

127 FERC ¶ 61,006
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

BJ Energy LLC
Franklin Power LLC
GLE Trading LLC
Ocean Power LLC
Pillar Fund LLC

Docket No. EL08-49-000

v.

PJM Interconnection, LLC

ORDER ON COMPLAINT

(Issued April 2, 2009)

1. On March 28, 2008, BJ Energy LLC, Franklin Power LLC, GLE Trading LLC, Ocean Power LLC, and Pillar Fund LLC (collectively, Tower Companies) filed a complaint against PJM Interconnection, LLC. (PJM). The Tower Companies contend that PJM is withholding excess collateral and revenues due several Tower Company affiliates in violation of its Open Access Transmission Tariff. Tower Companies request that the Commission direct PJM to distribute the funds. As discussed below, the Commission will grant Tower Companies' complaint without prejudice to PJM seeking an order from the district court requiring the preservation of those funds for district court litigation.

Background

2. The Tower Companies are private investment companies. They include Power Edge LLC, a trading participant in PJM's Financial Transmission Rights (FTR) markets that defaulted on its FTR obligations in December 2007. On January 18, 2008, PJM filed (in Docket No. ER08-455-000) tariff revisions that would allow PJM to hold all affiliates' collateral and FTR revenues if any one affiliate defaulted. Several days later, PJM also informed Tower Companies that it would be withholding disbursement of revenues that would otherwise be credited to the accounts of Tower Companies.

3. On March 25, 2008, the Commission issued an order in Docket No. ER08-455-000 rejecting PJM's proposed tariff revisions.¹ PJM's proposed tariff revisions would have required affiliated companies trading in FTR markets to be one another's guarantors in defined circumstances. PJM contended that current default allocation rules allow a market participant to establish another affiliate to hold risky offsetting FTR positions. PJM asserted that, in this scenario, the affiliate taking the risk could default and walk away leaving other, unaffiliated PJM members to cover the default, while the non-defaulting affiliate would continue to earn revenues for its FTR position.

4. In the March 25 Order, the Commission stated that it was rejecting PJM's filing as too narrow to address the perceived flaw in its credit rules.² The Commission determined that companies have legitimate, non-manipulative reasons to establish affiliates and that it was not just and reasonable for PJM, as a generic matter, to propose a tariff provision that automatically takes the profits of one affiliate to offset against the losses of another. Instead, the Commission found that the proper focus should be on establishing adequate credit requirements for all participants, regardless of their alleged motivations. Finally, the Commission noted that the issues raised by the Power Edge default would be addressed in an ongoing investigation by the Commission's Office of Enforcement (OE).

5. On March 7, 2008, in Docket No. EL08-44-000, PJM also filed a complaint alleging market manipulation by Tower Companies. The Commission issued an order in that docket on April 30, 2008, holding the complaint in abeyance pending the report on the OE investigation.³ On March 26, 2008, Tower Companies again demanded that PJM return all excess collateral and revenues being held by PJM. On March 27, 2008, PJM informed Tower Companies that it did not intend to disburse any of the funds to Tower Companies.

6. In July 2008, the Tower Companies filed a civil suit in federal district court in Pennsylvania against PJM. Based on claims such as conversion and breach of contract, the suit seeks, inter alia, compensatory damages equal to the withheld collateral.⁴

¹ *PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,279 (2008) (March 25 Order).

² *Id.*

³ *PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,103 (2008).

⁴ See *BJ Energy LLC v. PJM Interconnection, L.L.C.*, C. A. No. 08-CV-3649-NS, First Amended Complaint (Nov. 7, 2008), <http://www.pjm.com/~media/about-pjm/member-services/default-notification/amended-complaint-with-cert-of-service.ashx>.

7. In an order in Docket No. EL08-44-000 issued contemporaneously with this order, the Commission is dismissing PJM's complaint with respect to two principal allegations: (1) that certain Tower Company affiliates perpetrated a fraud upon PJM by entering into coordinated, offsetting positions in the market for FTRs, concentrating high-risk or losing positions in one affiliate, Power Edge, and deliberately causing Power Edge to default on its obligations by saddling it with these positions, and hedging its risk, not in Power Edge, but in its more profitable affiliates; and (2) that Power Edge was deliberately under- or de-capitalized in order to trigger its collapse. In that order, the Commission finds that PJM's claims with respect to these two allegations do not rise to the level of a violation of 18 C.F.R. § 1c.2. (2008), because PJM provided, and OE found, no evidence that the Tower Companies' dealings with PowerEdge constituted a scheme or artifice to defraud made with the requisite scienter.

Complaint

8. In their complaint, the Tower Companies assert that, since January 2008, PJM has improperly withheld over \$25 million of either FTR revenue or excess FTR collateral that it owes several Tower Company affiliates. Tower Companies maintain that since PJM refuses to return the excess FTR collateral or disburse the earned revenues to Tower Companies, PJM has violated its tariff. Tower Companies assert that PJM's tariff requires that "collateral returns shall be made by PJM at least once per calendar quarter, if requested by a Market Participant."⁵ Tower Companies state that each of its affected affiliates has made such a request, and PJM has refused every request to return the excess collateral. Tower Companies also contend that while PJM's tariff requires monthly settlements of amounts owed between PJM and market participants, PJM is withholding revenues that are due to Tower Company's affiliates.

Notice and Responsive Pleadings

9. Notice of Tower Companies' filing was published in the *Federal Register*, 73 Fed. Reg. 19,062 (2008), with answers, interventions and protests due on or before April 17, 2008. PEPCO Holdings, Inc.; Allegheny Energy Supply Company, LLC; Reliant Energy, Inc.; and Coral Power, LLC filed motions to intervene. DTE Energy Trading, Inc. (DTET); Exelon Corporation (Exelon); First Energy Service Company; and Constellation New Energy, Inc. (CEG) filed motions to intervene and comments. PJM filed an answer and Tower Companies filed an answer in response. Dominion Resources Services, Inc. (Dominion) filed a motion to intervene out of time.

⁵ PJM Tariff, § V.F.

10. In its answer, PJM states that it has filed a civil suit in federal district court in Delaware alleging that the Tower Companies violated the Racketeering Influenced and Corrupt Organizations Act by manipulating PJM's energy market. In the civil suit, PJM alleges that Power Edge fraudulently disbursed over \$4 million to its investors when it knew, or should have known, that it would soon be incurring losses that it could not afford to pay.

11. PJM argues that, given this history, it is entitled to withhold excess collateral and revenues earned by Tower Companies pending the outcome of its civil suit, the Commission's enforcement investigation, and the Commission's resolution of PJM's complaint against Tower Companies. PJM asserts that it is protecting its members by withholding disbursement of these funds until these disputes are resolved. PJM states that, if it were to disburse the money owed, Tower Companies could easily distribute the funds beyond the Commission's reach. PJM adds that it has set aside these funds in an interest-bearing account until the dispute is resolved.

12. PJM asserts that the Commission traditionally has not intervened in disputes over money damages arising from such claims or counterclaims, because it is not a collection agency.⁶ It argues the Commission should leave the resolution of the amounts owed between PJM and Tower Companies to the pending district court litigation, without prejudging the outcome, and without frustrating the court's ability to order meaningful relief. PJM maintains that this dispute does not require a tariff interpretation, but that it is entitled to retain these funds pending the resolution of its claims for damages in the civil suit and for disgorgement and other relief in the pending Commission proceedings. PJM maintains that Tower Companies are free to seek a judgment from the district court for a return of the funds. Furthermore, PJM requests that the Commission defer to the civil suit in district court as to the proper disposition of the money.

13. PJM argues that Commission precedent supports its refusal to return the funds to Tower Companies while these proceedings are pending. PJM asserts that the Commission has denied complaints demanding the return of posted collateral in energy markets where there were numerous, ongoing, contested proceedings.⁷ PJM asserts that

⁶ PJM Answer at 11 citing *Pub. Serv. Co. of N.H. v. N.H. Elec. Coop., Inc.*, 55 FERC ¶ 61,028 at 61,078 (1991).

⁷ PJM Answer at 14 citing *Constellation Power Source, Inc., v. Cal. Power Exch. Corp.*, 100 FERC ¶ 61,124, *order on reh'g*, 100 FERC ¶ 61,380 (2002), *aff'd*, *Constellation Energy Commodities Group, Inc., v. FERC*, 457 F.3d 14 (D.C. Cir. 2006); *PowerEx Corp. v. Cal. Power Exch. Corp.*, 102 FERC ¶ 61,328 (2003), *order on reh'g*, 104 FERC ¶ 61,119 (2003), *aff'd*, *Constellation Energy Commodities Group, Inc. v.*

(continued...)

its tariff expressly provides a right of “set off equal to any amount that the Member is required to pay the LLC in connection with or arising under or from this Agreement, any service or rate schedule, any tariff, or any services performed by the Office of the Interconnection.”⁸ PJM argues that, under this tariff provision, it has the right to withhold these amounts as an offset until the resolution of its complaint and the OE investigation, both of which could result in a disgorgement to PJM, and its stakeholders, of money owed by the Tower Companies.

14. In its response to PJM’s answer, Tower Companies assert that they are not asking the Commission to act as a bill collector, but to decide whether PJM is permitted to continue withholding these funds in the absence of an express tariff provision authorizing such withholding. Tower Companies assert that, contrary to PJM’s arguments, *Constellation* does not support PJM’s proposal to continue withholding funds since the PJM’s tariff lacks a similar express provision. Tower Companies also assert that PJM’s set-off provision does not apply here since neither BJ Energy nor any of the other individual Tower Company affiliates from which PJM is withholding funds owes PJM. Tower Companies maintain that the set-off provision does not allow PJM to withhold funds from one affiliate to cover the default of another.

15. Several commenters request that the Commission permit PJM to retain the collateral and revenue amounts pending the outcome of the OE investigation. FirstEnergy argues that if the Commission finds that the Tower Companies manipulated the FTR markets, none of the Tower Companies would be due excess collateral or revenues and, thus, FirstEnergy requests that the Commission hold the complaint in abeyance pending the completion of the OE investigation. FirstEnergy also urges PJM to consider placing the disputed collateral and revenue amounts into escrow accounts pending the completion of the OE investigation and the Commission’s final order in PJM’s pending complaint proceeding. Exelon, the CEG Companies, and DTET request that the Commission issue an immediate order preserving the status quo pending the outcome of the OE investigation.

Discussion

16. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding. Pursuant to Rule 214(d) of the

FERC, 457 F.3d 14 (D.C. Cir. 2006) (*Constellation*); *PG&E Energy Trading, L.P. v. Cal Power Exch Corp.*, 102 FERC ¶ 61,091 (2003).

⁸ PJM Operating Agreement, § 15.1.3(a) (set-off provision).

Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214(d) (2008), the Commission will grant Dominion's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept Tower Companies' answer because it has provided information that assisted us in our decision-making process.

17. As discussed above, in Docket No. EL08-44-000, the Commission is dismissing PJM's complaint with respect to the allegation that the Tower Companies formed Power Edge with the intent to defraud. Since this formed the crux of PJM's argument to withhold collateral and revenues, and it is being dismissed, it provides no basis for PJM to retain the collateral and revenues.

18. PJM is required under the terms of its tariff to return the excess collateral to the Tower Companies. The PJM tariff states that "collateral returns shall be made by PJM at least once per calendar quarter, if requested by a Market Participant."⁹ Each of the Tower Company affiliates has made such a request. PJM does not dispute that it is withholding excess collateral that would otherwise be payable to Tower Companies,¹⁰ but PJM has refused to return the excess collateral absent a Commission order. Additionally, the tariff requires PJM to make monthly settlement of revenue accounts,¹¹ and PJM concedes that it is withholding the revenues and does not dispute the dollar amount at issue.¹²

19. PJM maintains that it has the right under its tariff to set off the amounts owed to BJ Energy and the other affiliates based on its claim that these companies owe it money resulting from the Power Edge default. In addition, PJM explains that section 15.1.3 of the PJM Operating Agreement states: "With respect to any payment that the LLC is required to make to a Member in connection with or arising under this Agreement, any service or rate schedule, or any tariff, the LLC shall have a right of setoff equal to any amount that the Member is required to pay the LLC in connection with or arising under or from this Agreement, any service or rate schedule, any tariff, or any services performed by the Office of the Interconnection."

⁹ PJM Tariff, § V.D.

¹⁰ PJM Answer at 3.

¹¹ *See* PJM Operating Agreement, § 3.4.3.

¹² PJM Answer at 11.

20. We find that applying this set-off provision to BJ Energy and the other Tower Company affiliates to recover funds Power Edge owes PJM stretches the meaning of this set-off provision beyond its language. The provision focuses only on amounts that a single member owes PJM for which PJM can offset amounts that it owes that member; in other words, the set-off applies as between PJM and a single member, not among different affiliates, as PJM claims.¹³

21. PJM cites to a number of cases involving the California Power Exchange (CalPX) for the proposition that it is entitled to withhold collateral.¹⁴ But, in those cases, the Commission found that a specific tariff provision authorized the CalPX to retain collateral:

Based on our review of CalPX's tariff, we find that the tariff language provides a basis for retaining the collateral, since outstanding liabilities have not been billed and settled, as required by the tariff. Under the provisions of CalPX's tariff, a market participant is required to post collateral as security for potential defaults arising from this participant's failure to pay its outstanding liabilities to CalPX. Outstanding obligations are not extinguished until they are billed and settled.¹⁵

Here, not only is there no comparable provision authorizing the withholding of Tower Companies' excess collateral, there is an express provision requiring its return.¹⁶

¹³ We rejected PJM's proposal to amend its Tariff to allow set-offs among affiliates. March 25 Order, *supra* note 1.

¹⁴ *See supra* note 5.

¹⁵ 100 FERC ¶ 61,124 at P 27. *See* 102 FERC ¶ 61,328 at P 27 ("the PX Tariff permits the PX to retain collateral until all of the PX Participants', such as Powerex, trades in the PX's market are fully resolved (i.e., their liabilities are finally determined, billed, and settled"); 102 FERC ¶ 61,091 at P 14 ("Based on our review of CalPX's tariff, we find that the tariff language provides a basis for retaining the collateral, since outstanding liabilities have not been billed and settled, as required by the tariff").

¹⁶ In *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services*, 97 FERC ¶ 61,275, at 62,240 (2001), similarly, the Commission denied a request that energy sellers hold amounts in escrow based only on speculative concerns about their ability to repay the funds.

22. PJM also cites Commission precedent that it does not operate as a “collection agency”¹⁷ and argues that, accordingly, the Commission should not intervene here while litigation is pending in other fora. However, those cases involve distinguishable factual scenarios in which utilities sought to have the Commission institute enforcement actions against non-jurisdictional customers, and the Commission generally has required utilities to institute civil actions against such customers to collect amounts due under a tariff. In contrast, this case involves a public utility’s (i.e., PJM’s) compliance with its tariff, and the Commission generally does require public utilities to pay amounts due under their tariffs. And, again, this argument ignores the express language of the tariff and Operating Agreement providing that PJM must return the amounts at issue.

23. Therefore, we direct PJM to return the excess collateral to the named complainants no later than 120 days after the date of this order and to file a refund report with the Commission. The requirement to return such collateral and revenues, however, is without prejudice to PJM seeking an order from a court requiring the preservation of those funds. In addition, this interpretation of the current collateral provision of PJM’s tariff does not automatically preclude PJM from presenting common law claims before any court, and seeking common law remedies.¹⁸

The Commission orders:

(A) Tower Companies’ complaint is hereby granted, without prejudice to PJM seeking an order from a court requiring the preservation of those funds.

¹⁷ See *Pub. Svc Co. of N.H. v. N.H. Elec. Coop., Inc.*, 55 FERC ¶ 61,028, at 61,078 (1991) (“This Commission, however, is not a collection agency, nor does it enforce money judgments. Bill collection actions belong before an appropriate court, not this Commission.”).

¹⁸ Whether any such claims or remedies would be excluded as a result of the Commission’s exclusive jurisdiction over transmission and wholesale sales in interstate commerce will have to be determined on a case-by-case basis.

(B) PJM is directed to return the excess collateral and revenues to the Tower Companies and file a refund report with the Commission, within 120 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.