

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

PJM Interconnection, L.L.C.

)

Docket No. ER13-535-000

**MOTION FOR LEAVE TO FILE A RESPONSE OUT OF TIME AND
RESPONSE OF THE ILLINOIS COMMERCE COMMISSION
TO THE PJM INTERCONNECTION, L.L.C. MOTION FOR ORDER ON REMAND**

Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.213, and the Notice of Extension issued on November 2, 2017, extending the response deadline to November 14, 2017, the Illinois Commerce Commission (“ICC”) hereby submits the following Motion for Leave to File a Response Out of Time and Response to the PJM Interconnection, L.L.C. (“PJM”) Motion for an Order on Remand filed on October 23, 2017, in the above-captioned docket (“PJM Motion”). The ICC filed a Notice of Intervention on December 13, 2012, and, therefore, is a party to the proceeding. This proceeding is on remand from the United States Court of Appeals for the District Columbia Circuit decision in *NRG Power Marketing, LLC v. FERC*.¹

I. MOTION FOR LEAVE TO FILE A RESPONSE OUT OF TIME

Pursuant to Rules 212 and 213 of the Commission Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.213, the ICC hereby submits this Motion for Leave to File a Response Out of Time to the PJM Motion in the above-captioned docket. Given the ICC’s administrative

¹ *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017) (“*NRG*”).

process, and state rules and regulations, it was unable to meet the November 14, 2017 deadline for filing a response to the PJM Motion.

The Commission may allow an untimely answer where there is no showing of any undue prejudice or delay.² With this brief Response, the ICC accepts the record to date and does not wish to disrupt or delay the proceedings. Rather, the ICC wishes to clarify the record and provide information that may be useful to the Commission in its decision-making process. Moreover, the scope of the proceedings could have implications in Illinois. Therefore, good cause exists to grant this motion for leave to respond one week out of time. The ICC does hereby so move.

II. SUMMARY OF RESPONSE

On remand, the Commission should issue an order within its Section 205 authority³ and accept PJM's initial proposal to eliminate the unit-specific cost review exception ("unit-specific review exception") to the Minimum Offer Price Rule ("MOPR"), but only for the limited purpose of addressing the time-period to date - not going forward. The ICC does not wish to disrupt the results of the past PJM auctions that already occurred. However, PJM fails to provide any basis in the PJM Motion to address the Commission's concerns that the MOPR, absent certain conditions, could produce unjust and unreasonable results.⁴ Consequently, the Commission should open a Section 206 investigation⁵ to find PJM's MOPR tariff revision filed on December 7, 2012 is unjust and unreasonable going forward absent the retention and inclusion of (1) the unit-specific review process, by which if a new generator could demonstrate

² See, *North Carolina Municipal Power Agency No. 1*, 50 FERC ¶ 61,138 (1987)

³ Federal Power Act ("FPA"), 16 U.S.C. § 824d.

⁴ See 143 FERC ¶ 61090 at PP 210-212 (2013) *vacated in part*, *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108 (DC Cir. 2017) ("May 2013 Order") (citing prior MOPR proceedings, 135 FERC ¶ 61,022 at P 175 (2011); 137 FERC ¶ 61,145 P. 122 (2011)); See, also, 153 FERC ¶ 61,066, at P 34 (2015) ("October 2015 Order").

⁵ FPA, Section 206, 16 U.S.C. §824e.

to PJM that its actual costs were below the price floor set by PJM, the generator would be permitted to bid below the price floor, and (2) the retention of the one-year mitigation period for new generators (rather than the extension of the mitigation period to three years).

Application of the MOPR should be reserved to prevent the exercise of market power or attempts to intentionally manipulate capacity auction clearing prices. The Commission's MOPR policy in this respect is clear: "The purpose of the MOPR . . . is to protect the market from the exercise of buyer-side market power."⁶ The Commission defines buyer-side market power as "an incentive to suppress market clearing prices by offering supply at less than a competitive level."⁷ "A resource that can show that it does not have an incentive to exercise buyer-side market power should not be subject to market power mitigation."⁸ PJM's December 7, 2012 Filing is inconsistent with the Commission's MOPR policy and simply readopting the conditions previously proposed by the Commission as suggested by PJM in its motion is insufficient to bring PJM's MOPR into compliance with Commission Policy. Therefore, the ICC recommends that the Commission employ its Section 206 authority to find unjust and unreasonable any application of MOPR outside instances where an entity either exercises market power, attempts to exercise market power or intentionally attempts to manipulate capacity auction clearing prices.

III. BACKGROUND

On December 7, 2012, PJM submitted to the Commission a tariff filing ("December 7 Filing")⁹ that proposed numerous changes to the PJM MOPR. The changes included, *inter alia*, the addition of two broad categorical exemptions to MOPR that would displace the then-current

⁶ October 2015 Order, at P 39.

⁷ *Id.* at P 2.

⁸ *Id.* at P 34.

⁹ Per Section 35.13(a)(2)(iii): Revisions to the PJM Tariff re 2012 Stakeholder Proposed MOPR Revisions to be effective 2/5/2013.

unit-specific exemption,¹⁰ which provided generator owners an opportunity to demonstrate that their individual unit cost (net of revenues) would be lower than the generic class MOPR benchmark established by PJM.¹¹

The December 7 Filing created two categories of exemptions from the MOPR: (1) the “Self Supply Exemption” and (2) the “Competitive Entry Exemption.” The Self Supply Exemption is for Load Serving Entities (“LSEs”) that generally supply their resource needs with their own generation, and would include entities such as vertically integrated utilities in traditionally regulated states as well as cooperative and municipal utilities. The Competitive Entry Exemption would apply to an LSE that procures a resource that can be shown to either: (1) not be supported by a non-bypassable charge linked to the construction, or clearing in any Reliability Pricing Model (“RPM”) auction; or (2) be obtained through a state-sponsored procurement process that meets competitive and non-discriminatory standards established by PJM.¹²

On May 2, 2013, the Commission issued an order conditionally accepting in part, and rejecting in part, PJM’s proposed tariff provisions, subject to conditions.¹³ The Commission’s conditional approval of PJM’s proposed competitive entry and self-supply exemptions required PJM to retain its unit-specific cost review exception.¹⁴ The Commission also rejected PJM’s proposal to extend the MOPR mitigation period from one year to three years.¹⁵ Electricity generators petitioned for review of the May 2013 Order denying PJM’s proposal to modify the

¹⁰ December 7 Filing at 15.

¹¹ *Id.*

¹² *Id.*

¹³ May 2013 Order, *supra*.

¹⁴ *Id.* at PP 141-144.

¹⁵ *Id.* at P 212.

rate structure based on the finding that the new rate scheme was not just and reasonable under the FPA.

On review, the United States Court of Appeals for the District of Columbia Circuit in *NRG Power Marketing, LLC v. FERC*, held that the Commission's proposed modifications to PJM's proposal to modify the rate structure violated the FPA even though PJM consented to the Commission's proposed modifications.¹⁶ The court noted the Commission's factual finding that PJM's proposal was not just and reasonable but held that the Commission's proposed modifications to rectify PJM's proposal exceeded its authority under Section 205 of the FPA.¹⁷ The court cited its prior precedent that Section 205 does not allow the Commission to make modifications to a proposal that transforms it into an entirely new rate of the Commission's own making.¹⁸ In granting the petitions for review, the court vacated the Commission's orders with respect to several aspects of PJM's tariff proposal – the self-supply exemption, the competitive entry exemption, unit-specific review, and the mitigation period.¹⁹ The court remanded this action back to the Commission.

On October 23, 2017, PJM filed a motion for an order on remand requesting that the Commission issue an order accepting PJM's December 7 Filing wherein it proposes to eliminate the unit-specific exception process and extend MOPR mitigation for non-exempt capacity to three delivery years.

¹⁶ *NRG*, 862 F.3d at 116.

¹⁷ *Id.* at 117.

¹⁸ *Id.*, at 115.

¹⁹ *Id.*, at 110.

IV. THE RELIEF SOUGHT BY PJM SHOULD BE LIMITED TO THE PERIOD TO DATE AND THE COMMISSION SHOULD INITIATE A SECTION 206 INVESTIGATION TO FIND APPLICATION OF PJM’S MOPR, GOING FORWARD, IS UNJUST AND UNREASONABLE ABSENT IMPLEMENTATION OF THE TWO CONDITIONS IDENTIFIED BY THE COMMISSION IN ITS PRIOR ORDERS.

A. PJM Fails To Demonstrate That Application of Its Original December 7 Filing Will Be Just And Reasonable On A Going Forward Basis.

Based on the speculation of its affiant, PJM asserts that the “facts” established by the capacity auctions between 2013 and the remand order demonstrate that it is safe to apply the MOPR as set forth in PJM’s original December 7 Filing.²⁰ The ICC disagrees. PJM fails to adequately address the Commission’s concerns that PJM’s original December 7 Filing is unjust and unreasonable, absent inclusion of the two conditions proposed in the Commission’s May 2013 Order. PJM’s argument fails to address the on-going risk of over-mitigation described in the Commission’s prior orders on this matter.

PJM relies heavily on what has, or has not occurred in the capacity auctions since the May 2013 Order, but admits that the results do “not rule out the possibility of future low-price competitive offers that do not qualify for the categorical exemptions. . .”²¹ As PJM itself points out, the underlying risk of improperly excluding valid offers in the capacity auction remains.²² The ICC does not agree that because something may not yet have occurred, it is of only “mild or minimal concern.”²³ If the Commission permits the MOPR to continue, the Commission should act to mitigate potential over-mitigation or other unjust and unreasonable impacts of the MOPR.

The Commission ruled that absent the conditions at issue, PJM’s original December 7 Filing is not just and reasonable and the DC Circuit recognized that finding.²⁴ The

²⁰ PJM Motion at 1, 8.

²¹ PJM Motion at 8.

²² *Id.*

²³ *Id.*

²⁴ NRG, at 110.

Commission’s concerns are still pertinent on a going-forward basis. Specifically, the Commission said, “. . . we find that PJM’s proposal does not provide a just and reasonable replacement for the unit-specific review process.”²⁵ No intervening events change those underlying concerns. If the Commission permits the PJM MOPR to continue, then the Commission must also impose appropriate conditions going forward.

B. The Commission Should Limit the Imposition Of the MOPR To Instances Where Entities Exercise Market Power Or Otherwise Intentionally Manipulate Capacity Clearing Prices.

PJM’s admission that “prospective changes to its MOPR, or its Tariff more generally, may be warranted,”²⁶ understates the fact that dramatic changes to PJM’s MOPR are required and that the Commission should limit application of the MOPR only to instances where entities exercise their market power or otherwise attempt to intentionally manipulate capacity auction clearing prices. As described above, the Commission’s position on the MOPR is clear: “a resource that can show that it does not have an incentive to exercise buyer-side market power should not be subject to market power mitigation.”²⁷ “Accordingly, because additional changes to PJM’s MOPR are warranted (over and above re-adoption of the two conditions previously proposed by the Commission), the ICC recommends that the Commission employ its Section 206 authority to find unjust and unreasonable, any application of the MOPR outside instances of exercise or attempt to exercise market power, or to intentionally manipulate capacity clearing prices.

The PJM MOPR has shown itself to be unjust and unreasonable because PJM applies mitigation measures to market participants that are not engaging in the exercise of market power

²⁵ PJM Motion, at 11.

²⁶ PJM Motion, at 10.

²⁷ October 2015 Order, at P 34.

or market manipulation. PJM's application is inconsistent with the Commission's express position on the MOPR, and PJM offers no rationale or authority in its Motion suggesting that the Commission should permit this to continue. The Commission has put in place rules and regulations that prohibit market manipulation in its many forms²⁸ and is required by the FPA to ensure that rates are just and reasonable. Mitigating market participants that are not engaging in the exercise of market power, market manipulation, fraud or deception, however, would not comport with either of those standards.

The PJM Motion noted PJM's current Capacity Construct/Public Policy Senior Task Force Stakeholder process where a number of tariff change options are under consideration.²⁹ The current MOPR in the PJM tariff applies only to new resources, and specifically only to new, combined cycle natural gas units. As currently proposed in the stakeholder process, PJM's Capacity Repricing proposal would eliminate and replace the current MOPR provisions. PJM is currently proposing that the same exemptions would also apply to the Capacity Repricing approach, so resources meeting the criteria of those exemptions would not be subject to repricing. Based on certain triggering criteria, however, the Capacity Repricing approach would apply to all resource types. The existence of PJM's Capacity Repricing proposal demonstrates that PJM's existing MOPR tariff provisions merits modification—but not in the way PJM is proposing in its Repricing Proposal.

Contrary to the statement in PJM's Motion, the instant proceeding is the ideal proceeding through which the Commission can and should initiate a Section 206 investigation on its own initiative to eliminate application of the MOPR, outside of instances of the exercise or attempt to exercise market power, or to intentionally manipulate capacity auction clearing prices. The

²⁸ See 18 C.F.R. §1.c.2

²⁹ PJM Motion, at 10.

Commission should not leave in place any existing tariff terms and conditions that it knows to be unjust and unreasonable.³⁰ Rather, it must find the just and reasonable rate.³¹

V. CONCLUSION

WHEREFORE, for the reasons discussed above, the ICC urges the Commission to consider this response in its deliberations and issue an order on remand that opens a Section 206 investigation for the purposes described above. The ICC further requests any, and all, appropriate relief.

Respectfully submitted,

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³⁰ See *FirstEnergy Services Company v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014) (Section 206 empowers FERC to make a determination on existing rates and to modify them if they are found to be “unjust, unreasonable, unduly discriminatory or preferential.”); 16 USC § 824e(a).

³¹ *Id.* (“ . . . whenever the Commission . . . shall find that any rate. . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate. . .”).

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing document of the Illinois Commerce Commission to be served this day upon each person designated on the official service list compiled by the Secretary in this proceeding, a copy of which is attached, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Chicago, Illinois, this 21st day of November, 2017.

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