127 FERC ¶ 61,025
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, LLC — Docket No. ER09-804-000

ORDER DENYING LIMITED WAIVER REQUEST

(Issued April 3, 2009)

1. On March 6, 2009, PJM Interconnection, LLC (PJM) filed a request for a limited waiver as may be necessary to implement the allocation of Auction Revenue Rights (ARRs) pursuant to the Notice of Cancellation of the Amended and Restated Wholesale Power Contract (Notice of Cancellation) filed by Old Dominion Electric Cooperative (ODEC) to effect withdrawal of Northern Virginia Electric Cooperative (NOVEC) from ODEC (Request for Waiver). For the reasons discussed below, we deny PJM's Request for Waiver because PJM has not demonstrated that the Notice of Cancellation requires such a waiver.

I. **Background**

2. Financial Transmission Rights (FTRs) are financial instruments used to hedge the risk of transmission congestion by entitling the holders of these instruments to compensation for transmission congestion charges. Auction Revenue Rights (ARRs) are entitlements allocated annually to firm transmission service customers that entitle the holder to receive an allocation of the revenues from the annual FTR auction. The revenues associated with ARRs offset the purchase price of FTRs in the annual FTR auction. The economic value of an ARR is based on the price difference between the source and sink of the identical FTR obligations in the corresponding FTR auction. Holders of ARRs can either retain the ARRs and receive revenues from the FTR auction associated with those ARRs, or they can convert the ARRs into FTRs by self-scheduling the ARRs into FTRs.[1] Self-scheduling ARRs is particularly beneficial in instances where the ARR path is from the ARR holder's actual energy source to its load because it

[1] *See* PJM Manual 6 and Section 7 of Attachment K in the Tariff.

provides an assurance of an FTR that can be used to hedge against the day-ahead congestion from the ARR holder's energy source to its load.

3. The ARR allocations and FTR auctions are held annually in March, April and May for the upcoming May through June planning year. The FTR auctions are held subsequent to the ARR allocation. ARRs are allocated in two stages that consist of several parts. In the stage 1 ARR allocation, firm transmission service customers can seek an allocation of ARRs sourced from a specific list of historic generating resources that varies by transmission zone. In stage 2, there are three rounds in which market participants can "point to"[2] ARRs from other sources and adjust their hedging paths on an annual basis. PJM can also allocate ARRs to parties in a manner different from this formula based upon both parties advising PJM of their mutual agreement to accept a different allocation.[3]

4. On September 8, 2008, in Docket No. ER08-1506, ODEC filed with the Commission its Notice of Cancellation to effect the termination of a wholesale power supply contract between ODEC and NOVEC. The Notice of Cancellation was comprised of several documents including a Termination Agreement among NOVEC, ODEC, New Dominion Energy Cooperative (NDEC) and TEC Trading, Inc. (TEC), dated August 15, 2008 (Termination Agreement). Section 3.5 of the Termination Agreement provides as follows:

> [ODEC, NDEC and TEC] recognize that effective at the time that NOVEC assumes responsibility for its wholesale power supply pursuant to Article 3.1.1, PJM will allocate to NOVEC a portion based on NOVEC's load of ODEC's [ARRs] through May 31, 2009, and [ODEC, NDEC and TEC] will not object to allocation of such ARRs based on NOVEC's load. With respect to future ARR auctions after Closing, the Parties shall, to the extent each deems it to be in its own best interest, cooperate in reasonable efforts to allow NOVEC to point to Dominion Virginia Power system resources in such auctions, rather than to ODEC-owned capacity resources. If either Party determines this effort is unsuccessful or unlikely to succeed then, in such ARR auctions after Closing, NOVEC shall point to a 28% share of the ODEC owned capacity

[2] According to ODEC, the process of selecting a source point for an ARR is commonly referred to as "pointing to" a particular source point. ODEC Comments at 3.

[3] PJM Transmittal at 4, n.3.

> resources that ODEC points to as of the Closing, more particularly described in Exhibit N. NOVEC shall have no rights to ODEC-owned FTRs (or the value of such FTRs) after Closing, but will have all rights afforded to PJM market participants to participate in PJM's FTR markets.[4]

On November 4, 2008, the Commission accepted the Notice of Cancellation with an effective date of January 1, 2009.[5]

II. Request for Waiver

5. PJM states that, while it was in the process of determining the allocations of stage 1 resources for the 2009/2010 planning year, ODEC asked PJM to allocate ARR stage 1 resources to NOVEC based on a 28 percent share of the ODEC-owned capacity resources, as identified in Exhibit N to the Termination Agreement, with the remaining 72 percent being allocated to ODEC.[6] PJM states that NOVEC, to the contrary, advised PJM that section 3.5 of the Termination Agreement does not require PJM to allocate the stage 1 resources in question as requested by ODEC. PJM states that NOVEC instead

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[4] The portion of section 3.5 that is the subject of PJM's Request for Waiver is the following language: " . . . in such ARR auctions after Closing, NOVEC shall point to a 28% share of the ODEC owned capacity resources that ODEC points to as of the Closing, more particularly described in Exhibit N." The provision whereby NOVEC could "point to" Dominion Virginia Power system resources in post-closing ARR auctions is no longer applicable. Subsequent to ODEC filing the Notice of Cancellation, Dominion Virginia Power informed ODEC and NOVEC that Dominion Virginia Power disagreed with the provision that NOVEC could point to Dominion Virginia Power system resources in ARR auctions as opposed to ODEC resources. By letter agreement dated September 29, 2008, Dominion Virginia Power, ODEC and NOVEC agreed that in consideration for Dominion Virginia Power's agreement not to intervene and protest in ODEC's Notice of Cancellation proceeding, "ODEC and NOVEC will agree that allowing NOVEC to point to Dominion Virginia Power system resources will be unsuccessful and unlikely to succeed, and after Closing, NOVEC will not point to Dominion Virginia Power's system resources pursuant to section 3.5, but will point to the ODEC resources pursuant to section 3.5." *See* ODEC Comments Attachment 1.

[5] *Old Dominion Electric Cooperative*, Docket No. ER08-1506-000 (Nov. 4, 2008) (unpublished letter order).

[6] PJM Filing at 3. Exhibit N lists only ODEC-owned resources. ODEC's historic resource list for its load in the Dominion zone prior to the departure of NOVEC consists of both ODEC-owned resources and non ODEC-owned resources.

believed that PJM should allocate the resources on a pro rata basis by ratio share of the respective peak loads as set forth in PJM's Open Access Transmission Tariff (Tariff) and related rules, which would result in a 45 percent share of each ODEC resource going to NOVEC and 55 percent to ODEC.[7]

6. PJM states that given that NOVEC and ODEC disagree on the interpretation of the Termination Agreement, and given that neither party nor PJM requested that the Commission approve an allocation of stage 1 resources that deviates from the specific requirements of the PJM Tariff, PJM advised the parties that it had no choice but to apply the pro rata, peak load ratio share allocation methodology provided for in the PJM Tariff for the 2009/2010 planning year until such time as the Commission or a court of law orders another allocation methodology.

7. PJM states that a plain reading of section 3.5 of the Termination Agreement seems to direct a 28 percent allocation of stage 1 ARRs to NOVEC after May 31, 2009, which as stated above is different from PJM's Tariff and related rules which would allocate these resources in accordance with the NOVEC's load ratio share.[8] However, because the parties disagree regarding the interpretation of section 3.5 of the Termination Agreement, PJM seeks a waiver of the relevant Tariff language so as to allow for an allocation consistent with section 3.5 of the Termination Agreement. According to PJM, this dispute threatens to disrupt PJM's ability to run its FTR auction in an orderly manner and clouds the title of those ARRs should they be bid into PJM's annual FTR auction.

III. Notice, Interventions and Protests

8. Notice of PJM's filing was published in the *Federal Register*, 74 Fed. Reg. 11,096 (2009), with interventions and protests due on or before March 17, 2009.[9] ODEC and Virginia Electric and Power Company (Dominion Virginia Power) filed motions to intervene and comments. VDEC filed a motion to intervene and protest. On March 24, 2009, ODEC filed a motion for leave to answer and answer to NOVEC's protest and, on March 25, 2009, NOVEC filed an answer to ODEC's comments.

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[7] *Id*.

[8] *See* Section 7.4.2 of Attachment K – Appendix to PJM's Open Access Transmission Tariff, PJM Manual 6, Financial Transmission Rights, Section 4, Annual Allocation of ARRs – Stage 1A.

[9] The Commission granted ODEC's request that the Commission establish expedited procedures so that an order may be issued no later than April 3, 2009 and accordingly, comments were due on March 17, 2009.

A. NOVEC Protest

9. NOVEC argues that the Commission should reject PJM's Request for Waiver. It claims that PJM does not describe the matter as an impartial third party and presumes the outcome by seeking waiver of the Tariff provision. NOVEC states that PJM's proper role was and is to remain neutral, to apply its Tariff, and to allow the parties in interest to pursue their respective rights and remedies with the appropriate tribunal. Further, NOVEC contends that PJM is not a competent body to render an interpretation of the Termination Agreement since PJM is not a party to the agreement and played no role in negotiation or development of the Termination Agreement.

10. NOVEC also argues that ODEC's position, and PJM's Request for Waiver, are premised on the incorrect assertion that NOVEC and ODEC agreed in the Termination Agreement that NOVEC would forego its rights under the PJM Tariff. NOVEC contends that there is no language in section 3.5 of the Termination Agreement addressing departures from the PJM Tariff or waivers of any rights. To the contrary, NOVEC argues, the last sentence of section 3.5 expressly states that NOVEC will have "all" rights afforded to PJM market participants to participate in PJM's FTR markets.[10]

11. In addition, NOVEC disagrees with PJM's "plain reading" of section 3.5 of the Termination Agreement. NOVEC states that the parties knew that PJM allocates ARRs based upon load, as evidenced by the first sentence of section 3.5, and to the extent they intended to depart from the PJM Tariff they could have so stated. NOVEC contends that section 3.5 says that NOVEC "might try" to point to Dominion Virginia Power system resources or, failing that, to a 28 percent share of the ODEC owned capacity resources, which is different from an agreement to fix NOVEC's allocation of ARRs at any level.

12. NOVEC states that the sentence at issue provides that if NOVEC does not point to Dominion Virginia Power resources, then it shall point to a 28 percent share of the ODEC owned resources listed on Exhibit N. This, NOVEC maintains, neither states nor means that NOVEC would thus be entitled only to 28 percent of the ARRs rather than to its load ratio share. Rather, NOVEC argues, it means that NOVEC will be able to claim that portion of the ODEC resources listed on Exhibit N, which is not the same thing as capping NOVEC's ARR allocation at 28 percent.[11]

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[10] NOVEC Protest at 8.

[11] NOVEC also states that section 3.5 does not address how the 28 percent allocation would be applied in the various stages of PJM's allocation process.

13. Finally, NOVEC states that ODEC's failure to seek regulatory approvals before the present filing confirms that no waiver of the PJM Tariff was intended by section 3.5 of the Termination Agreement.

B. ODEC Comments in Support

14. ODEC asks the Commission to grant PJM's Request for Waiver on an expedited basis. ODEC states that ARR holders can convert allocated ARRs into FTRs by self-scheduling in the FTR auction during the period between April 6 and April 8. ODEC states that, at that time, ODEC will be limited to self-scheduling only those ARRs that it has been currently allocated, which is 55 percent (as compared to the 72 percent it is claiming under the Termination Agreement). After this window closes, ODEC understands that it will not be able to resubmit a self-schedule for ARRs that it would receive by virtue of an order granting the Request for Waiver. Therefore, ODEC contends that it faces significant harm if PJM's Request for Waiver is not granted by April 3, 2009, specifically it will not be able to hedge its congestion costs by self-scheduling its full 72 percent entitlement.[12]

15. ODEC agrees with PJM that a plain reading of the Termination Agreement directs a 28 percent allocation of stage 1 ARRs to NOVEC starting after May 31, 2009. ODEC states that when a contract is clear on its face, the Commission has held that "an examination of the plain language within [its] four corners" is all that is required.[13] ODEC argues that NOVEC's interpretation of the agreement is neither plausible nor reflected in the plain language of section 3.5 of the Termination Agreement, which provides that NOVEC is obligated to seek an allocation of ARRs based upon a 28 percent share of the ODEC-owned resources in Exhibit N to the Termination Agreement, and no more.

16. ODEC states that the PJM Tariff ARR allocation assigns an amount of the MW capability from each historical generation resource in the zone to each load serving entity (LSE) based on its load ratio share. ODEC states that NOVEC's agreement to "point to a 28% share of the ODEC owned capacity resources" for purposes of the ARR auctions can only mean that NOVEC's ARR allocations would be based on a 28 percent share rather than the load ratio share allocation under the Tariff. Moreover, ODEC states that it and NOVEC discussed and specifically agreed that, after May 31, 2009, NOVEC would be

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[12] ODEC estimates its financial harm at $2.3 to $4.5 million.

[13] ODEC Comments at 11, citing *Delmarva Power & Light Co.*, 69 FERC ¶ 61,144 (1994).

limited to an ARR allocation of 28 percent from each of the ODEC resources in Exhibit N to the Termination Agreement.[14]

17. Further, ODEC argues that if the intent of section 3.5 of the Termination Agreement was to leave NOVEC free to seek a load ratio share of the ODEC resources, the language in section 3.5 for the ODEC resources would have mirrored the language in section 3.5 used for the Dominion Virginia Power resources. Specifically, ODEC argues that the language with respect to the Dominion Virginia Power resources in section 3.5 does not contain any limit or quantification of the amount of those resources that NOVEC could point to in the ARR auctions, and presumably would have allowed NOVEC to proceed with an ARR allocation from those resources based on its load ratio share. ODEC states the fact that the ODEC provision in section 3.5 specifically obligates NOVEC to point to a 28 percent share of the ODEC Exhibit N resources, as opposed to simply pointing to ODEC resources as the Dominion Virginia Power language provides, makes clear the parties' intent that NOVEC is obligated to seek allocations based on the 28 percent share.

C. Dominion Virginia Power Comments

18. Dominion Virginia Power requests that any resolution of the dispute between ODEC and NOVEC that differs from the allocation under the PJM Tariff and related rules be carefully crafted in order to avoid harming Dominion Virginia Power and other PJM members. It suggests as a possibility that PJM could allocate the ARRs as required by its Tariff, and then ODEC and NOVEC could settle financially any differences between the Tariff allocation and the allocation in section 3.5 of the Termination Agreement.

IV. Commission Determination

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the unopposed motions to intervene of ODEC, Dominion Virginia Power and NOVEC serve to make them each a party to this proceeding.

20. 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 answer unless otherwise ordered by the decisional authority. We are not persuaded to accept either ODEC's or NOVEC's answers and will, therefore, reject them.

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[14] ODEC Comments at 5.

B. <u>Discussion</u>

21. The Commission denies PJM's Request for Waiver because it has not shown that the Notice of Cancellation warrants the suspension of its tariff requirements.

22. Section 3.5 states:

> [ODEC, NDEC and TEC] recognize that effective at the time that NOVEC assumes responsibility for its wholesale power supply pursuant to Article 3.1.1, PJM will allocate to NOVEC a portion based on NOVEC's load of ODEC's [ARRs] through May 31, 2009, and [ODEC, NDEC and TEC] will not object to allocation of such ARRs based on NOVEC's load. With respect to future ARR auctions after Closing, the Parties shall, to the extent each deems it to be in its own best interest, cooperate in reasonable efforts to allow NOVEC to point to Dominion Virginia Power system resources in such auctions, rather than to ODEC-owned capacity resources. If either Party determines this effort is unsuccessful or unlikely to succeed then, in such ARR auctions after Closing, NOVEC shall point to a 28% share of the ODEC owned capacity resources that ODEC points to as of the Closing, more particularly described in Exhibit N. NOVEC shall have no rights to ODEC-owned FTRs (or the value of such FTRs) after Closing, but will have all rights afforded to PJM market participants to participate in PJM's FTR markets.

While this provision may be subject to some ambiguity, we have examined this provision in light of the parties' agreements and the PJM ARR market, and we do not find that PJM has justified its proposal to waive its tariff requirements as requested.

23. Under the PJM Tariff, a customer is entitled to select ARRs in the stage 1A process "from a subset of the historical generation resources that were designated to be delivered to load based on the historical reference year for the Zone."[15] Further, in stage 1A of the allocation process, "the sum of each Network Service User's allocated Auction Revenue Rights for a Zone must be equal to or less than the Network Service User's pro-rata share of the Zonal Base Load for that Zone."[16] When NOVEC was still a part of ODEC, ODEC would be able to use this provision to obtain ARRs up to its full load in

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[15] PJM Tariff section 7.4.2(b).

[16] *Id*.

the historical reference year in order to help serve NOVEC as well as its other customers. Now that NOVEC is no longer a part of ODEC, ODEC's load has decreased, and the Notice of Cancellation is designed to allocate the ODEC historical resources between the parties. Section 3.5 of the of Termination Agreement resolves this issue by relegating NOVEC to 28 percent of generation from certain resources, but still permits it to seek ARRs up to its full historical load with respect to other ODEC resources.

24. As NOVEC points out, the first sentence of section 3.5 indicates that the parties were aware that, unless otherwise directed, PJM would allocate to NOVEC a portion of ODEC's ARRs based upon NOVEC's load and, for the period prior to May 31, 2009, they agreed to such allocation.[17] To the extent the parties wanted to rely on this allocation methodology after May 31, 2009, the parties could easily have done so.

25. Instead, the parties agreed that in the event efforts to obtain capacity from Dominion Virginia Power were unavailing, "NOVEC shall point to a 28% share of the ODEC owned capacity resources that ODEC points to as of the Closing, more particularly described in Exhibit N."[18] Exhibit N contains specific ODEC resources. Thus, as ODEC contends, this provision ensures that NOVEC cannot claim greater than a 28 percent share of the ARRs from these resources.[19] But such an interpretation does not justify PJM's inference that NOVEC is not permitted greater than a 28 percent share of ODEC's overall resources in the ARR allocation. As long as NOVEC does not obtain ARRs greater than 28 percent of the resources in Exhibit N, PJM has not shown that NOVEC need be excluded from the rest of the ARR allocation process.

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[17] "[ODEC, NDEC and TEC] recognize that effective at the time that NOVEC assumes responsibility for its wholesale power supply pursuant to Article 3.1.1, PJM will allocate to NOVEC a portion based on NOVEC's load of ODEC's [ARRs] through May 31, 2009, and [ODEC, NDEC and TEC] will not object to allocation of such ARRs based on NOVEC's load."

[18] As the parties have already agreed that the effort to point to Dominion Virginia Power system resources in the ARR auctions was unsuccessful and unlikely to succeed, we do not find it necessary to discuss any further the preceding sentence concerning Dominion Virginia Power in section 3.5 of the Termination Agreement. *Supra* n.4.

[19] PJM does not indicate that a waiver is necessary for it to honor the 28 percent allocation based upon the Exhibit N resources as discussed in this order.

<u>The Commission orders</u>:

PJM's Request for Waiver is denied as discussed in the body of the order.

By the Commission.

Kimberly D. Bose,
Secretary.