

134 FERC ¶ 61,158
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

EnerNOC, Inc.

Docket No. EL11-23-000

ORDER ADDRESSING PETITION FOR DECLARATORY ORDER

(Issued March 3, 2011)

1. On February 22, 2011, EnerNOC, Inc. (EnerNOC) filed a petition for declaratory order, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,¹ seeking clarification that it may continue to register customers and settle under PJM Interconnection, L.L.C.'s (PJM) Guaranteed Load Drop (GLD) baseline methodology,² in accordance with the PJM Open Access Transmission Tariff (PJM Tariff), as it has in previous periods without enforcement action being threatened or taken on account thereof. The Commission addresses EnerNOC's petition for declaratory order, to the extent discussed below.

I. Background and Details of the Filing

2. Under PJM's Reliability Pricing Model (RPM) rules, PJM conducts forward auctions to secure capacity for a future delivery year, thereby allowing both existing and proposed generation, demand response, and energy efficiency resources to compete to meet the region's installed capacity needs. Demand response resources with capacity committed in the auction must reduce load in the delivery year subsequent to a request for load reduction from PJM following the declaration of a Maximum Emergency

¹ 18 C.F.R. § 385.207 (2010).

² GLD is one of three baseline methods prescribed in the PJM business rules for measuring event compliance. GLD is achieved by a customer reducing its load by a pre-determined amount (i.e., by the Guaranteed Load Drop or GLD). PJM Tariff, Attachment DD, section H.

Generation action, unless the resource has already reduced load pursuant to PJM's economic load response program.³ To comply with its capacity obligation in the delivery year, a demand resource participating in PJM's emergency load response programs can elect to use one of three types of load management measurement and verification options: direct load control, firm service level, and GLD.

3. EnerNOC states that it is an active market participant in PJM's load management programs as an aggregator of retail customers (ARC). EnerNOC states that it aggregates customers to deliver emergency demand response when dispatched and is compensated for the aggregated capacity and energy it provides, with over-performing resources allowed to net against the underperformance of other resources, consistent with the PJM Tariff.

4. In its filing, EnerNOC raises concerns about a joint statement regarding "double counting" that was issued by PJM and Monitoring Analytics, LLC, its Independent Market Monitor (IMM), on February 4, 2011 (Joint Statement). In the Joint Statement, PJM and the IMM explain that an end-use customer may curtail its load due to incentives outside of PJM's load reduction program (e.g., to reduce its peak load contribution (PLC) or to satisfy a retail rate contract) and show substantial over-compliance during an emergency event by using a baseline load that includes its full load levels, rather than its managed load levels that enabled a lower PLC. PJM and the IMM indicate that this apparent over-compliance is not performance under the PJM load management program and thus it is not appropriate for an ARC to use this over-compliance to offset underperforming resources. The Joint Statement states that future occurrences of this behavior could result in referrals to the Commission's Office of Enforcement.

5. EnerNOC asserts that, under the PJM Tariff, demand response resources using the GLD baseline receive compensation for their performance of demand response services based on their actual reduction in demand, and that the PJM Tariff permits EnerNOC to aggregate capacity by offsetting over-performing resources against the underperformance of other resources. EnerNOC argues that the Joint Statement effectively amends the PJM Tariff without the Commission authorization required by the Federal Power Act (FPA).⁴ According to EnerNOC, the Joint Statement finds that it is no longer acceptable to measure compensation by actual measured reductions in customers' loads, but instead compensation must be based on performance below a customer's PLC. EnerNOC argues

³ PJM Tariff, Attachment K-Appendix, PJM Emergency Load Response Program, Emergency Operations.

⁴ 16 U.S.C. § 824d (2006).

that issuance of the Joint Statement instead of an FPA section 205 filing to amend the PJM Tariff was improper and unexpected, particularly given that stakeholders engaged in nine months of meetings to discuss whether the PJM Tariff should be changed to eliminate or reform the settlement feature under the GLD methodology, and stakeholders unanimously agreed that the PJM Tariff should not be changed at that time and that the issue should be deferred until May 2011.

6. EnerNOC contends that PJM's action will effectively eliminate the GLD baseline methodology and demand response aggregation. EnerNOC states that the GLD baseline method is preferable for customers that do not have the means to reliably predict or control the level of demand at which they can reduce. Further, EnerNOC asserts that, if an ARC would not be able to count most or all of a resource's over-performance toward portfolio compliance, then it would not be able to effectively aggregate. Finally, EnerNOC states that the Joint Statement has created uncertainty in the market that significantly affects the participation of ARCs in the upcoming capacity auctions, including the Third Incremental Auction and 2014/15 Base Residual Auction.

7. Therefore, EnerNOC requests that the Commission issue a declaratory order finding that participants may continue to register customers and settle under the GLD baseline methodology as they have in previous periods without enforcement action being threatened or taken on account thereof, without prejudice to the position of any party in any future proceeding seeking to change the tariff prospectively. In order to resolve this uncertainty before the Third Incremental Auction closes on March 4, 2011, and before the April 1, 2011 deadline for participation in PJM's Interruptible Load for Reliability (ILR) Program, EnerNOC requests expedited action by the Commission by March 3, 2011.

II. Notice of Filing and Responsive Pleadings

8. Public notice of the filing was issued on February 22, 2011, with protests and interventions due on or before March 1, 2011. Notices of intervention and motions to intervene were filed by American Municipal Power, Inc.; Energy Curtailment Specialists, Inc.; Indiana Utility Regulatory Commission; PJM Power Providers Group; Edison Mission Energy; Hess Corporation; PSEG Companies; American Electric Power Service Corporation; Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.; GenOn Parties; and Electric Power Supply Association. Motions to intervene and comments were filed by PJM Industrial Customer Coalition; North America Power Partners, LLC (NAPP); and Viridity Energy, Inc. Comments were filed by Demand Response and Smart Grid Coalition and American Forest & Paper Association. The IMM filed a motion to intervene and protest. FirstEnergy Service Company; Exelon Corporation; PPL EnergyPlus, LLC; Dominion Resources Services, Inc; Maryland Public Service Commission; Old Dominion Electric Cooperative; and Direct Energy Services LLC filed motions to intervene out-of-time. PJM filed a motion

to intervene out-of-time and protest. On March 2, 2011, EnerNOC filed an answer to the protests.

A. Comments

9. Commenters, other than the Market Monitor and PJM, generally request that the Commission find that market participants may continue to register demand response customers and settle under PJM's current baseline methodologies as they have in previous periods until the current tariffs and business rules have been formally changed through normal stakeholder and Commission approval processes. NAPP requests that the Commission determine under what circumstances counting resources in excess of their PLC is determined to be market manipulation under the current tariff. Commenters generally agree that issuance of the Joint Statement is not the proper procedure for addressing PJM's and the IMM's concerns. Commenters also express concern that the Joint Statement would adversely impact or eliminate aggregation in the PJM markets.

B. Protests

10. PJM acknowledges that the rules and practices set forth in the PJM Tariff and manuals do not give unambiguous direction as to how performance reporting of curtailment in PJM's capacity market should be measured. PJM concedes that the PJM Tariff and manuals are susceptible to two interpretations on this matter. PJM admits that there is confusion in the PJM markets that would benefit from the Commission providing, prior to the start of the next Delivery Year on June 1, 2011, its view of what constitutes curtailment in the capacity markets and how such curtailment should be measured. PJM therefore asks the Commission to deny the relief EnerNOC requests and instead:

(1) determine that the curtailment of capacity will be recognized only to the extent it represents a reduction from the capacity procured for a particular end-user, or,
(2) alternatively, until broader rule changes are considered by PJM stakeholders, interpret PJM Tariff Attachment DD-1, Section J to allow curtailments above the end-user's established PLC, provided the value or amount of total curtailment by the end-user did not exceed its PLC.

11. The IMM acknowledges that the Joint Statement does not effectuate any change to the PJM Tariff or manuals and constitutes only the joint opinion of PJM and the IMM. The IMM states that PJM's rules do not explicitly provide that a Market Participant may apply comparison load higher than PLC, and states that it intends to propose clarifying revisions to the rules. The IMM states that it does not intend to refer to the Commission behavior confined solely to the use of comparison loads higher than PLC that occurred prior to the issuance of the Joint Statement. The IMM requests that the Commission set the matter for an administrative hearing so that EnerNOC and other Curtailment Service Providers (CSP) may provide additional information that would make approval of how they manage their portfolios possible. The IMM argues that the Commission should deny

the Petition if EnerNOC does not provide such information and to the extent that EnerNOC petitions the Commission to enjoin the IMM from communicating to the public its views about what constitutes appropriate market conduct.

C. Answers

12. EnerNOC argues in its answer that the PJM Tariff unambiguously contradicts the two interpretations of the PJM Tariff that PJM presents in its protest, and that if PJM wishes to pursue its policy objectives, it must do so in a stakeholder process followed by a section 205 filing or by filing a section 206 complaint. EnerNOC argues that both approaches would impose a new cap on the amount of creditable performance from a customer's demand response actions during an emergency demand response event, which is not specified or implied in the PJM Tariff. EnerNOC also argues that the IMM, in its protest, attempts to reverse the burden of proof. Finally, EnerNOC contends that PJM seeks to eliminate demand response as a supply resource.

13. In its answer, the IMM states that aggregation is appropriate but that aggregation must be based on the correct definition of over-compliance. The IMM asserts that PJM has not proposed to change compensation for demand response, but to apply an interpretation of GLD that more accurately determines whether demand resources are delivering their nominated value. The IMM states that netting over-performance with under-performance is a perfectly acceptable approach and does not depend on double counting.

III. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁵ the notices of intervention and the timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure⁶, the Commission will grant the late-filed motions to intervene submitted by FirstEnergy Service Company; PPL EnergyPlus, LLC; Exelon Corporation; Old Dominion Electric Cooperative; Maryland Public Service Commission; Direct Energy Services LLC; and Dominion Resources Services, Inc. and motion to intervene and protest submitted by PJM given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

⁵ 18 C.F.R. § 385.214 (2010).

⁶ 18 C.F.R. § 385.214(d) (2010).

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁷, prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept EnerNOC's and the IMM's answers because they have provided information that assisted us in our decision-making process.

B. Commission Determination

16. PJM, EnerNOC and the IMM all generally agree that the PJM Tariff could have been clearer as to whether a curtailment exceeding an end-use customer's PLC can be counted as an over-performance and used by an ARC to offset under-performing resources to meet the ARC's capacity commitments.⁸ Moreover, the IMM states that it "does not intend to refer to the Commission ... the use of comparison loads higher than PLC that occurred prior to the issuance of the Joint Statement on February 4, 2011."⁹ PJM similarly says that conduct taking place "prior to PJM's issuance of the Joint Statement on February 4, 2011" is "[l]ess important" and "less helpful ... given the likelihood of good faith participant conduct in the context of the limited rules" at the time.¹⁰

17. While the Joint Statement reflects PJM and the IMM's interpretation, both acknowledge that they have created uncertainty for market participants like EnerNOC who are participating in the auction closing on March 4 and in the ILR program that has a deadline of April 1, 2011.¹¹ PJM and the IMM acknowledge that a market participant can seek declaratory relief from this Commission to help resolve such uncertainty.¹²

⁷ 18 C.F.R. § 385.213(a)(2) (2010).

⁸ See PJM at 2 ("PJM acknowledges that the rules and practices set forth in both the PJM Tariff and applicable Manuals do not provide optimal detail..."); IMM at 14 ("The Market Monitor agrees that the rules should be revised for clarity..."); and Petition at 24 ("Had PJM and the Market Monitor actually brought a complaint... this unworkable ambiguity would have become obvious.")

⁹ IMM at 16, and *see also* 2.

¹⁰ PJM at 3.

¹¹ PJM at 7, IMM at 17.

¹² *Id.*

18. We will not consider the issuance of the Joint Statement in any of our considerations regarding market manipulation, and will treat it as if it were never issued. In this fashion, market participants will be placed in exactly the same situation that they were prior to the Joint Statement.

19. We clarify that – until further notice – this Commission does not intend to institute any enforcement actions against EnerNOC (or other similarly situated ARCs) for registering customers in good faith and settling under the GLD baseline methodology.¹³

20. While PJM has convened a stakeholder process on this issue, it has not yet made a section 205 filing, nor has a section 206 filing been made on this issue. Our determination here today is without prejudice to PJM submitting a section 205 filing to the Commission to amend its tariff with respect to this issue or any interested person submitting a section 206 filing on this issue.¹⁴ We expect this issue to be addressed as part of the ongoing stakeholder process.

The Commission orders:

EnerNOC's petition for declaratory order is hereby addressed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹³ Good faith participation in the PJM load management programs, including accurate customer GLD registration and aggregation during emergency events, is permitted. However, our finding here does not exempt from challenge conduct prohibited under section 1c.2 of the Commission's regulations. 18 C.F.R. § 1c.2 (2010).

¹⁴ We do not, in this order, pre-judge our determination on any such filings.