

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Indeck-Elwood, L.L.C.

v.

Docket No. EL06-103-000

PJM Interconnection, L.L.C.

ORDER ON COMPLAINT

(Issued November 21, 2006)

1. On August 31, 2006, Indeck-Elwood, L.L.C. (Elwood) filed a complaint pursuant to section 206 of the Federal Power Act (FPA)¹ against PJM Interconnection, L.L.C. (PJM). Elwood alleges that PJM's policy of requiring interconnection customers to post cash or cash-equivalent security: (i) violates PJM's open access transmission tariff (OATT); and (ii) requires that article 36.8.4(b) of the PJM OATT be revised. For the reasons discussed below, we will deny Elwood's complaint.

Background

2. Elwood states that it plans to build and operate a 600 megawatt coal-fired power plant in Ellwood, Illinois, with an estimated in-service date of 2011 and a total project cost of \$1.2 billion. Elwood states that construction of the network upgrades required by the project is expected to begin after July 1, 2008. It notes that if Network Upgrade construction is performed by the transmission owner, the cost to interconnect the Ellwood facility to the PJM system is approximately \$10.1 million. Elwood states however, that because it has elected to build the Network Upgrades itself pursuant to the Option to

¹ 16 U.S.C. § 824e (2000).

Build provision under PJM's OATT, it is being required by PJM to post \$1.2 million in security in connection with the Network Upgrades. Elwood states that the majority of this expense reflects PJM's projected construction oversight costs.

3. Elwood complains that under PJM's OATT, at article 36.8.4(b), interconnection customers are required to post security equal to the estimated cost of *all* Network Upgrades within sixty days of PJM's tendering an unexecuted interconnection agreement, even where, as here, no costs will be incurred for any upgrade for years.² Elwood states that this requirement is at odds with the policy adopted by the Commission in Order No. 2003.³ Specifically, Elwood asserts that in Order No. 2003, the Commission approved, at article 11.5 of the Large Generator Interconnection Agreement (LGIA), a

² Article 36.8.4(b) ("Security") states, in relevant part:

At the time the Generation Interconnection Customer executes and returns to the Transmission Provider the Interconnection Service Agreement (or requests dispute resolution or that it be filed unexecuted), the Generation Interconnection Customer also shall provide the Transmission Provider (for the benefit of the affected Transmission Owner(s)) with a letter of credit or other reasonable form of security acceptable to the Transmission Provider that names the Transmission Provider as beneficiary and is in an amount equivalent to the sum of the estimated costs determined by the Transmission Provider of (i) the required Local Upgrades and Network Upgrades[.]

³ See *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2005), *order on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005); see also *Notice Clarifying Compliance Procedures*, 106 FERC ¶ 61,009 (2004).

more flexible requirement, *i.e.*, the requirement that the interconnection customer provide security 30 days prior to the construction of discrete portions of Network Upgrades.⁴ Elwood asserts that in this case, PJM has no need for security until that time.

4. Elwood also challenges the PJM requirement that security covering the entirety of the Network Upgrades be provided. Elwood asserts that the better approach, as reflected in article 11.5 of the *pro forma* LGIA, is to require security prior to work on the “applicable portion” of the Transmission Provider’s system. Elwood argues that this policy allows for the posting of security that is proportionate to the Transmission Provider’s potential risk exposure at every point during the construction process, while avoiding an excessive requirement.

5. Elwood also states that PJM’s practice of refusing to allow creditworthy interconnection customers to post security in any form other than cash or a cash-equivalent letter of credit is contrary to the PJM OATT, which provides that security may be provided in the form of a “letter of credit *or other reasonable form of security.*”⁵ Elwood asserts that PJM’s policies are unreasonable, burdensome and inconsistent with article 11.5 of the *pro forma* LGIA. Elwood notes that under article 11.5, the interconnection customer is allowed to provide, at its option, a guarantee, a surety bond, letter of credit, or other form of security that is reasonably acceptable to the transmission provider and consistent with the Uniform Commercial Code. Elwood concludes that article 36.8.4(b) of the PJM OATT should be revised to list all forms of security that PJM will accept in addition to a letter of credit.

⁴ See Elwood complaint at 9, *citing* Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 431 and P 596 (discussing the potential chilling effect of requiring excess security and finding that article 11.5 requires the interconnection customer to provide security for only discrete portions of the Network Upgrades, not the total amount of the Network Upgrades) and *California Independent System Operator Corp.*, 112 FERC ¶ 61,009 at P 161, *reh’g denied*, 112 FERC ¶ 61,231 (2005) (rejecting a proposed modification that would have required additional security, finding that it would be unduly burdensome for Interconnection Customers and could discourage construction of new generating capacity).

⁵ See PJM OATT at section 36.8.4 (emphasis added).

6. Finally, Elwood takes issue with the PJM OATT provision governing the filing of unexecuted interconnection agreements, specifically, the requirement that security be posted before an unexecuted agreement may be filed, even when the proper amount or form of security is under dispute. Elwood argues that, as such, an interconnection customer seeking review of a PJM security decision has no choice but to comply with the disputed security requirements while seeking Commission review or else risk forfeiting its position in the interconnection queue.

Notice of Filing and Responsive Pleadings

7. Notice of Elwood's complaint was published in the *Federal Register* with interventions, answers, protests and comments due on or before September 20, 2006.⁶ An answer was timely filed by PJM, and comments were filed by PHI, *et al.*, Constellation, PSEG Companies, LS Power, and Dominion.

8. PJM, in its answer, asserts that the OATT requirements at issue in this case have been in effect since 1999,⁷ and were most recently re-approved as appropriate by the Commission in its order addressing PJM's Order No. 2003 compliance filing.⁸ PJM asserts that Elwood, in its complaint, presents no evidence supporting a change in circumstances or other facts that would warrant a change in these Commission-approved OATT requirements. PJM also asserts that its interconnection procedures have a proven

⁶ 71 Fed. Reg. 54,047 (2006).

⁷ PJM answer at 1, *citing PJM Interconnection, L.L.C.*, 87 FERC ¶ 61,299 at 62,196 (1999).

⁸ *Id.* at 2, *citing PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,025 at PP 17-18 (2004) (*PJM Compliance Order*) (accepting section 36.8.4(b), as amended, to: (i) reduce the amount of security required for Attachment Facilities to the estimated costs of the first three months of construction; (ii) require that the security be held until final invoice, while the security for Network Upgrades would be reduced as construction progresses; and (iii) require quarterly invoicing). *See also PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,099 (2005) (accepting PJM's second Order No. 2003 compliance filing capping PJM's total security requirements at 125 percent of the total estimated projected costs and incorporating provisions set forth in section 36.8.4(b) into section 36.7B, relating to interim interconnection service agreements).

track record, as evidenced by over 200 interconnection service agreements that have been executed since 1999, including approximately 90 such agreements that have required a security posting. PJM argues that given this track record, it cannot be said that PJM's security requirements have erected barriers to entry.

9. PJM also asserts that its security requirements are both necessary and appropriate. Specifically, PJM argues that once a Network Upgrade is approved and included in PJM's Regional Transmission Expansion Plan (RTEP), these upgrades become part of the baseline for future transmission plans. In other words, the completion of the upgrades included in an interconnection service agreement is assumed when developing future RTEPs and determining the required upgrades for later queued projects. PJM asserts that, as such, if the upgrades are not built, future RTEPs may be affected. PJM concludes that its security requirements ensure the availability of funds to complete the upgrades specified in a customer's interconnection service agreement, providing a degree of certainty for all other market participants.

10. PJM also responds to Elwood's charge that the forms of security accepted by PJM violate the allowances set forth in section 36.8.4(b), *i.e.*, Elwood's claim that the clause "or other reasonable form of security acceptable to the Transmission Provider" contemplates the acceptance of something *other* than cash or a cash-equivalent security. PJM responds that, in fact, it accepts a letter a credit (the security expressly noted in section 36.8.4(b)) *or* cash – another "reasonable form of security," as referenced in section 36.8.4(b). PJM states that other forms of security have been found to be unacceptable by PJM's stakeholders, including surety bonds and guarantees. PJM notes, however, that it remains open to any other alternative forms of security so long as the security needs of PJM can be satisfied.

11. Finally, PJM responds to Elwood's request that interconnection customers not be required to post security until such time as any disputes related to that requirement have been resolved. PJM argues, first, that the provision at issue (a subpart of section 36.8.4(b)) has already been accepted by the Commission as just and reasonable. Second, PJM asserts that this requirement is appropriate because it lends assurance to the market as a whole that the project at issue will, in fact, proceed to completion.

12. As noted above, comments were submitted by PHI, *et al.*, Constellation, PSEG Companies, LS Power, and Dominion. Constellation and LS Power generally support Elwood's complaint. PHI, *et al.* and Dominion assert that Elwood's complaint should be denied for the reasons articulated by PJM in its answer.

13. On October 5, 2006, Elwood filed an answer responding to PJM's answer. Elwood's answer largely reiterates the arguments set forth in its complaint, including its argument that PJM's security requirements are onerous and operate as an impediment to market entry.

Discussion

Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁹ all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties.

15. Rule 213(a) of the Commission's Rules of Practice and Procedure¹⁰ prohibits an answer to an answer, unless otherwise permitted by the decisional authority. We are not persuaded to accept Elwood's answer and will, therefore, reject it.

Analysis

16. For the reasons discussed below, we will deny Elwood's complaint. Elwood asserts that requiring it to post \$1.2 million in security prior to the start of construction of its project is onerous and unreasonable. Elwood requests, instead, that PJM be required to adopt the more flexible requirement approved by the Commission in the *pro forma* LGIA under which security is not required until 30 days before construction on the project is to begin. Elwood asserts, in effect, that PJM's security requirements are inconsistent with Commission policy.

17. The policy on security in Order No. 2003 was established for transmission owners that are not independent entities, such as regional transmission organizations (RTOs). In Order No. 2003, the Commission expressly recognized the appropriateness of permitting RTOs, such as PJM, to propose variations from the Commission's *pro forma* LGIA. Specifically, in Order No. 2003, the Commission stated that an RTO is less likely to act

⁹ 18 C.F.R. § 385.214 (2005).

¹⁰ *Id.* at § 385.213(a)(2).

in an unduly discriminatory manner than would a transmission provider that is also a market participant and would therefore be permitted to seek “independent entity variations” from the Order No. 2003 *pro forma* tariff.¹¹

18. As Elwood acknowledges, PJM sought just such a variation with respect to its security requirements, and the Commission accepted these requested variations in the *PJM Compliance Order*.¹² These variations, moreover, as PJM correctly points out in its answer, are consistent with PJM’s requirements dating back to 1999, reflect the views of PJM’s stakeholders, and are rationally related to PJM’s stated policy of providing assurance to market participants regarding the viability of all projects queued to go on line.

19. While Elwood asserts that PJM’s policies create barriers to entry, we do not find that such barriers are so significant as to warrant changing the PJM provision. Elwood points to no other project except its own as being significantly adversely affected by this policy. PJM points out that since 1999, there have been approximately 90 interconnection service agreements requiring security that have been executed and that PJM’s security requirement has not deterred these projects. Moreover, even with respect to Elwood’s own project, Elwood has failed to show that providing security at the time of the interconnection agreement amounting to less than 1% of the overall project cost of \$1.2 billion creates a significant barrier.

20. Under the PJM OATT, the costs for projects later in the queue are dependent on the upgrade projects for those earlier in the queue. The PJM requirement of posting security at the time of the interconnection provides assurance to those later in the queue of the seriousness of earlier projects on which they rely. Elwood has not provided sufficient evidence for the Commission to find that PJM’s existing policy is unjust and unreasonable.

21. We also reject Elwood’s request that we revise other aspects of PJM’s security requirements to conform with the *pro forma* LGIA, specifically, the PJM requirement that security be posted sixty days prior to PJM’s tendering an unexecuted interconnection agreement, even when the proper amount or form of the security is in dispute. Elwood

¹¹ See Order No. 2003, FERC Stats. & Regs ¶ 31,146 at P 827.

¹² 108 FERC ¶ 61,025 at PP 17-18.

has not shown that posting security during a dispute is such an onerous requirement that a change to its OATT is warranted, and such posting does serve to provide those later in the queue with the requisite assurances underlying PJM's policy.

22. Finally, we reject Elwood's claim that PJM has violated article 36.8.4(b) of its OATT or Order No. 2003 with respect to its interpretation of valid security. PJM's OATT provides that a "letter of credit or other reasonable form of security acceptable to [PJM] be provided." This provision is consistent with Order No. 2003 which provides that "the Interconnection Customer (IC) shall provide to Transmission Provider (TP), at the IC's option, a guarantee, a surety bond, letter of credit or other form of security that is reasonably acceptable to the Transmission Provider."¹³ The Commission also has recognized that RTO/ISOs have reasonable discretion in determining the forms of collateral that they will accept.¹⁴ PJM states that it is willing to review a form of security other than cash, or a letter of credit, but Elwood has not shown that it has presented PJM with an acceptable or alternative form of security.

The Commission orders:

Elwood's complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹³ See *pro forma* LGIA at article 11.5.

¹⁴ See *Southwest Power Pool, Inc.*, 116 FERC ¶ 61,162 at P 17 (2006) (limiting acceptable financial security to cash deposits, irrevocable letters of credit and corporate guaranties); *New York Independent System Operator, Inc.* 104 FERC ¶ 61,311 at P 58 (2003) (not requiring the acceptance of surety bonds without a "pay now/fight later" clause); *New York Independent System Operator, Inc.*, 105 FERC ¶ 61,340, at P 23 (2003) (not requiring the acceptance of a surety bond from a company without an "A" rating).