

147 FERC ¶ 61,141  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C.

Docket No. ER14-1579-000

ORDER ACCEPTING NOTICE OF CANCELLATION

(Issued May 22, 2014)

1. On March 25, 2014, PJM Interconnection, L.L.C. (PJM) submitted a Notice of Cancellation of the Upgrade Construction Service Agreement (Upgrade Agreement) entered into among PJM, H-P Energy Resources LLC (H-P Energy) and Potomac Electric Power Company (PEPCO), designated as Original Service Agreement No. 3555. In this order, we accept PJM's filing, effective March 28, 2014.

**I. Background and Details of the Filing**

2. In its filing, PJM states that H-P Energy submitted a merchant transmission request to up-rate the terminal equipment at the Dickerson substation to increase the transfer capability on the PEPCO side of the Pleasant View – Dickerson 230 kV line by 155 million volt-amperes. PJM explains that, to achieve the requested transfer capability, the parties agreed that PEPCO would upgrade the line metering ampere rating from 3,000 amperes to 4,000 amperes.<sup>1</sup> The parties further agreed that H-P Energy would fund replacement of the line metering equipment at a cost of \$250,000 and estimated tax gross

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<sup>1</sup> The Upgrade Agreement describes the scope of work as “[r]eplace 23111 line metering equipment at Dickerson substation with equipment that is 4000A capable.” Appendix I to the Upgrade Agreement.

up of \$44,000 in return for certain financial rights.<sup>2</sup> On December 28, 2012, H-P Energy executed the Upgrade Agreement. On May 13, 2013, PJM filed the Upgrade Agreement with the Commission. The Commission accepted the agreement on June 21, 2013.<sup>3</sup>

3. PJM states that, in July of 2013, PEPCO advised PJM that PEPCO had made a clerical error and failed to document that the feeder at the Dickerson substation had already been upgraded from 3,000 amperes to 4,000 amperes prior to H-P Energy submitting its merchant transmission request. PJM explains that it then notified H-P Energy of the error and PJM's intention to void the Upgrade Agreement. PJM states that, by email to PJM dated August 18, 2013, H-P Energy objected to termination of the Upgrade Agreement. PJM further states that PEPCO advised H-P Energy by letter dated September 11, 2013 that the clerical error was a "mistake in fact" rendering performance of the Upgrade Agreement impossible and offering to reimburse H-P Energy "the costs of the PJM studies and other direct, out-of-pocket expenses incurred in executing the [Upgrade Agreement]."<sup>4</sup>

4. PJM states that the Upgrade Agreement is being cancelled because it rests on a mistake of fact due to a clerical error making it impossible for the parties to carry out the terms and conditions of the contract.<sup>5</sup> PJM requests an effective date of March 28, 2014.

## **II. Notice and Responsive Pleadings**

5. Notice of PJM's filing was published in the *Federal Register*, 79 Fed. Reg. 18,681 (2014), with interventions and protests due on or before April 15, 2014. H-P Energy filed a motion to intervene and protest.

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<sup>2</sup> "New Service Customer shall pay all Costs for the design, engineering, procurement and construction of the Direct Assignment Facilities or Customer-Funded Upgrades identified in Appendix I..." Upgrade Agreement, § 2.0. "New Service Customer shall receive the following rights...Incremental Auction Revenue Rights...Incremental Available Transfer Capability Revenue Rights..." *Id.* § 5.1.

<sup>3</sup> *PJM Interconnection, L.L.C.*, Docket No. ER13-1484-000 (Jun. 21, 2013) (delegated letter order).

<sup>4</sup> PJM Filing at 2-3.

<sup>5</sup> *Id.* at 3 (citing *City of Baltimore v. DeLuca-Davis Constr. Co.*, 124 A.2d 557, 562 (Md. 1956)).

6. On April 16, 2014, PEPCO filed a motion to intervene out-of-time.

7. On April 30, 2014, PEPCO filed an answer to H-P Energy's protest. On May 5, 2014, H-P Energy filed an answer to PEPCO's answer. On May 15, 2014, PJM filed an answer to H-P Energy's answer. On May 16, 2014, H-P Energy filed an answer to PJM's answer. On May 20, 2014, PJM filed an answer to H-P Energy's answer.

8. In its protest, H-P Energy urges the Commission to reject the Notice of Cancellation because (1) the prerequisites for rescission are not met and the legal authority cited by PJM does not support rescission; (2) the Upgrade Agreement is a final, binding agreement accepted by and on file with the Commission under the Federal Power Act; (3) H-P Energy has acted in good faith and delivered substantial tangible value to PJM and PEPCO such that it would be unjust to deprive H-P Energy of the benefit of its bargain; and (4) contract stability and finality are critical to sustain market participant and investor confidence. H-P Energy argues that it had no ability to determine PEPCO's equipment ratings, while PEPCO had complete control and information about its equipment ratings. H-P Energy contends that there is no legal basis to cancel an agreement based on the carelessness of one party, when the other party was not careless,<sup>6</sup> and it is reasonable for PEPCO to bear the risk of its mistake in these circumstances.<sup>7</sup> H-P Energy also argues that, absent a showing of fraud or duress, such a filed agreement is presumptively just and reasonable, and may only be reformed if the public interest so requires, a standard said to be "practically insurmountable."<sup>8</sup>

9. In its answer, PEPCO explains that it did not become aware of the actual limit of the metering equipment until a pre-construction field visit in July of 2013. PEPCO asserts that the Upgrade Agreement provides for the construction of facilities that have already been constructed, and therefore the contract could not be performed at the time of execution and cannot be performed now. PEPCO contends that the contract must be

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<sup>6</sup> H-P Energy Protest at 19-20 (citing *Praxair Inc. v. Hinshaw & Culbertson*, 235 F.3d 1028, 1034 (7th Cir. 2000); *Florida Gas Transmission Co.*, 95 FERC ¶ 61,087 (2001)).

<sup>7</sup> *Id.* at 20 (citing Restatement (Second) of Contracts § 154(c)).

<sup>8</sup> *Id.* at 8-9 (citing *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950,954 (D.C. Cir. 1983); *Morgan Stanley Capital Grp. Inc. v. Public Util. District No. 1 of Snohomish County*, 554 U.S. 527, 548 (2008)).

cancelled because it is based on a mutual mistake as to a basic, material fact.<sup>9</sup> PEPCO argues that its inadvertent recording of the metering limit as 3,000 amperes instead of 4,000 amperes does not amount to negligence and does not bar the remedy of cancellation.<sup>10</sup>

10. In addition, PEPCO states that the Upgrade Agreement specifically incorporates the PJM Open Access Transmission Tariff (OATT), which states that, to the extent a facility is in a public utility's rate base, it shall not be eligible to be a Customer-Funded Upgrade.<sup>11</sup> PEPCO argues that the entire cost of the upgrade is already included in rate base,<sup>12</sup> and therefore it is contrary to the PJM OATT for the Upgrade Agreement to call the upgrade a Customer-Funded Upgrade. Furthermore, PEPCO contends that the PJM OATT prohibits financial rights from being received by a New Service Customer "with regard to transmission investment that is included in the rate base of a public utility and on which a regulated return is earned."<sup>13</sup>

11. In its answer to PEPCO's answer, H-P Energy argues that PEPCO fails to demonstrate that the upgrade cost is actually in rate base and earning return, such that H-P Energy is prohibited from receiving the financial rights described in the Upgrade Agreement. Further, H-P Energy argues that it is uncontested that it has paid the full cost of the upgrade, and therefore those costs should not be included in PEPCO's rate base but credited to the transmission plant under the Commission's Uniform System of Accounts.

12. In its answer to H-P Energy's May 5, 2014 answer, PJM argues that H-P Energy's payment of \$294,000 is a payment of cash security and not the full cost of the upgrade

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<sup>9</sup> PEPCO Answer at 11-15 (citing *Allen v. Hammond*, 36 U.S. 63 (1837); *Hitt v. Cox*, 737 F.2d 421, 424 (4th Cir. 1984); *U.S. v. Bradley*, 381 F.3d 641, 648 (7th Cir. 2004)).

<sup>10</sup> *Id.* at 15 (citing Restatement (Second) of Contracts, § 157).

<sup>11</sup> *Id.* at 19 (citing PJM OATT, § 1.7A.01 Customer-Funded Upgrade, 1.0.0 ("No Network Upgrade, Local Upgrade or Merchant Network Upgrade or other transmission expansion or enhancement shall be a Customer-Funded Upgrade if and to the extent that the costs thereof are included in the rate base of a public utility on which a regulated return is earned.")).

<sup>12</sup> *Id.* at 7-8 (citing PJM's December 31, 2013 filing in Docket No. ER14-909-000).

<sup>13</sup> *Id.* at 20 (citing PJM OATT, § 234.6 Rate Based Facilities, 0.0.0).

and that, contrary to H-P Energy's claims, PEPCO has not received "the benefit of the bargain."

13. In its answer to PJM's May 15, 2014 answer, H-P Energy contends that performance in the Upgrade Agreement is not impossible but in fact occurred, and that H-P Energy relied on PJM's and PEPCO's representations in the Upgrade Agreement.

14. In its answer to H-P Energy's May 16, 2014 answer, PJM asserts that H-P Energy is not able to fund construction of the completed upgrade and is therefore not entitled to receive any rights under the Upgrade Agreement because the Upgrade Agreement specifies that the effectiveness of all rights is conditioned upon the completion of the upgrade.

### **III. Discussion**

#### **A. Procedural Matters**

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), timely, unopposed motions to intervene serve to make H-P Energy a party to this proceeding.

16. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2013), we will grant PEPCO'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.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest and or answer unless otherwise ordered by the decisional authority. We will accept the answers filed by H-P Energy, PJM, and PEPCO because they have provided information that assisted us in our decision-making process.

#### **B. Substantive Matters**

18. We accept the notice of cancellation, to become effective on March 28, 2014, as requested, in order to cancel a rate schedule that cannot be performed. Because the upgrade to the Dickerson substation that is the subject of the Upgrade Agreement was already completed before execution of the Upgrade Agreement, and because Incremental Capacity Transfer Rights can be awarded only to one party, we cannot require specific

performance of the Upgrade Agreement as drafted. Thus, we will allow the Upgrade Agreement to be cancelled as a filed rate with the Commission.<sup>14</sup>

19. While PEPCO has agreed to compensate H-P Energy for the costs of the PJM studies and other direct, out-of-pocket expenses in executing the Upgrade Contract, we make no findings regarding entitlement to further relief from a court of competent jurisdiction with respect to the validity of the contract, the rights and responsibilities of the parties, and whether further legal remedies such as rescission, damages, or other remedies are proper in this instance.<sup>15</sup>

The Commission orders:

The Notice of Cancellation is hereby accepted, to become effective March 28, 2014, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>14</sup> See 16 U.S.C. § 824d(c) (2012) (Commission is responsible to determine filing requirements).

<sup>15</sup> Cf. *Ark. La. Gas Co. v. Hall*, 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,031 (1979).

Because we are not revising or modifying the Upgrade Agreement, we leave the applicability of the *Mobile-Sierra* doctrine to be determined in the appropriate legal forum. See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).