

144 FERC ¶ 61,187
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.

J.P. Morgan Ventures Energy Corporation

Docket Nos. ER13-830-003
ER13-830-004

ORDER DENYING CLARIFICATION AND REHEARING AND ACCEPTING
COMPLIANCE FILING

(Issued September 4, 2013)

1. On May 28, 2013, J.P. Morgan Ventures Energy Corporation (JP Morgan) filed a motion for clarification or, in the alternative, request for rehearing (Motion for Clarification and Rehearing) of the Commission's May 10, 2013 order.¹ JP Morgan also filed proposed tariff revisions in compliance with the May 10 Rehearing Order (May 28 Compliance Filing). As discussed below, we deny the Motion for Clarification and Rehearing and accept the May 28 Compliance Filing to be effective April 1, 2013.

I. Background

A. Suspension Order

2. On November 14, 2012, the Commission suspended JP Morgan's authority to sell energy, capacity, and ancillary services at market-based rates for a period of six months, beginning April 1, 2013.² Under the terms of the suspension, the Commission explained:

JP Morgan will only be allowed to participate in wholesale electricity markets by either scheduling quantities of energy products without an

¹ *J.P. Morgan Ventures Energy Corp.*, 143 FERC ¶ 61,118 (2013) (May 10 Rehearing Order).

² *See J.P. Morgan Ventures Energy Corp.*, 141 FERC ¶ 61,131 (2012) (Suspension Order), *order granting clarification*, 142 FERC ¶ 61,085 (2013) (clarifying that the suspension would apply only prospectively and would not modify or abrogate agreements entered into by JP Morgan before the suspension's effective date).

associated price or by specifying a zero-price in [its] offer, as the relevant tariffs require. Furthermore, the rate received by JP Morgan will be capped at the higher of the applicable locational marginal price [(LMP)] or its default energy bid.^{3]}

3. The Commission, however, delayed the effective date of the suspension until April 1, 2013, in response to concerns raised by the California Independent System Operator Corporation (CAISO) that the generating units controlled by JP Morgan play a significant role in enabling CAISO to address system reliability needs.⁴

B. January 30 Filing and March 19 Order

4. On January 30, 2013, JP Morgan filed two tariffs setting forth the rates that it proposed to charge during the suspension period.⁵ First, JP Morgan proposed the General Tariff, which would govern its new sales outside of the CAISO markets. Part I of the General Tariff would govern JP Morgan's sales of electricity, capacity, and ancillary services into organized electricity markets other than CAISO during the suspension period.⁶ Second, JP Morgan proposed a tariff that would govern JP Morgan's sales into the CAISO markets during the suspension period; that tariff is not the subject of JP Morgan's Motion for Clarification and Rehearing.

5. In the March 19 Order, the Commission conditionally accepted Part I of the General Tariff, finding that JP Morgan's proposal departed from the strictures prescribed in the Suspension Order.⁷ Thus, the Commission directed JP Morgan to revise Part I of the General Tariff to reflect the bidding and rate restrictions imposed by the Commission in the Suspension Order. Specifically, the Commission directed JP Morgan to submit a

³ Suspension Order, 141 FERC ¶ 61,131 at P 53.

⁴ *Id.*

⁵ J.P. Morgan Ventures Energy Corp., Application, Docket No. ER13-830-000 (filed Jan. 30, 2013) (January 30 Filing).

⁶ The General Tariff was divided into three parts. Part II of the General Tariff purported to authorize JP Morgan's new bilateral sales of energy, capacity, and ancillary services during the suspension period. Part III of the General Tariff set forth the general terms and conditions that would govern Parts I and II.

⁷ *J.P. Morgan Ventures Energy Corp.*, 142 FERC ¶ 61,190, at P 31 (2013) (March 19 Order).

compliance filing that, subject to the Commission's approval, would permit JP Morgan to either self-schedule energy products or submit offers of \$0/MWh and to receive a rate capped at the higher of the applicable LMP or the default energy bid.⁸

C. May 10 Rehearing Order

6. On March 29, 2013, JP Morgan submitted the compliance filing required by the March 19 Order.⁹ In relevant part, JP Morgan proposed to revise Part I of the General Tariff to limit its offers to \$0/MWh and self-schedules and to receive a rate set at the higher of the applicable LMP or the "Cost-Based Energy Price."¹⁰ PJM Interconnection, L.L.C. (PJM), as well as the market monitors for PJM and Midwest Independent Transmission System Operator, Inc. (MISO),¹¹ filed comments opposing the March 29 Compliance Filing, in which they argued that permitting JP Morgan to receive the Cost-Based Energy Price would lead to economically inefficient results, impose unnecessary uplift costs on consumers, and be inconsistent with the applicable market rules.¹²

7. In response, JP Morgan filed a request for rehearing of the March 19 Order. JP Morgan argued that, if the Commission determined that JP Morgan was required to submit offers of \$0/MWh and receive only the applicable LMP for its sales into

⁸ The Commission rejected Part II of the General Tariff, *id.* P 32, but conditionally accepted JP Morgan's CAISO-Specific Tariff. *Id.* P 29 (citing *Cal. Indep. Sys. Operator Corp.*, 142 FERC ¶ 61,191 (2013) (*California ISO*)).

⁹ J.P. Morgan Ventures Energy Corp., Compliance Filing, Docket No. ER13-830-001 (filed Mar. 29, 2013) (March 29 Compliance Filing).

¹⁰ JP Morgan defined the "Cost-Based Energy Price" as "those energy costs for the unit being offered into an Organized Market, required to be filed with the market operator and/or market monitor, in accordance with the tariff applicable to that market." May 10 Rehearing Order, 143 FERC ¶ 61,118 at P 8 n.11.

¹¹ Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

¹² See PJM Interconnection, L.L.C., Protest, Docket No. ER13-830-001 (filed April 3, 2013); Monitoring Analytics, LLC, Comments, Docket No. ER13-830-001 (filed April 3, 2013); Potomac Economics, Ltd., Comments, Docket No. ER13-830-001 (filed April 4, 2013).

organized markets outside of CAISO, the March 19 Order imposed a potentially confiscatory rate.¹³

8. In the May 10 Rehearing Order, the Commission granted JP Morgan's request for rehearing.¹⁴ The Commission found that "the conditions imposed by the March 19 Order may subject JP Morgan to a confiscatory rate in the event that the LMP falls below the relevant resource's cost of producing electricity."¹⁵ Thus, the Commission granted rehearing and modified the conditions under which it had previously accepted Part I of the General Tariff in the March 19 Order.¹⁶ In light of this decision, the Commission directed JP Morgan to "submit an additional compliance filing capping its offers to supply energy and ancillary services at the costs of providing such services on file with the pertinent market operator and/or market monitor."¹⁷ The Commission further stated that "JP Morgan's compliance filing should specify that it will receive a rate calculated in accordance with the applicable market rules."¹⁸

II. Motion for Clarification and Rehearing

9. JP Morgan seeks clarification of the May 10 Rehearing Order, requesting that the Commission clarify that, for its sales into the markets operated by PJM and MISO that occurred between April 1, 2013, and its implementation of the May 10 Rehearing Order,¹⁹ JP Morgan should receive the higher of the Cost-Based Energy Price or the

¹³ J.P. Morgan Ventures Energy Corp., Request for Rehearing, Docket No. ER13-830-002 (filed Apr. 10, 2013); *see also* May 10 Rehearing Order, 143 FERC ¶ 61,118 at P 14.

¹⁴ May 10 Rehearing Order, 143 FERC ¶ 61,118 at PP 23-29. The Commission accepted in part and dismissed in part JP Morgan's March 29 Compliance Filing. *Id.* PP 29-30.

¹⁵ *Id.* P 24.

¹⁶ *Id.* P 26.

¹⁷ *Id.* P 29. Further, the Commission stated that "[c]onsistent with the terms of the Suspension Order, JP Morgan may also self-schedule energy and ancillary services, as the relevant tariffs require." *Id.* P 26 n.43.

¹⁸ *Id.* P 29.

¹⁹ JP Morgan states that it continued to submit \$0/MWh offers for a few days after the issuance of the May 10 Rehearing Order. Motion for Clarification and

(continued...)

applicable LMP.²⁰ JP Morgan explains that, in compliance with the March 19 Order, it began submitting offers for \$0/MWh on April 1, 2013; however, JP Morgan states that “[t]here have been hours when the applicable LMP in PJM and MISO was below the cost-based offer cap now required by the Commission.”²¹ In addition, JP Morgan contends that PJM and MISO have refused to pay JP Morgan a rate higher than the applicable LMP for those sales.²² Thus, JP Morgan claims that it has incurred unreimbursed costs for those periods when its units delivered energy to PJM and MISO and the applicable LMP was below its cost of production.²³ In order to ensure that it recovers its costs, JP Morgan argues that the Commission should require PJM and MISO to pay the Cost-Based Energy Price for those periods.²⁴ Otherwise, JP Morgan asserts that the resulting below-cost rate is unjust, unreasonable, arbitrary, and unconstitutionally confiscatory.²⁵

10. JP Morgan further claims that the Commission has previously recognized that JP Morgan should receive the higher of the applicable LMP or the Cost-Based Energy Price.²⁶ JP Morgan suggests that, in *California ISO*, the Commission “recognized that it would be confiscatory to impose . . . a structure where [JP Morgan] could be forced to sell energy at a price below [JP Morgan’s] cost of production.”²⁷ JP Morgan argues that the Commission should clarify that JP Morgan should receive the higher of the applicable

Rehearing at 4 n.2. According to PJM, it committed and dispatched JP Morgan’s generating units based on \$0/MWh offers from April 1, 2013 through May 14, 2013. PJM Answer at 2.

²⁰ JP Morgan explains that it has reached an agreement with PJM and MISO as to how to calculate the Cost-Based Energy Price for its units. *Id.* at 3.

²¹ *Id.* at 4.

²² *Id.* at 5.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 5-8 (citing *California ISO*, 142 FERC ¶ 61,191 at P 29; May 10 Rehearing Order, 143 FERC ¶ 61,118 at PP 26-27).

²⁷ *Id.* at 7.

LMP or the Cost-Based Energy Price for its \$0/MWh offers.²⁸ JP Morgan additionally contends that the May 10 Rehearing Order found that JP Morgan must receive the higher of the applicable LMP or the Cost-Based Energy Price in order to ensure that JP Morgan is not subject to a confiscatory rate.²⁹

11. JP Morgan also argues that the Commission should grant the Motion for Clarification and Rehearing as a matter of equity.³⁰ JP Morgan explains that, where the Commission has committed an error, precedent requires that the proper remedy is one that puts the parties in the position that they would have been in had the error not been made.³¹ In this case, JP Morgan maintains that it is necessary for the Commission to do more than simply apply the requirements of the May 10 Rehearing Order retroactively.³² Instead, JP Morgan argues that the Commission should direct PJM and MISO to pay JP Morgan the Cost-Based Energy Price for those periods when its cost of production exceeded the applicable LMP.³³

12. Moreover, JP Morgan contends that it would be inequitable for the Commission to allow PJM and MISO to pay JP Morgan a confiscatory rate simply because paying the Cost-Based Energy Price is not permitted under their tariffs.³⁴ JP Morgan argues that PJM and MISO had adequate notice of the Suspension Order's requirements and were

²⁸ *Id.* at 8.

²⁹ *Id.* (quoting May 10 Rehearing Order, 143 FERC ¶ 61,118 at P 26).

³⁰ *Id.* at 8-10.

³¹ *Id.* at 8 (citing *Pub. Utils. Comm'n v. FERC*, 988 F.2d 154, 168 (D.C. Cir. 1993); *Exxon v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999); *PPL Wallingford Energy, LLC*, 115 FERC ¶ 61,015 (*PPL Wallingford*), *clarified in part*, 116 FERC ¶ 61,089 (2006)).

³² *Id.* at 9.

³³ *Id.* at 9-10. Unlike *PPL Wallingford*, JP Morgan asserts that it is unnecessary to conduct a hearing to determine the payment required to make JP Morgan whole. First, JP Morgan states the Commission has already determined that JP Morgan is entitled to recover its cost of production. Second, JP Morgan explains that it has already reached an agreement with PJM and MISO to calculate the Cost-Based Energy Price. *Id.* at 9-10.

³⁴ *Id.* at 10.

free to propose tariff revisions to implement the Commission's requirements, just as CAISO did.³⁵

13. To the extent that the Commission does not clarify that JP Morgan is entitled to receive the higher of the applicable LMP or the Cost-Based Energy Price, JP Morgan requests rehearing of the May 10 Rehearing Order. JP Morgan asserts that limiting to LMP the rate that it should receive for its sales between April 1, 2013 and May 15, 2013 would be confiscatory.³⁶ Additionally, JP Morgan contends that equitable principles require that the Commission grant rehearing.³⁷

III. May 28 Compliance Filing

14. In the May 28 Compliance Filing, filed in response to the May 10 Rehearing Order, JP Morgan proposes to cap its energy offers at the Cost-Based Energy Price³⁸ instead of \$0/MWh bids.³⁹ JP Morgan also proposes to receive the "applicable rate established in accordance with the rules of each Organized Market in effect at the time of the offer."⁴⁰ JP Morgan requests an effective date of April 1, 2013, consistent with the date that the Commission conditionally accepted Part I of the General Tariff in both the March 19 Order and May 10 Rehearing Order.

³⁵ *Id.*

³⁶ *Id.* at 10-11.

³⁷ *Id.* at 11.

³⁸ JP Morgan proposes to define the Cost-Based Energy Price as "those energy costs for the unit being offered into an Organized Market, required to be filed with, or established by, the market operator and/or market monitor, in accordance with the tariff applicable to that market." *See* May 28 Compliance Filing at 3. Although the proposed definition adds the phrase "or established by" to the definition initially proposed in the March 29 Compliance Filing, this distinction is insignificant for purposes of this order, except as explicitly noted below.

³⁹ *See Id.* ex. 1 at § 2.2.

⁴⁰ *Id.* § 2.5.

IV. Notice and Responsive Filings

15. Notice of the May 28 Compliance Filing was published in the *Federal Register*, 78 Fed. Reg. 34,369 (2013), with interventions and protests due on or before June 18, 2013. None were filed.

16. On June 12, 2013, PJM filed an answer to the Motion for Clarification and Rehearing. PJM asserts that providing JP Morgan with make-whole payments for JP Morgan's sales that cleared the market at a price that was less than that unit's cost of production would violate the PJM Open Access Transmission Tariff and the Amended and Restated Operating Agreement and, therefore, violate the prohibition on retroactive ratemaking.⁴¹ PJM also contends that granting the relief sought by JP Morgan would result in an unjust, unreasonable, and inequitable cost shift to other PJM market participants.⁴² Further, PJM contends that a remedial transfer of funds, such as that directed by the Commission in *PPL Wallingford*, is infeasible given its complex market structure.⁴³

V. Discussion

A. Motion for Clarification and Rehearing

17. We deny the Motion for Clarification and Rehearing.

18. As an initial matter, and contrary to the suggestion of JP Morgan, the Commission has not found in its prior orders in this proceeding that any rate that falls below JP Morgan's cost of production in any particular hour is unconstitutionally confiscatory. Rather, the Commission sought in the Suspension Order and the *California ISO* order to make certain that the rates paid to JP Morgan were neither excessive nor, as relevant for purposes of this discussion, confiscatory. There is an inherent complexity in creating a procedure that would allow JP Morgan to continue to participate in organized energy markets throughout the suspension period but to do so only at rates that were neither excessive nor confiscatory. The complexity of that task derived, at least in part, from the need to account for hour-by-hour fluctuations of the applicable LMP. Thus, the Commission attempted to mitigate the risk that the applicable LMP could fall below

⁴¹ PJM Answer at 1, 5-6.

⁴² PJM estimates that the cost shift would result in an allocation of \$425,000 to PJM load. *Id.* at 3 n.6.

⁴³ *Id.* at 5.

JP Morgan's costs, not in any single hour, but in so many hours or to such an extent that it might destroy the value of JP Morgan's resources, and potentially deprive JP Morgan of its property.⁴⁴ The bid and rate restrictions imposed by the Commission represent a conservative and preventative measure to guard against those risks. These efforts, however, do not amount to a finding that a seller's rate is confiscatory in any particular hour that the applicable LMP happens to fall below the seller's cost of production.

19. In addition, JP Morgan has failed to show that it was subject to an unconstitutionally confiscatory rate. In support of its position, JP Morgan states only that there were "hours when the applicable LMP in PJM and MISO was below the cost-based offer cap now required by the Commission."⁴⁵ To the extent that JP Morgan has submitted a motion subject to the requirements of Rule 212 of the Commission's Rules of Practice and Procedure, JP Morgan has failed to advance a clear statement of facts required to justify the relief sought.⁴⁶ Moreover, with respect to JP Morgan's alternative request for rehearing, such a bare assertion fails to substantiate the conclusion that JP Morgan was subject to a confiscatory rate for its sales that preceded the May 10 Rehearing Order.

20. Further, equity does not require that we direct PJM and MISO to pay JP Morgan the Cost-Based Energy Price for those hours in which JP Morgan was dispatched but the applicable LMP was below JP Morgan's costs. As the Commission observed in the May 10 Rehearing Order, the bid and rate restrictions under which JP Morgan previously participated in organized markets outside of CAISO were problematic in that they inequitably required other market participants to make JP Morgan whole where the

⁴⁴ See *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) (citing *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896), for the proposition that "[a] rate is too low if it is 'so unjust as to destroy the value of [the] property for all the purposes for which it was acquired,' and in doing so 'practically deprives the owner of property without due process of law'"); see also *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 605 (1944) ("Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called 'fair value' rate base.").

⁴⁵ Motion for Clarification and Rehearing at 4.

⁴⁶ See 18 C.F.R. § 385.212(c)(1) (2013).

applicable LMP was less than the cost of JP Morgan's resources.⁴⁷ In this respect, requiring market participants to make JP Morgan whole in certain intervals would conflict with the Commission's previous efforts to avoid such an inequitable result.

B. May 28 Compliance Filing

21. We find that JP Morgan's proposed revisions to Part I of the General Tariff comply with the directives of the May 10 Rehearing Order. Specifically, the May 28 Compliance Filing provides for JP Morgan to limit its offers to the Cost-Based Energy Price, and specifies that JP Morgan will receive a rate calculated in accordance with the applicable market rules.⁴⁸ Therefore, we accept JP Morgan's revised General Tariff to be effective April 1, 2013.⁴⁹

The Commission orders:

(A) JP Morgan's Motion for Clarification and rehearing is hereby denied, as discussed in the body of this order.

(B) The May 28 Compliance Filing is hereby accepted, effective April 1, 2013, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁴⁷ See May 10 Rehearing Order, 143 FERC ¶ 61,118 at P 25.

⁴⁸ *Id.* P 26.

⁴⁹ Notably, we accept the revised definition of "Cost-Based Energy Price." proposed in the May 28 Compliance Filing.