . collected by any public utility . . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate . . . *to be thereafter observe and in force, and shall fix the same by order*.[18]

[15] Should the Commission issue a Final Order crafting that replacement rate between now and the August 2019 BRA, PJM would then report to the Commission through its compliance filing, the feasibility of running the auction under those newly crafted rules in August of 2019.

[16] Should the Commission not wish PJM to run the August 2019 BRA under the existing rules, PJM respectfully asks that the Commission affirmatively and clearly indicate same to PJM in its ruling on this Motion.

[17] 16 U.S.C. 824e(a). *See also City of Anaheim v. FERC*, 558 F. 3d 521, 523 (D.C. Cir. 2009) ("*City of Anaheim*"); *Elec. Dist. No.1 v. FERC*, 774 F. 2d 490 (D.C. Cir. 1985) ("*Electrical District No. 1*").

[18] *Electrical District No. 1* at 492 (internal citations omitted, emphasis in original).

Likewise, here, just because the Commission has found PJM's current MOPR rules are unjust and unreasonable, until the replacement rate is instituted, the filed rate is in effect allowing PJM or any public utility to continue to operate under those rules until new rules are established and an effective date for those new rules to be followed established by the Commission. Indeed, rate predictability is the essence of the "filed rate" doctrine which ensures the utility only charges the rate which is currently on file with the Commission.[19] In the absence of the Commission establishing the replacement rate, the only lawful rate PJM can operate under is its filed rate.

Even though the Commission established refund effective dates in this proceeding under FPA section 206(b), the Commission is not required to order refunds in all cases. In fact, the Commission recently clarified this point in a long-standing proceeding where its refund policy was front and center:

> The Commission's approach to refunds has instead been shaped by the way certain equitable considerations are typically associated with certain specific fact patterns. The term "general policy" does appear in Commission discussions of refunds, but it has not been used to refer to a broad policy that applies to refunds generally. Instead, it is a term that has always been associated with one specific factor that the Commission has considered when dealing with refunds, i.e., the presence or absence of overcharges that result in over-collection of revenue by the utility.
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> The Commission takes a different approach when addressing refund requests in cases where a cost allocation or rate design has been found to be unjust and unreasonable. Specifically, 'in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds.[20]

[19] *Id.*at 493. This court also found that the Commission's establishment of the principles around the replacement rate in the initial order was not enough to call the rate "fixed" because it would not provide any notice to wholesale purchasers around the cost of what they are receiving. *Id*. at 492-493. The same can be said here – as it was by the Joint Consumer Advocates in their recently letter. *See* n. 14, *supra*.

[20] *Louisiana Public Service Commission and City Council of New Orleans v. Entergy,* 155 FERC ¶ 61,120 at PP 20 & 25, n. 58 (2016) ("*LPSC Remand Order*") (footnotes omitted), *aff'd, Louisiana Pub. Serv. Comm'n v. FERC*, 883

(Cont'd . . .)

This follows from the text of FPA section 206(b) which provides refunds are warranted only when the "amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, [are] in *excess of those* which would have been paid under the just and reasonable rate . . . ."[21] In fact, on this basis in *City of Anaheim*, the court found refunds were not necessary where the complaint was that rates were too low and not too high:

> But § 206(b) applies in cases where the complainant is a *purchaser* alleging that the rates it paid were too high. That provisions permit FERC-ordered refunds "*of any amounts paid . . . in excess of* those which would have been paid under the just and reasonable rate." . . . By contrast, this case involves a complainant *seller* alleging that the rates it received were two low. In other words, the six cities were not making payments before February 13, 2007, "*in excess of* . . . the just and reasonable rate," which is the statutory precondition for a § 206(b) refund.[22]

The Commission should make a similar finding here where the MOPR rules were found unjust and unreasonable on the basis they were not protecting against the price suppressive impact of out of market payments to certain resources – in other words, the prices were too low. Given

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(. . . cont'd)
F. 3d 929, 932-933 (D.C. Cir. 2018) ("*LPSC IV*"). The following cases were cited in n. 58 of the *LPSC Remand Order*: *Portland Gen. Elec. Co.*, 106 FERC ¶ 61,193, at P 5 (2004) (accepting rate design change on a prospective basis); *Consumers Energy Co.*, 89 FERC ¶ 61,138, at 61,397 (1999) (same); *Union Elec. Co.*, 58 FERC ¶ 61,247, at 61,818 (1992) (Union Elec.) (same); *Commonwealth Edison Co*., 25 FERC ¶ 61,323, at 61,732 (1983) (Comm. Ed.); *accord Second Taxing Dist. of City of Norwalk v. FERC*, 683 F.2d 477, 490 (D.C. Cir. 1982) (Norwalk) (affirming determination to make rate design changes prospective only); *Cities of Batavia.* v. FERC, 672 F.2d 64 (D.C. Cir. 1982) (Batavia) (same)); *Occidental Chemical Corporation*, 110 FERC ¶ 61,378 at P 10 (stating that the "Commission's long-standing policy is that when a Commission action under Section 206 of the FPA requires only a cost allocation change, or a rate design change, the Commission's order will take effect prospectively"); *Commonwealth Edison Co*, 8 FERC ¶ 61,277, at 61,844 (1979) (stating that "any change of rate form due to modification in the demand ratchet or in the form of energy charging . . . should not be given effect in computing refunds, if any, due under this decision" because the utility "cannot retroactively collect more from any customer than has already been collected subject to refund, even though a redesigned rate presumably would show some customers should be charged more and others less than under the rates in effect subject to refund").,.

[21] 16 U.S.C.824e(b) (*emphasis added*).

[22] *City of Anaheim*, 558 F. 3d at 524, *internal citations omitted.*

that, there should be no finding that purchasers paid "in excess of" the just and reasonable rate and therefore no refund should be required.

2. The Commission has broad authority when establishing remedies and should clarify that it will not order a rerunning of the August 2019 BRA.

Nothing compels the Commission to upset settled auction results. The Commission should clarify that its intention under these circumstances is to apply any replacement rate only prospectively and to remove any uncertainty that the results of the August 2019 BRA may be subject to refund. That is because the Commission's authority is at its zenith when establishing remedies,[23] and it should exercise that discretion here and decline to upset the August 2019 BRA results after that auction is run. In determining whether a refund is required, the Commission will look at the equities such as how costs would be recovered as between the various customers and also will look at the fact that "customer firms [made] operational decisions in reliance on one set of rates [and] would be unable to undo those transactions retroactively in light of the new, corrected rates; a refund would, at least in part, pull the economic rug out from under those transactions."[24]

Similarly here, as noted above, certainty of auction results is absolutely essential. The exercise of refund authority will chill the results of this market, and could lead to new developers with new projects staying out of the market; skewing the impacts. New projects which might have obtained financing based on the results of the August 2019 BRA would be faced with the prospect of having to undo that financing and obtain replacement capacity or ultimately risk not being available in the delivery years as required.

[23] *See, e.g.*, *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967); *Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992).

[24] *See LPSC IV* at 933.

In short, little would be served to subject the upcoming auction to refund during this interim period before a final order. The Commission has routinely declined rerunning of the markets for these reasons.[25] It should similarly decline to do so here. Although PJM recognizes that in this case it is asking the Commission to make this clarification prior to its crafting the replacement rate, given the delays which have occurred in the determination of that replacement rate and the importance of a forward auction and market certainty to guide investment decisions, such a ruling at this time is entirely in keeping with the Commission's discretion in crafting a replacement rate (and the timing of the institution of same) and is called for given these unusual circumstances.

It bears noting that the only resources with ZECs as of the BRA held in May, 2018 cleared, and the clearing price in that zone remained consistent with levels observed in prior years. And, while renewable penetration is still expected in the near term, levels of participation are not expected to rise greatly from last year to this year.[26] As a practical matter, while the underlying issues in this proceeding – the price suppressive impacts resulting from out of market payments to resources in our capacity market – are real and need to be remedied,[27] as a matter of law and policy, until such remedy is in place, PJM will operate under the current rules.

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[25] A long line of cases confirms the Commission's broad discretion in matters involving remedies and refunds, generally, as well as in the specific context of addressing market settlements. *Towns of Concord v. FERC,* 955 F.2d 67, 76 (D.C. Cir. 1992) (describes the agency discretion at its "zenith" when the challenged action relates to the fashioning of remedies); *Midwest Indep. Trans. Sys. Operator, Inc*., 117 FERC ¶ 61,113 at PP 93-95 (2006) (where the Commission exercised its remedial discretion in declining to order prior period transactions unwound, noting the substantial uncertainty created by post-hoc disruption of market results); *Maryland Pub. Serv. Comm. v. PJM Interconnection*, L.L.C., 123 FERC ¶ 61,169 at P 49 (2008) ("in a case involving changes to market design, we generally exercise our discretion over remedies and do not order refunds that require re-running the market").

[26] Using the trends from the last several Base Residual Auctions and the percentage of eligible wind and solar resources that have previously chosen to offer, we would expect an increase in the range of 70 to 200MW of additional wind and solar resources that would otherwise be subject to the MOPR to offer into this auction.

[27] *See, e.g., Calpine Corporation, et al. v. PJM Interconnection, L.L.C.,* Motion to Lodge of LS Power Associates, L.P., Docket Nos. EL16-49-000, ER18-1314-000 & 001, EL18-187-000 (Apr. 5, 2019).

III. CONCLUSION

PJM requests that the Commission grant clarification of the June 29 Order as discussed herein. Even in the absence of the requested clarification, PJM will proceed with the August 2019 BRA as scheduled in August, 2019 under the current Tariff unless the Commission rules otherwise.

Respectfully submitted,

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Dated: April 10, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Audubon, Pennsylvania, this 10th day of April, 2019.

Jennifer Tribulski
Attorney for
PJM Interconnection, L.L.C.