

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller.

American Electric Power Service Corporation	Docket Nos. ER04-1003-004 ER04-1003-005 ER04-1007-004 ER04-1007-005
PJM Interconnection, L.L.C.	EL05-62-000

ORDER ACCEPTING TARIFF SHEETS SUBJECT TO CONDITIONS

(Issued August 25, 2006)

1. On April 26, 2005, as amended on October 14, 2005, American Electric Power Service Corporation (AEP) filed on behalf of the AEP east zone Operating Companies¹ revisions (Compliance Filings) to AEP's Open Access Transmission Tariff (OATT) in compliance with the Commission's order issued on February 25, 2005 (February 25 Order).² AEP's Compliance Filings propose terms and conditions and a formula rate³ for the construction, maintenance and operation of new delivery points, modification or removal of existing delivery points, and associated facilities⁴ not covered under PJM's

¹ The AEP east zone Operating Companies are: Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company. The east zone Operating Companies are members of PJM Interconnection, Inc. (PJM).

² *American Electric Power Service Corporation*, 110 FERC ¶ 61,187 (2005).

³ AEP states that the parties may also agree to a stated rate that will be specified in Attachment 1. AEP proposes that, consistent with Commission policy, the customer shall reimburse AEP for its costs associated with new and existing facilities that are not recovered through the transmission charges under PJM's OATT either through monthly charges agreed to by the customer that will be specified in Attachment 1 or under the Formula Rate for Facility Construction, Operation and Maintenance contained in Attachment 4 of the *pro forma* Agreement.

⁴ AEP characterizes this service as an interconnection and "local delivery" service.

OATT.⁵ In this order, the Commission finds that AEP has generally complied with the requirements of the February 25 Order. Accordingly, this order conditionally accepts the Compliance Filings and makes them effective October 1, 2004, as requested. This order also terminates the proceeding instituted under section 206 of the Federal Power Act (FPA),⁶ in Docket No. EL05-62-000, since AEP has re-designated the Attachment T service agreements under the PJM OATT as directed by the Commission in the February 25 Order.⁷

I. Background

2. On November 1, 2004, the Commission issued an unpublished delegated letter order (November 1 Letter Order)⁸ stating that since AEP east zone Operating Companies will be providing transmission and interconnection service under PJM's OATT,⁹ AEP was required to submit revised tariff sheets to the AEP OATT reflecting only those AEP Operating Companies that are not integrated into PJM.

3. On December 2, 2004 (December 2 filing), AEP submitted its compliance filing in response to the Commission's November 1 Letter Order. AEP proposed to maintain an OATT for its east zone Operating Companies in order to provide delivery services for its customers over distribution and transmission facilities not covered under PJM's OATT and to continue to provide service under existing grandfathered transmission service agreements. AEP also proposed to delete references to terms that are no longer valid

⁵ AEP transferred functional control of its east zone transmission system to PJM on October 1, 2004. Those east zone Operating Companies that are now members of PJM continue to provide certain services to customers under the AEP OATT rather than through PJM's OATT. AEP states that PJM does not involve itself in the provision of services beyond the PJM transmission system.

⁶ 16 U.S.C. § 824d (2000).

⁷ AEP filed five Service Agreements under its proposed Attachment T (the *pro forma* Agreement). On December 29, 2004, December 30, 2004 and January 13, 2005, AEP submitted for filing individual agreements under the AEP OATT in Docket Nos. ER05-392-000, ER05-394-000 and ER05-450-000, respectively. On January 4, 2005 and January 7, 2005, AEP submitted for filing in Docket Nos. ER05-420-000 and ER05-432-000 executed Letter Agreements to establish new delivery points (collectively, Service Agreements).

⁸ *American Electric Power Services Corporation*, Docket Nos. ER04-1003-000, ER04-1003-001, ER04-1007-000 and ER04-1007-001.

⁹ In *PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,318 (2004), the Commission approved the integration of AEP east zone Operating Companies into PJM on October 1, 2004.

under AEP's tariff and proposed a new Attachment T,¹⁰ the *pro forma* Agreement. AEP states that this *pro forma* Agreement, which includes a formula rate, will apply to the operation and maintenance of interconnection¹¹ of existing and future delivery points and that it sets forth the monthly charges for meters, distribution facilities, and reactive power demands at the delivery points.

4. On January 4, 2005, AEP supplemented its December 2 filing, explaining that the proposed *pro forma* Agreement is intended to replace the Network Integration Transmission Service Agreement (NITSA), which provided for both transmission and "local delivery" services before the integration of AEP's east zone Operating Companies into PJM. In addition, the *pro forma* Agreement gives AEP's east zone customers the option to purchase "local delivery" service from AEP.

5. On February 25, 2005, the Commission conditionally accepted the proposed *pro forma* Agreement, including the proposed formula rate, and directed AEP to ". . . provide a more in-depth demonstration that the proposed terms and conditions are just and reasonable and are consistent with current Commission policy as required in 18 C.F.R. § 35.13."¹² The February 25 Order also initiated a section 206 proceeding under which PJM and AEP were directed to file the *pro forma* Agreement's corresponding service agreements under the PJM OATT.¹³

6. On April 26, 2005, AEP submitted its Compliance Filings, which included a summary of each provision¹⁴ in the *pro forma* Agreement; cost justification for the formula rate; arguments as to why the terms and conditions it proposes in the *pro forma* Agreement are just and reasonable and consistent with current Commission policy; and re-designated service agreements under PJM's tariff; as directed by the February 25 Order. AEP also contends that the Commission should not have used Order No. 2003¹⁵

¹⁰ Attachment T is entitled the "Interconnection and Local Delivery Service Agreement."

¹¹ AEP points out that the use of the word "interconnection" in the *pro forma* Agreement refers to the connection of AEP facilities to the "local delivery" service customer's facilities at existing or future delivery points, as opposed to interconnection of generator or merchant transmission facilities.

¹² February 25 Order at P 23.

¹³ See *supra* note 7.

¹⁴ In its *pro forma* Agreement, AEP labels its provisions under article headings and section headings (*i.e.*, Article 1, section 1.1). However, in its discussion, the Commission will refer to the provisions of the *pro forma* Agreement only as articles (*i.e.* article 1.1).

¹⁵ As we stated in the February 25 Order and reiterate here, although Order No. 2003 does not directly apply to Attachment T, it nevertheless does provide guidance for

as a guideline for evaluating whether the terms and conditions proposed in the *pro forma* Agreement are just and reasonable, since the *pro forma* Agreement is not a generation interconnection arrangement.

7. On September 15, 2005, the Commission issued a deficiency letter seeking additional information on: (1) the proposed formula rate; (2) certain terms and conditions of the *pro forma* Agreement; and (3) the terms and conditions of the various filed Service Agreements that do not conform to the terms and conditions of the *pro forma* Agreement. On October 14, 2005, AEP filed its response to the Commission's September 15, 2005 deficiency letter and a revised *pro forma* Agreement.

8. In its response, AEP reiterated that the purpose of the *pro forma* Agreement is to replace the *pro forma* NITSA which, under AEP's OATT, provided for both transmission and "local delivery" services prior to AEP's integration into PJM. It states that, while transmission service to customers in the AEP east zone is now provided under the PJM OATT, "local delivery" service will continue to be provided by AEP under the *pro forma* Agreement. AEP asserts that PJM does not involve itself in the provision of services beyond transmission service; however, as a convenience to the *pro forma* Agreement customers, PJM will include in its monthly billings the charges for the services which are agreed to by the customer.

9. AEP states that while it is not required to engage in a stakeholder process, it did solicit comments from both American Municipal Power-Ohio, Inc. (AMP-Ohio) and the Ohio Municipal Energy Group (Ohio Municipals)¹⁶ on more than one occasion, even though it did not accept all the changes offered by the various parties. AEP states that its goal was to devise an agreement that, on balance, is impartial and fair to all parties.

II. Notices of Filings and Pleadings

10. Notice of AEP's April 26, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 24,567 (2005), with interventions and protests due on or before May 17, 2005.

conducting certain studies and other practices that are used outside the generator interconnection context. Ultimately, however, the Commission's determination turns on whether the proposed terms and conditions are just and reasonable.

¹⁶ The members of Ohio Municipals that join in the motion to intervene and protest are: the Village of Arcadia, the Village of Bloomdale, the City of Bryan, the Village of Carey, the City of Clyde, the Village of Cygnet, the Village of Deshler, the Village of Greenwich, the Village of Ohio City, the Village of Plymouth, the Village of Republic, the Village of Shiloh, the Village of Sycamore, the City of St. Clairsville, the City of Wapakoneta, and the Village of Wharton.

11. Notice of AEP's October 14, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 61,972 (2005), with interventions and protests due on or before November 4, 2005. AMP-Ohio and the Ohio Municipals filed timely motions to intervene and protests. Indiana and Michigan Municipal Distributors Association, *et. al.* filed a timely motion to intervene.

12. On November 4, 2005, AMP-Ohio filed a protest in which it complains that: (1) AEP's response to the Commission's September 15, 2005 deficiency letter is insufficient; and (2) several provisions of the revised *pro forma* Agreement are unnecessary, duplicate PJM's tariff provisions, or may be more properly addressed through PJM's tariff. It also claims that many of the provisions are otherwise objectionable.

13. AMP-Ohio also notes that in AEP's October 14 Compliance Filing, AEP claims that it "engaged each customer with an openness to refine the language . . ." ¹⁷ of the *pro forma* Agreement. AMP-Ohio claims that AEP's description of the negotiating measures it employed with its customers is self-serving and may not represent the views of its customers.

14. AMP-Ohio also states that the communications between AEP and PJM concerning PJM's refusal to provide "local" services under PJM's OATT should be a matter of public record. ¹⁸ AMP-Ohio adds that AEP should provide a copy of the communication in which PJM stated such a position.

15. Also on November 4, 2005, the Ohio Municipals filed a protest arguing that several terms and conditions of the *pro forma* Agreement are not just and reasonable. Ohio Municipals state that on August 29, 2005, they sent an e-mail to AEP requesting clarification of certain provisions in the *pro forma* Agreement, and that AEP has not responded to their request. They ask that AEP be directed to clarify these provisions here.

16. On November 21, 2005, AEP filed an answer to AMP-Ohio and the Ohio Municipals' protests. AEP argues that the protestors have requested twenty-nine changes to the *pro forma* Agreement that favor only the protestors' interests. AEP complains that AMP-Ohio and Ohio Municipals are simply using their right to protest in an attempt to turn the *pro forma* Agreement into an entity-specific contract. AEP states that while it does not intend to address the protestors' proposed changes individually, the fact that there are twenty-nine changes validates AEP's actions in creating the *pro forma* Agreement.

¹⁷ AEP's October 14, 2005 Transmittal Letter at 10.

¹⁸ AEP states that PJM has informed AEP that PJM does not wish to be involved in providing the "local delivery" services provided under the *pro forma* Agreement.

17. AEP states that the *pro forma* Agreement includes monthly charges for meters, distribution facilities and reactive power demands at the delivery points. AEP adds that the *pro forma* Agreement clarifies how AEP will coordinate with PJM to facilitate transmission service and contains an “optional” operation and maintenance agreement. The *pro forma* Agreement includes a cost-based formula rate for construction and operation and maintenance work performed by AEP, when, for system security reasons, AEP requires AEP staff or contractors under AEP’s direction do the work. AEP complains that the protestors waited until November 14, 2005, to come forward to protest the *pro forma* Agreement. It also complains that AMP-Ohio’s protest contains many of the same arguments the Commission addressed in the February 25 Order. For example, in its protest AMP-Ohio reiterates its argument, which the February 25 Order dismissed, that the *pro forma* Agreement was not the product of a “credible stakeholder process.” AEP notes that although the February 25 Order encouraged parties to work together, the Commission found that “...there is no policy, statutory or regulatory requirement to hold a stakeholder process prior to a public utility, such as AEP, making a tariff filing with the Commission. Further AEP’s OATT does not require AEP to hold a stakeholder process prior to making a filing with the Commission.”

III. Procedural Matters

18. Pursuant to Rule 214(c) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

19. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest or another answer unless otherwise ordered by the decisional authority. We will accept AEP’s answer because it provided information that assisted us in our decision-making process.

IV. Discussion

20. As discussed in further detail below, we find that AEP’s April 26 Compliance Filings, as amended, generally responds to the February 25 Order by demonstrating that the *pro forma* Agreement’s formula rate and terms and conditions are just and reasonable and consistent with Commission policy. AEP and PJM have also re-designated the Service Agreements as directed by the February 25 Order. In response to the February 25 Order, AEP has also included a time line in articles 2.2.2 and 2.2.3 to state when a System Impact Study is to be completed and when AEP will furnish a Facilities Study to the customer.

21. The *pro forma* Agreement explains how AEP will provide “local delivery” services in coordination with transmission service provided by PJM and defined in the *pro forma* Agreement. The *pro forma* Agreement also allows AEP to continue to recover certain costs associated with the interconnection of “delivery” service facilities not covered under PJM’s OATT.

22. We also find that the *pro forma* Agreement, read in conjunction with PJM's tariff, adequately details AEP's responsibilities. AEP will have the primary responsibility for administering interconnection of "local delivery" services for facilities not covered under the PJM tariff. We conclude that this proposed split of functions between PJM and AEP is necessary to clarify the separate responsibilities of PJM and AEP. As a result, we find the proposed revisions to the *pro forma* Agreement detailing the split of functions, to be just and reasonable.

23. However, as discussed below, the Commission continues to have concerns with AEP's proposed treatment of: changes in delivery points and local delivery facilities; cost recovery protection; the measurement of load at each delivery point; operational access and control; billing, payment and disputes; indemnity.

A. Requests for Clarification and Editorial Comments

24. AMP Ohio and Ohio Municipals propose numerous editorial or clerical changes to the *pro forma* Agreement. They also request that the Commission direct AEP to respond to their inquiries and requests for clarification and modify the *pro forma* Agreement accordingly. They assert that these requests are intended to improve and/or clarify the *pro forma* Agreement.

25. Under section 205 of the FPA, the Commission is obligated to review AEP's proposed *pro forma* Agreement to determine whether it is just and reasonable and not unduly discriminatory or preferential. While the protestors assert that their requests improve and/or clarify the *pro forma* Agreement, the Commission is not obligated to consider the protestors' preferred alternatives; we must decide whether AEP has shown that its filing meets the statutory standard, not whether alternatives offered by intervenors are better.¹⁹ AEP's proposed provisions need be neither perfect nor even the most desirable; they need only be just and reasonable and not unduly discriminatory or preferential. We find that AEP's provisions described above are just and reasonable and not unduly discriminatory or preferential. Thus, we will reject AMP-Ohio and Ohio Municipals' proposed improvements or ministerial changes that are unsupported or

¹⁹ See *New England Power Co.*, 52 FERC ¶ 61,090, at 61,336 (1990), *reh'g denied*, 54 FERC ¶ 61,055, *aff'd*, *Town of Norwood v. FERC*, 962 F.2d 20 (D.C. Cir. 1992); *City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 917 (1984) (utility need only establish that its proposed rate design is reasonable, not that it is superior to alternatives); *accord*, *OXY USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) (Commission may approve methodology proposed in settlement agreement if it is just and reasonable; it need not be the only reasonable methodology, or even the most accurate.)

unnecessary to make the *pro forma* Agreement just and reasonable.²⁰ As discussed further below however, we will require that some of AMP-Ohio's and Ohio Municipals' proposed changes be adopted because they are needed to make the *pro forma* Agreement provisions just and reasonable and not unduly discriminatory or preferential.

B. Terms and Conditions

26. Article 1.2 (Governance of Conflicts) specifies that in the event of conflicts between the *pro forma* Agreement and the AEP and PJM OATTs, the AEP and PJM OATTs will govern. Where there is a conflict between the AEP OATT and the PJM OATT, the PJM OATT controls.

27. Ohio Municipals claim that because the *pro forma* Agreement is customer specific, it should control whenever there is a conflict. Likewise, Ohio Municipals state that whenever there is a conflict between the *pro forma* Agreement and the PJM tariff, the *pro forma* Agreement should control.

28. We find article 1.2 to be just and reasonable and not unduly discriminatory or preferential since the Commission has previously found the AEP and the PJM OATTs to be just and reasonable and not unduly discriminatory or preferential. And since the *pro forma* Agreement (as opposed to being a bilateral agreement) is part of the AEP OATT, the AEP OATT should govern. Also, because the PJM OATT governs when there is a conflict between the AEP OATT and the PJM OATT, PJM should have ultimate responsibility for the functions it contracts to AEP. AEP has similar authority for delivery points and related facilities.

29. Article 2.1.1 (Interruption or Reduction of Service at the Delivery Points) governs situations where there is an interruption or reduction of service at a delivery point. Article 2.1.1(b) states that, before service is interrupted to permit installation, maintenance, inspection, repair or replacement of equipment determined to be necessary, consultation with the affected customer will occur "if practicable."

30. Both AMP-Ohio and Ohio Municipals ask that AEP be directed to modify article 2.1.1(b) to eliminate the phrase "if practicable." According to AMP-Ohio, article 2.1.1(c) already provides for AEP to interrupt or reduce service at the delivery point in the event of an emergency, which according to AMP-Ohio would be the only situation in which AEP should take an action without prior consultation.

31. The Commission agrees with AMP-Ohio that article 2.1.1(b) should be modified to eliminate the phrase "to the extent practicable." As AMP-Ohio correctly notes, article

²⁰ The Commission finds that the protestors' comments on the following articles are unsupported or ministerial in nature: 1.1, 2.2.5, 3.2, 3.3, 3.4, 3.5, 4, 4.2, 5.3, and the definition of "Interconnection and Local Delivery Service."

2.1.1(c) already allows AEP to interrupt service at a delivery point in an emergency. We do not believe that AEP should have the same discretion when it is performing routine maintenance, inspections, repairs or replacement of equipment.

32. Article 2.2.1 (Study Requests for Changes in Delivery Facilities) specifies the types of information a customer is required to provide when requesting a new delivery point or modification to an existing delivery point, including the amount of load to be served by the delivery point for the first five years.

33. AMP-Ohio asks that AEP be directed to revise article 2.2.1(e) to state that the customer is only required to furnish a non-binding estimate of the amount of load to be served by the delivery point for the first five years. It claims that it is impossible to predict the exact amount of load that will be served by a delivery point during this period.

34. The Commission agrees that the amount of load served cannot be predicted with precision during this period. Further, the Commission notes that to get network integration transmission service, the customer must set forth only its best estimate of the total loads to be served at each transmission voltage level.²¹ Therefore, AEP must revise article 2.2.1(e) to allow the customer to furnish a non-binding good faith estimate of the amount of load to be served by the delivery point for the first five years. This is necessary to make the provision just and reasonable.

35. Articles 2.2.2, 2.2.3 and 2.2.4 govern the studies to be performed in conjunction with new delivery points or changes to existing delivery points.²² These provisions require the customer to provide a deposit as well as return an executed study agreement within a specific time to satisfy AEP's requirements to PJM. If the customer fails to adhere to AEP's requirements, the customer's request would be deemed withdrawn or the customer may provide AEP with a written notice to request a withdrawal along with a written explanation. Article 2.2.2 also provides that if the cost of the study is less than the deposit amount, AEP will refund the difference with interest.

36. AMP-Ohio complains that while these articles make allowances for agreed-upon extensions of deadlines that apply to AEP, there is no such allowance for the customer. AMP-Ohio requests that articles 2.2.2, 2.2.3, and 2.2.4 be revised to allow for agreed-upon extensions to the deadlines applicable to customers. AMP-Ohio also requests that these articles be revised to specify the interest rate that will apply when AEP makes refunds of study deposit and how the amount of the deposit will be determined.

²¹ AEP's OATT at section 29.2 (iii).

²² Such as the System Impact Study, Facility Study or an Expedited System Study.

37. The Commission will direct AEP to revise articles 2.2.2, 2.2.3 and 2.2.4 to allow extensions of deadlines to customers. This is necessary to make the *pro forma* Agreement just and reasonable, and not unduly discriminatory or preferential.

38. We also agree with AMP-Ohio that the method for calculating the interest payment should be codified in article 2.2.2. Accordingly, AEP must revise article 2.2.2 to state that the interest is to be computed in accordance with section 35.19a(a)(2) of the Commission's regulations.²³

39. In addition, the Commission finds that the customer should have the opportunity to address any deficiencies before its request is deemed withdrawn. The customer may have a reasonable excuse for being deficient or for not correcting the deficiency immediately. Therefore, we direct AEP to revise the *pro forma* Agreement accordingly.

40. Finally, the Commission notes that there is an inconsistency in articles 2.2.2, 2.2.3 and 2.2.4. In articles 2.2.2 and 2.2.4, the customer is required to return the executed study Agreement in "thirty (30) days." However, in article 2.2.3, the customer is required to return the executed Agreement in "thirty (30) business days" in one paragraph and in "thirty (30) days" in the second. AEP must revise the *pro forma* Agreement to correct this inconsistency.

41. Article 2.4 provides that where AEP constructs or otherwise expands transmission and local delivery facilities on behalf of the customer, and the customer subsequently transfers its load to the system of another service provider, AEP shall be entitled to compensation for "stranded costs" to the extent such load transfer causes AEP's revenues to be reduced. It also provides that any claim by AEP is to be computed based on the net present value of any incremental transmission revenue that AEP will receive by providing transmission or "local delivery" service to other customers using the transmission or local delivery capacity on AEP's system freed up by the customer's load change.

42. AMP-Ohio argues that article 2.4 may allow over-recovery of revenues by AEP because AEP has not taken into account the possibility that a change in customer use might enable AEP to make additional sales of non-firm transmission service (thus reducing the amount of "stranded" costs). According to AMP-Ohio, the "offset provision would net only projected revenues from firm transmission transactions."²⁴ In addition, AMP-Ohio alleges that the risk of non-recovery from a customer's change in transmission provider is the sort of bypass risk that AEP included as an additional element of cost in its rate of return requests in Docket No. ER05-751. Finally, AMP-Ohio states that if new transmission facilities are built for the purposes described above,

²³ 18 C.F.R. § 35.19a(a)(2) (2006).

²⁴ AMP-Ohio Protest at 6. The term "offset provision" is a term used but not defined by AMP-Ohio.

the costs will be charged under Schedule 12 of the PJM OATT. AMP-Ohio is concerned that the costs are allocated on a different basis in Schedule 12 than that proposed in article 2.4, and “thus produce an outcome that conflicts with the allocation of costs established pursuant to the PJM OATT.”

43. First, we note that AEP’s proposed language does not indicate the length of time that the transmission service customer must continue to pay for the “stranded costs”²⁵ of the facilities once it has transferred its load to another provider. AEP must revise article 2.4 to state the duration of the transmission service customer’s financial responsibility and provide justification for its proposed duration.

44. Second, we find convincing AMP-Ohio’s concerns that article 2.4 may allow over-recovery of revenues by AEP because AEP has not taken into account the possibility that a change in customer use might enable AEP to make additional sales of non-firm transmission service. Accordingly, AEP must revise article 2.4 to state that it will make every effort to ensure that it finds customers to take the available transmission service.

45. Third, if AEP seeks to recover these costs, it must make a section 205 filing under Part 35 of the Commission’s regulations, accompanied by cost support that discusses, among other things, the identity of the “stranded” facilities and voltages involved; their costs; how the customer is to be paid for the facilities (for example, were the cost of the facilities rolled into AEP’s transmission rates, or directly assigned to the customer and paid for up front or over time through a contribution in aid of construction); the derivation of any net present value amount and the determinants used in the net present value amount and any transmission offsets; and whether the “stranded” facilities can be used by other customers on the system.

²⁵ We note that the term “stranded cost” as defined in article 2.4 is different from the term in Order No. 888. In Order No. 888, “stranded costs” refers to the cost of generating units built to serve customers under existing requirements contracts, that costs may become stranded as a result of open access when these customers leave the utility’s system to take power from a competing power supplier. Article 2.4 does not address generation facilities and does not involve a requirements customer leaving AEP’s system to take power service from a competing power supplier. Rather, it pertains to the construction or modification of delivery points and related facilities to accommodate a transmission service customer. *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F. 3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

46. Finally, we disagree with AMP-Ohio that the rate of return methodology used in Docket No. ER05-751-000 is relevant to this proceeding. The rate of return methodology developed in that proceeding was for network transmission facilities (not new local interconnection facilities, as is the case here) under the PJM tariff.

47. Article 3.1 (Measurement of Load At Each Delivery Point) sets forth the terms and conditions governing the measurement of load at each delivery point. It states that the customer shall compensate AEP for metering and meter data processing services as specified in Attachment 1.²⁶

48. AMP-Ohio argues that customers generally have access to the “behind-the-meter generation data”²⁷ and should not be required to pay for data they already have. AMP-Ohio states that if the provision is retained, AEP’s obligation should be limited to data to which the customer does not already have access.

49. The Commission agrees with AMP-Ohio that if the customer already has access to the “behind-the-meter generation data,” and does not wish AEP to provide it to the customer, the customer should not have to pay for the data. Thus, AEP is directed to revise article 3.1 to clarify that the customer has the option whether AEP will provide “behind-the-meter generation data” to the customer.²⁸

50. Article 3.6 states that unless otherwise agreed, AEP has the sole right to enter upon, test, operate and control the facilities owned by AEP. It also states that this right includes but is not limited to directing the opening and closing of switches for construction, operation, testing, maintenance and other relevant purposes. However, in its Compliance Filing, AEP explains that it shall have the sole right to enter upon, test, operate and control facilities that are owned by the customer but that must be operated by AEP to ensure safety and reliability and to maintain continuity of service to other customers.

51. AMP-Ohio contends that it should have the same right as AEP with regard to granting “the rights of access, testing etc. of customer owned facilities.” AMP-Ohio also suggests that the following language be added to article 3.6: “unless permission is

²⁶ Article 3.1 states: “If AEP, _____, or PJM requires real-time load or facility status information from any Delivery Point, the other Party shall cooperate, to the extent necessary, in order that such monitoring and telecommunications equipment, as shall be needed for such purpose may be installed and maintained during normal business hours common to AEP and _____ _____ shall compensate AEP for metering and meter data processing services as specified in Attachment 1 of this Agreement.”

²⁷ See *infra* P 55.

²⁸ AEP does account for customers who are not connected to the PJM transmission system in article 4.4 of the *pro forma* Agreement.

expressly granted to the other party by the owning party.” It claims that this language is needed to recognize that there are situations where granting such permission may be desirable.²⁹

52. We will deny AMP-Ohio’s request, since article 3.6 only deals with AEP-owned facilities. However, if AEP wishes to revise article 3.6 to include customer-owned facilities, as appears to be its intent in the Compliance Filing, then it must incorporate AMP-Ohio’s proposed language or, if AEP does not believe that AMP-Ohio’s proposed language is necessary, AEP must fully justify in its revised filing why AMP-Ohio’s revision may not be appropriate.

53. Article 4 (Customer’s Load, Capacity and Other Obligations to the RTO)³⁰ requires all Load Serving Entities (LSEs) to comply with all RTO requirements and explains that AEP’s responsibility to assist LSEs is limited to that required under the PJM OATT. Article 4 also requires AEP to cooperate with PJM and the customer in order to ensure that data used to calculate transmission charges and generation capacity obligations is available to PJM.³¹

54. Article 4.4 (Behind-the-Meter Generation) refers to “a generation unit that delivers energy to load without using the transmission system or any distribution facilities (unless the entity that owns or leases the distribution facilities has consented to such use).”³² Article 4.4 also requires that AEP cooperate with PJM, LSEs and generators connected to the PJM transmission system so that PJM can obtain real-time and hourly generator output metering information when needed.

55. AMP-Ohio states that it is unclear whether the settlement agreement recently accepted by the Commission concerning behind-the-meter generation, to which PJM is a party,³³ is reflected in the *pro forma* Agreement. AMP-Ohio states that if there are

²⁹ AMP-Ohio Protest at 8.

³⁰ Regional Transmission Organization (RTO).

³¹ Additionally, AEP will provide PJM data regarding network service peak load determinations, behind-the-meter generation, post settlement of PJM inadvertent energy allocations and Locational Marginal Pricing node/zone aggregator.

³² See PJM’s OATT, section 1.3B, Second Revised Second Revised Sheet No. 33 under FERC Electric Tariff, Sixth Revised Volume No. 1.

³³ *PJM Interconnection, L.L.C.*, 113 FERC ¶ 61,279 (2005) (PJM Settlement). In an order issued on July 6, 2005, the Commission instituted an investigation and hearing as to whether it is unduly discriminatory for PJM to exclude generation connected to a distribution system from its behind-the-meter generation netting program. *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,034 (2005). On December 16, 2005, the

inconsistencies between the *pro forma* Agreement and the PJM Settlement, the *pro forma* Agreement should be revised to conform to the settlement. AMP-Ohio also points out that the obligations imposed on customers to furnish generator data are also set forth in PJM's OATT and business practices. It argues that there is no need to add potentially conflicting requirements through the *pro forma* Agreement.

56. AMP-Ohio also requests that the first sentence of article 4.4.1 (Generators that do not participate in the PJM Markets) be revised to read: "The generating party shall comply with the PJM generator data requirements for generators that do not participate in the PJM markets" instead of "The generating party shall provide, each month by the 5th working day after the end of the month, a data file containing the hourly unit or plant kWh output." Further, AMP-Ohio requests that the first sentence of article 4.4.2 (Generators that do participate in the PJM Markets), should read: "The generating party shall comply with the PJM interconnected generator data requirements" instead of "The generating party shall provide real-time unit or plant output data required by PJM via an Inter-Control Center Protocol ("ICCP") data link to AEP."

57. We agree with AMP-Ohio's request that AEP's language in article 4.4 (including Article 4.4.1) must conform with the PJM Settlement.³⁴ AEP must revise the *pro forma* Agreement to conform with the PJM Settlement. Additionally, since specific obligations imposed on customers, with respect to furnishing generator data, are already present in PJM's OATT and business practices, as AMP-Ohio notes, we direct AEP to revise Articles 4.4.1 and 4.4.2 in order to prevent adding requirements to the *pro forma* Agreement that could potentially conflict with the PJM OATT or PJM business practices.

58. Article 4.5 (Post Settlement of PJM Inadvertent Energy Allocation) states that when PJM assigns the costs of supplying inadvertent energy to AEP's control zone each month, AEP will allocate a portion of the cost to each LSE in the control zone in proportion to the LSE's Network Service Peak Load.

59. AMP-Ohio complains that under article 4.5, AEP is not required to provide customers with sufficient information to verify the charges for inadvertent energy settlements. AMP-Ohio proposes that the following language be included at the end of article 4.5: "AEP will provide each customer the data necessary for the customer to verify the charges for Inadvertent Energy settlement that are passed through to the customer from the PJM invoice."

Commission approved an uncontested settlement that provides an opportunity for generators connected to a distribution system to qualify for the behind-the-meter generation netting provisions.

³⁴ *Id.*

60. We agree with AMP-Ohio that article 4.5 must provide customers with sufficient information to verify the inadvertent energy settlement charges. This will allow customers to verify their share of the costs in these circumstances. Accordingly, AEP is directed to revise article 4.5 to incorporate AMP-Ohio's proposed language.

61. Article 5.1 (Billing, Payments and Disputes) states that as long as PJM is willing to provide billing and payment collection services, the charges for delivery point, power factor, distribution, meter and related meter reading and data processing services provided for under the *pro forma* Agreement will be included in the monthly transmission service invoice issued by PJM. It also requires that customers taking service under the *pro forma* Agreement be subject to PJM's creditworthiness provisions.

62. AMP-Ohio questions the need for customers taking service under the *pro forma* Agreement to be subject to PJM's creditworthiness provisions. It complains that certain PJM OATT creditworthiness requirements are the result of PJM being a not-for-profit entity that has no assets of its own and that passes all its costs through to its customers. It argues that for these reasons, PJM requires a greater degree of credit protection than does an asset-rich investor-owned utility company such as AEP.

63. The Commission agrees with AMP-Ohio. Since AEP is providing the service under its OATT, AEP's creditworthiness requirements should apply.³⁵ Accordingly, AEP must revise its *pro forma* Agreement to delete the requirement that the customer will be subject to PJM creditworthiness provisions.

64. Article 5.2 (Taxes on Contributions in-Aid of Construction) states that when the customer funds the construction of AEP-owned facilities through to a contribution in aid of construction (CIAC), the customer also shall reimburse AEP for any taxes associated with the CIAC. The amount of the tax to be assessed to the customer is to be computed using a present value depreciation amount that discounts AEP's anticipated tax depreciation deductions by AEP's current weighted cost of capital (with respect to the constructed property).

65. Ohio Municipals complain that AEP has not explained the method it used to compute the "current weighted average cost of capital." It asks the Commission to require AEP to so explain and to provide an example of a calculation using current data.

66. We agree with Ohio Municipals that AEP has not explained in sufficient detail how the weighted average cost of capital will be computed. Accordingly, AEP is directed to provide a detailed explanation of how its "current weighted average cost of capital" is determined and to provide an example of the calculation using its most recent data when it makes a section 205 filing to assess CIAC charges to a customer.

³⁵ See section 11 of AEP's OATT.

67. Article 5.3 (Indemnity) sets forth the indemnity provisions for each of the parties to the *pro forma* Agreement. AEP proposes to add the following language at the end of the article: “Further, to the extent that a Party’s immunity as a complying employer, under the worker’s compensation and occupational disease laws of the state where the work is performed, might serve to bar or affect recovery under or enforcement of the indemnification otherwise granted herein, each Party agrees to waive such immunity. With respect to the State of Ohio, this waiver applies to section 35, Article II of the Ohio Constitution and Ohio Rev. code section 4123.74.”

68. AMP-Ohio states that the municipal members may not be willing or legally able to waive the rights discussed. It requests that AEP be directed to provide an opinion of its Ohio counsel that the rights referred to in the new language are waivable. AMP-Ohio also complains that even if waiver is permissible, waiver may only be requested by the party possessing the rights being waived. AMP-Ohio states that it cannot waive the rights of its individual municipal members. Therefore, AMP-Ohio requests that the language be deemed inoperative where one entity is acting on behalf of other entities.

69. The Commission finds that part of AEP’s proposal,³⁶ that allows each party to indemnify the other party, is just, reasonable, and not unduly discriminatory or preferential. We find that this part of the proposal provides transparency and the necessary balance to protect the rights of all of the parties. However, the remaining parts of the proposal are different from the indemnification language currently in AEP’s existing OATT and AEP has failed to demonstrate that the remaining parts of the proposed provision, as revised, are just, reasonable, and not unduly discriminatory or

³⁶ Section 5.3 of AEP’s proposed indemnification provision states:

To the extent permitted by law, each Party shall indemnify and save harmless the other Party from and against any loss, liability, cost, expenses, suits, actions, claims, and all other obligations arising out of injuries or death to persons or damage to property caused by or in any way attributable to the Delivery Point(s) and/or distribution facilities covered by this Agreement, except that a Party's obligation to indemnify the other Party shall not apply to any liabilities arising solely from the other Party's negligence, recklessness or intentional misconduct or that portion of any liabilities that arise out of the other Party's contributing negligent, reckless or intentional acts or omissions. Further, to the extent that a Party's immunity as a complying employer, under the worker's compensation and occupational disease laws of Ohio, might serve to bar or affect recovery under or enforcement of the indemnification otherwise granted herein, each Party agrees to waive such immunity. As respects this subsection only, the term "Party" shall include the Party's directors, officers, employees, and agents.

preferential. Therefore, the Commission will reject the proposal and require that AEP file revised indemnification language consistent with the indemnification language in AEP's OATT but revised to retain the language discussed above, which indemnifies both parties.

70. AEP also must provide an opinion of its Ohio counsel that the rights afforded to the parties in the new language are waivable. Also, if counsel affirms that these rights are waivable, AEP is directed to add language that states that article 5.3 is deemed inoperative where one entity is acting on behalf of one or more entities as is the case with AMP-Ohio. However, if counsel is unable to affirm that these rights are waivable, AEP must delete the new language in its entirety.

71. Article 5.4 (Effective Date and Term of Agreement) sets forth the conditions under which the *pro forma* Agreement is to be executed and filed with the Commission if the parties are unable to reach agreement to file the Agreement in unexecuted form. AEP has also eliminated language that would have required AEP to file the agreement in unexecuted form pursuant to section 29³⁷ of its OATT.

72. AMP-Ohio complains that elimination of the reference to section 29 of the OATT will create needless uncertainty about AEP's obligation to file an unexecuted version of the *pro forma* Agreement if the parties are unable to reach agreement on the specific terms of the Agreement. AMP-Ohio asks that the article be revised to state that if the parties cannot reach agreement on the terms of the Agreement, AEP will file an unexecuted version with the Commission within a specific period of time of the customer's request for such a filing.

73. The Commission agrees with AMP-Ohio. The lack of a procedure for handling disputed or unexecuted Agreements could result in confusion and ultimately cause service to be delayed. Accordingly, AEP is directed to revise article 5.4 to state that AEP will file an unexecuted Agreement with the Commission within thirty days of the customer's request for such a filing.

74. Attachment 1 (List of AEP Power Delivery Points and Associated Charges), is blank. AEP proposes to list the delivery charges for metering, meter readings, data processing and local distribution facilities for each delivery point. AEP states that these charges are the same as those that were previously in the individual agreements between AEP and its customers.

³⁷ Regarding the initiating of service, section 29 sets forth: the conditions for receiving service; the application procedures for requesting service; the technical arrangements to be completed prior to the commencement of service; and responsibilities concerning network customer facilities and the filing of service agreements.

75. The Ohio Municipals ask whether Attachment 1 reflects all of the charges under the *pro forma* Agreement.

76. If AEP proposes to include new rates for service on Attachment 1 that are different from the formula rate (in Attachment 4) or the stated rates in the *pro forma* Agreement, the new charge would be a change in rate and AEP would be required to make a new section 205 filing.

C. Miscellaneous

77. AMP-Ohio expresses concern that there may be services that AEP is providing that PJM would have otherwise been required to furnish. We share AMP-Ohio's concerns that the *pro forma* Agreement may relieve PJM of an obligation it otherwise would bear. Accordingly, we will require AEP to provide a copy of the communication it had with PJM in which PJM stated that it will not be involved in the services beyond the transmission it controls. If PJM is to be the entity providing the service, the customer must take the service from PJM and compensate PJM for that service. If PJM does not provide the service offered under AEP's *pro forma* Agreement, then PJM must not bear a portion of the cost of the services.

78. AMP-Ohio requests that we reject the *pro forma* Agreement because it was not the product of a "credible stakeholder process." We reiterate our finding in the February 25 Order that AEP's OATT does not require it to hold a stakeholder process before making a filing with the Commission. Thus, we will deny AMP-Ohio's request to reject the proposed *pro forma* Agreement on these grounds.³⁸

79. While AEP's *pro forma* Agreement generally complies with the February 25 Order, AEP must make modifications for the reasons discussed above. AEP must file its revised tariff sheets within sixty (60) days of the date of this order.

D. Section 206 Proceeding

80. In the February 25 Order, the Commission established a proceeding under section 206 of the FPA stating that AEP was to properly re-designate its grandfathered Service Agreements and the proposed *pro forma* Agreement as it related to the PJM OATT, rather than the AEP OATT.³⁹ Given that AEP has re-filed the Service Agreements⁴⁰ with

³⁸ February 25 Order at P 29.

³⁹ The Commission initially instituted a proceeding under section 206 of the FPA in *Delmarva Power & Light Co.*, 110 FERC ¶ 61,186 (2005). AEP was to properly re-designate its grandfathered Service Agreements and its proposed *pro forma* Agreement as it related to the PJM OATT, rather than AEP's OATT. The Commission directed PJM to either designate the agreements as related to its OATT or, in the alternative, show cause why such agreements should not be so designated.

a PJM service agreement designation, and since those Service Agreements were accepted by the Commission,⁴¹ there is no further need for a section 206 proceeding. Accordingly, the Commission terminates the section 206 proceeding instituted in Docket No. EL05-62-000.

The Commission orders:

(A) AEP's April 26, 2005 filing, as amended, is conditionally accepted, to be effective October 1, 2004, subject to further Commission action on the compliance filing directed in Ordering Paragraph (B).

(B) AEP is directed to make a compliance filing within sixty (60) days of the date of this order, as directed in the body of the order.

(C) Docket No. EL05-62-000 is terminated.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁴⁰ See *supra* note at 12.

⁴¹ Delmarva Power & Light Company submitted its compliance filing to the Commission on April 26, 2005. See *Delmarva Power & Light Co.*, Docket Nos. ER04-509-005, ER04-1250-004 and EL05-62-002 and *PJM Interconnection, L.L.C.*, Docket No. EL06-62-001 (June 9, 2005) (unpublished letter orders).