

143 FERC ¶ 61,204  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Primary Power, LLC

v.

Docket No. EL12-69-001

PJM Interconnection, L.L.C.

ORDER ON CLARIFICATION AND REHEARING

(Issued June 3, 2013)

1. In this order, the Commission denies the August 20, 2012 request for clarification or, in the alternative, rehearing (Rehearing) filed by Primary Power, LLC (Primary Power) in response to the Commission's July 19, 2012 order denying its complaint against PJM Interconnection, L.L.C. (PJM).<sup>1</sup> In the *Complaint Order*, the Commission found that PJM acted in accordance with its current Open Access Transmission Tariff (Tariff) and Amended and Restated Operating Agreement (Operating Agreement) when it designated construction responsibility for two reliability upgrades in its 2011 Regional Transmission Expansion Plan (Regional Plan) to Virginia Electric and Power Company (Dominion Virginia Power) and Allegheny Power, acquired by First Energy Corp. (First Energy) rather than to Primary Power.<sup>2</sup>

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<sup>1</sup> *Primary Power, LLC v. PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,054 (2012) (*Complaint Order*).

<sup>2</sup> See [PJM, Intra-PJM Tariffs, OATT, Open Access Transmission Tariff \(0.0.0\)](#) (Tariff) and [PJM, Intra-PJM Tariffs, Operating Agreement, Operating Agreement \(1.0.0\)](#) (Operating Agreement), available at <http://www.pjm.com/documents/agreements.aspx>. The planning procedures are provided in the Operating Agreement, Schedule 6, Regional Transmission Expansion Planning Protocol (RTEPP) and PJM [Manual 14B: PJM Regional Transmission Planning Process](#).

2. On clarification and rehearing, Primary Power does not contest the Commission's determination that PJM's awarding the projects to Dominion Virginia Power and First Energy was proper. Rather, Primary Power requests clarification and rehearing regarding its ability to recover compensation for its efforts to promote its proposals. The Commission denies the request for rehearing, finding that compensation is not required under the Commission's orders addressing Primary Power's request for rate incentives under Order No. 679.<sup>3</sup> The Commission declines to address the proposals made on clarification, finding that the proposals are outside the scope of Primary Power's complaint. The Commission also rejects a separate Primary Power request for reconsideration as a late-filed request for rehearing.

### **Background**

3. This is the second of two proceedings involving Primary Power, an independent transmission developer. In the first proceeding, Primary Power sought approval in the PJM Regional Plan for an integrated array of static VAR compensators (SVC) in West Virginia and western Pennsylvania called "Grid Plus" as an economic project (*Incentives Order* projects).<sup>4</sup> Primary Power requested transmission incentives under Order No. 679, including assurances for recovery of its pre-commercial costs and abandoned plant, conditioned on PJM including its proposal in the Regional Plan as cost-of-service economic projects. The Commission granted incentive rates with the condition but rejected the request that PJM be required to designate Primary Power to finance, construct, and own the SVCs.<sup>5</sup> The Commission instead found that the planning procedure set forth in Schedule 6 of the PJM Operating Agreement permits, "but does not require," PJM to designate an entity other than an incumbent transmission owner, such as

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<sup>3</sup> *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh'g*, 119 FERC ¶ 61,062 (2007); *see also Promoting Transmission Investment Through Pricing Reform*, Policy Statement, 141 FERC ¶ 61,129 (2012).

<sup>4</sup> *Primary Power LLC*, 131 FERC ¶ 61,015 (2010), *reh'g denied*, 140 FERC ¶ 61,052 (2012) (*Incentives Order*).

<sup>5</sup> *Incentives Order*, 131 FERC ¶ 61,015 at PP 62, 106, 115. On rehearing, the Commission affirmed that Schedule 6 of the PJM Operating Agreement permitted PJM to designate independent entities to build economic projects. *Incentives Order*, 140 FERC ¶ 61,052 at P 35.

Primary Power, to build a project that is included in the Regional Plan as an economic project.<sup>6</sup>

4. From August 2011 through October 2011, Primary Power advocated a significantly revised reconfiguration of SVC installations to address local system reactive power needs identified by PJM after it cancelled the Potomac-Appalachian Transmission Highline (PATH) transmission project. Primary Power proposed to PJM staff that SVCs be included as baseline reliability projects in the PJM Regional Plan, not as economic projects (*Complaint Order* projects). Primary Power, PJM staff, Dominion Virginia Power and First Energy submitted additional proposals and supporting materials to the PJM Advisory Committee through the end of March 2012. While PJM staff initially proposed to include Primary Power's proposed baseline reliability projects in the Regional Plan, PJM staff eventually changed its recommendation to the PJM Board to support including the transmission owners' projects in the Regional Plan. The PJM Board approved the 2011 PJM Regional Plan on April 2, 2012, incorporating PJM staff's revised recommendations.

5. In this proceeding, on May 14, 2012, Primary Power filed a complaint requesting that the Commission require PJM to designate Primary Power to finance, construct, and own the SVCs in the recommended plan.<sup>7</sup> Primary Power also requested that the Commission confirm that it qualified for the incentives that the Commission granted in the *Incentives Order* because it satisfied the Commission's condition that Grid Plus be selected in the Regional Plan as a reliability project.<sup>8</sup>

6. In the *Complaint Order*, the Commission denied Primary Power's complaint, finding that PJM's decision to select the alternative projects was consistent with its planning procedures and based on legitimate economic and operational factors, including lower cost, reduced siting requirements, operational advantages and economies of scale.<sup>9</sup>

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<sup>6</sup> *Incentives Order*, 131 FERC ¶ 61,015 at P 62, *reh'g denied*, 140 FERC ¶ 61,052 at P 89.

<sup>7</sup> Primary Power Complaint at 31-32.

<sup>8</sup> *Id.* at 48.

<sup>9</sup> The Commission noted that the transmission owners' alternative projects were more cost effective for PJM ratepayers, saving \$24 to \$57 million compared to Primary Power's proposal. In addition, the Commission reviewed significant factors weighing in favor of the transmission owner proposals, including greater coordination with existing generator controls, increased reliability, ease of construction and lower regulatory burdens. *Complaint Order*, 140 FERC ¶ 61,054 at P 73.

In the *Complaint Order*, the Commission rejected Primary Power's contentions that the *Incentives Order* required PJM to designate Primary Power to build the SVCs once they were included in the Regional Plan as baseline reliability projects or that Primary Power qualified for compensation because its projects were in the plan. The Commission found that the reliability projects at issue in the *Complaint Order* were different than the economic project proposals approved for transmission incentives in the *Incentives Order*. Further, the Commission found that the transmission owners' projects selected by PJM for inclusion in the PJM Regional Plan were different from Primary Power's proposals.<sup>10</sup> Finally, the Commission found that issues raised by commenters relating to future changes in PJM's planning process were more appropriately addressed in PJM's Order No. 1000 compliance proceeding.<sup>11</sup>

### **Requests for Clarification, Rehearing, and Reconsideration**

7. Primary Power requests clarification of the *Complaint Order*, arguing that the Commission failed to address its request that it remain eligible to recover pre-commercial development costs despite the Commission's acceptance of PJM's decision to designate the transmission owners to build the projects in the PJM Regional Plan and rejection of Primary Power's proposals. Primary Power requests that the Commission clarify that either Primary Power is permitted to recoup its development costs under the *Incentives Order* or that the Commission craft (or require PJM to craft) an appropriate mechanism for Primary Power to recover development costs given its unique situation.<sup>12</sup>

8. If the Commission fails to grant clarification, Primary Power requests rehearing of the *Complaint Order*, claiming that the order failed to address its original request for pre-commercial cost recovery consistent with the *Incentives Order*.

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<sup>10</sup> *Complaint Order*, 140 FERC ¶ 61,054 at P 5, P 76 n.114, PP 77-79.

<sup>11</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012); *see also PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214 (2013) (*PJM Interconnection*) (order on PJM Order No. 1000 compliance filing).

<sup>12</sup> Rehearing at 2, 11 (Primary Power proposes that the Commission permit it to establish a regulatory asset for its pre-commercial development costs, including \$5 million spent on the *Incentive Order* projects and the *Complaint Order* projects prior to the Complaint and that these costs be reflected in the rate base for the Dominion Virginia Power and First Energy projects).

9. PJM and certain PJM transmission owners (the Owners Group) each filed an answer to the Rehearing. The Organization of PJM States, Inc. (OPSI) filed a motion to intervene out of time and comments supporting PJM's answer to the Rehearing. Primary Power then filed an answer to the several answers to its Rehearing.

10. On March 28, 2013, Primary Power submitted a separate request for reconsideration of the *Complaint Order*, on the basis that PJM recently argued that it was not necessary to add "a requirement to look at project costs" to its project selection criteria in its Order No. 1000 compliance filing, because the criteria already included "cost effectiveness."<sup>13</sup> PJM described cost as one factor, but not necessarily the dispositive one.<sup>14</sup> Primary Power characterizes PJM's statements as an "acknowledgement that it lacks the authority to select [Regional Plan] projects on the basis of costs."<sup>15</sup> Primary Power concludes that PJM's consideration of cost along with the other operational factors described in the 2011 Regional Plan supporting materials is inconsistent with its statements.

## **Discussion**

### **Procedural Matters**

11. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial.<sup>16</sup> Thus, movants bear a higher burden to demonstrate good cause for granting late intervention. In this case, OPSI seeks to participate in this proceeding with respect to whether Primary Power should be able to recover the costs of its participation in the PJM planning process, despite not being selected to build any of the disputed SVCs. We find there is sufficient nexus between Primary Power's current

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<sup>13</sup> Primary Power Request for Reconsideration at 2-5 (citing to PJM's January 29, 2013 answer in Docket No. ER13-198-000 at 52-53).

<sup>14</sup> PJM January 29, 2013 Answer at 53. PJM cited the Commission's statement in Order No. 1000: "If a nonincumbent transmission developer is unable to demonstrate that its proposal is the most efficient or cost-effective, given all aspects of its proposal, then it is unlikely to be selected as the preferred transmission solution within the regional transmission planning process for purposes of cost allocation." Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 331 n.307.

<sup>15</sup> Request for Reconsideration at 5.

<sup>16</sup> See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

rationale and its claim in the Complaint – that it is due compensation for its development efforts – that OPSI could and should have timely filed to intervene and OPSI has not overcome the higher burden necessary to warrant late intervention. Consequently, we deny OPSI’s motion for late intervention and reject its answer to the Rehearing.

12. Rule 713(d) of the Commission’s Rules of Practice and Procedure provides that the Commission will not permit answers to requests for rehearing.<sup>17</sup> Accordingly, we reject PJM’s and the Owners Group’s answers to the Rehearing and reject the subsequent Primary Power answer as moot.

### **Substantive Matters**

13. The Commission denies Primary Power’s request for rehearing and its request for clarification. Earlier in this proceeding, Primary Power argued that PJM should have designated it to build two reliability projects in the Regional Plan and that it was nevertheless eligible to recover its costs based on the *Incentives Order*, because PJM included its proposals in the Regional Plan, even though another party was designated to build them. In denying the Complaint, the Commission found that PJM had followed its tariff and based its decision on valid factors. In addition, the Commission noted that PJM did not include Primary Power’s proposals in the plan and that, because Primary Power made significant changes to its original proposals, the rate incentives granted in the *Incentives Order* would not apply to the proposals discussed in the Complaint.<sup>18</sup> On rehearing, we affirm our earlier determinations. We also find that Primary Power’s appeal to the Commission to direct PJM to develop a tariff provision to compensate Primary Power for its development costs is outside the scope of the instant proceeding.

### **Request for Rehearing**

14. In its Rehearing, Primary Power contends:

Primary Power seeks rehearing of the [*Complaint Order*] insofar as the Commission has failed to address the request made by Primary Power that the Commission confirm that Primary Power has qualified for the transmission rate incentives that the Commission conditionally granted in [the *Incentives Order*].<sup>19</sup>

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<sup>17</sup> 18 C.F.R. § 385.713(d) (2012).

<sup>18</sup> *Complaint Order*, 140 FERC ¶ 61,054 at P 5 and PP 76-79.

<sup>19</sup> Primary Power Rehearing at 13.

15. In the *Complaint Order*, the Commission did address Primary Power's contention that it met the conditions of the *Incentives Order* and is entitled to compensation based on those incentives. The *Complaint Order* specifically stated, in part, "the incentives granted in the *Primary Power Incentives Order* would not apply to these facilities."<sup>20</sup> We affirm that the incentives granted in the *Incentives Order* do not apply to the projects at issue in this proceeding due to significant changes in their scope and use.

16. As noted in the *Complaint Order*, Primary Power is no longer pursuing the integrated array of SVC installations for which it conditionally received rate incentives in the *Incentives Order*.<sup>21</sup> Rather, as the Commission indicated, the projects at issue in Primary Power's Complaint were significantly different from those in the *Incentives Order*, enough that the incentives conditionally granted in the *Incentives Order* "would not apply" to Primary Power's later proposals.<sup>22</sup>

17. The Commission also found that the incentives do not apply in this case because Primary Power's proposals were not included in the PJM Regional Plan.<sup>23</sup> The *Incentives Order* required that, before receiving incentives, Primary Power's project must be included in PJM's Regional Plan. Since the proposals at issue here are not the *Incentives Order* projects and such projects were not included in the PJM Regional Plan, Primary Power failed to meet the condition established in the *Incentives Order* to qualify for the requested rate incentives, including authorized recovery of pre-commercial expenses or abandoned plant costs. Primary Power's request for rehearing is therefore denied.

### **Request for Clarification**

18. Primary Power's request for clarification asks that the Commission authorize recovery of pre-commercial development costs either by permitting Primary Power to establish a regulatory asset to be recovered through a section 205 filing, or through some unspecified mechanism to be developed by PJM.<sup>24</sup> Based on the record in this case, we will not grant such relief at this time.

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<sup>20</sup> *Complaint Order*, 140 FERC ¶ 61,054 at P 76 n.114.

<sup>21</sup> *Id.* P 5 & n.7, PP 69-73, 75-78.

<sup>22</sup> *Id.* P 76 & n.114.

<sup>23</sup> *Complaint Order*, 140 FERC ¶ 61,054 at P 5 n.7; *see also id.* PP 78-79.

<sup>24</sup> Rehearing at 12.

19. Primary Power's primary arguments justifying cost recovery are (1) its efforts to promote its proposals made a significant contribution to reliability in PJM and (2) failure to approve cost recovery will discourage participation by third-party transmission developers. Primary Power maintains that load-serving entities and their customers in PJM will receive the reliability, operational, economic and environmental benefits of the *Complaint Order* projects, which are based on ideas that Primary Power initially developed. Thus, Primary Power posits that it is due compensation because its ideas, if it not its specific proposals, were incorporated in the Regional Plan. Primary Power requests that it be permitted to establish a regulatory asset to be recovered either under the PJM tariff or a stand-alone section 205 rate filing to encourage and reward companies for developing innovative reliability solutions. Primary Power requests "that the Commission craft an appropriate cost-recovery solution for Primary Power." Primary Power further argues that there is precedent for the Commission to initiate such action.

20. Primary Power's initial complaint did not raise these issues, and Primary Power raises them for the first time on rehearing. "The Commission has held that raising issues for the first time on rehearing is disruptive to the administrative process and denies parties the opportunity to respond."<sup>25</sup> In fact, Primary Power stated in its complaint that, "[w]hile the actions of PJM and the Incumbent Transmission Owners raise generic policy issues of national significance, Primary Power wishes to emphasize that this Complaint itself *solely addresses the designation of Primary Power SVC Projects* under the currently effective provisions of the PJM RTEPP."<sup>26</sup> Thus Primary Power's new arguments regarding compensation for their projects, even if not selected, and for the ideas behind the projects that were selected, are beyond the scope of this proceeding and will not be considered at this time.

21. As to Primary Power's citations to cases for the proposition that the Commission should provide compensation for Primary Power, those cases do not deal with recovery of pre-commercial costs by the developer of a project that has not been constructed. In *Neptune Regional Transmission System, LLC*, the Commission found only that PJM failed to follow tariff study procedures and ordered expedited delivery of an interconnection agreement, but did not address cost recovery.<sup>27</sup> In *Termoelectrica U.S.*,

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<sup>25</sup> *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,030, at P 15 n.10 (2009). *See also* *Northeast Utilities Svc. Co. v. ISO New England Inc.*, 109 FERC ¶ 61,204, at P 16 (2004).

<sup>26</sup> Complaint at 47 (emphasis added).

<sup>27</sup> *Neptune Regional Transmission System, LLC v. PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,098 (2005).

*LLC*, the Commission approved exempt wholesale generator status for a company owning a transmission line connected to a generator in Mexico, but did not address cost recovery for a project that was not constructed.<sup>28</sup> Thus, neither of these cases supports granting Primary Power's proposed remedy.

22. As to a potentially chilling effect on innovative transmission ideas that benefit ratepayers, and claims that granting cost recovery will send the right incentive to independent transmission developers and counteract the otherwise chilling effects on investment of the *Complaint Order*,<sup>29</sup> the Commission addressed a similar issue in Order No. 1000. The Commission directed revisions to the regional transmission planning process to provide for transparent and open consideration of alternative transmission solutions that might meet the needs of the transmission planning region more efficiently or cost-effectively than transmission solutions identified by individual public utility transmission providers.<sup>30</sup> Further consideration of these issues here is beyond the scope of this proceeding.

### **Request for Reconsideration**

23. As for Primary Power's separate request for reconsideration regarding recent PJM statements on the role of cost in the project selection process, we reject it as a late-filed rehearing request.<sup>31</sup> Even assuming *arguendo* we considered the merits of this pleading, PJM's statements relate to newly filed tariff provisions submitted in compliance with Order No. 1000, not to the tariff provisions in effect at the time of this proceeding, and thus would not change the result in this proceeding.

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<sup>28</sup> *Termoelectrica U.S., LLC*, 102 FERC ¶ 61,019 (2003).

<sup>29</sup> Rehearing at 6, 9-10.

<sup>30</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 148-49.

<sup>31</sup> 16 U.S.C. § 825l(a) (2006).

The Commission orders:

Primary Power's August 20, 2012 request for clarification and rehearing is hereby denied, as discussed in the body of this order, and its request for reconsideration is hereby rejected, also as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.