

149 FERC ¶ 61,059
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

PJM Interconnection, L.L.C.

Docket No. ER14-1144-001

ORDER ON REHEARING

(Issued October 21, 2014)

1. This order addresses requests for rehearing of the Commission's January 24, 2014, order on PJM Interconnection, L.L.C.'s (PJM) request for temporary waiver of the PJM Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (Operating Agreement) and the PJM Open Access Transmission Tariff (Tariff) to permit sellers that submit cost-based offers from Generation Capacity Resources¹ into the PJM energy markets and whose costs exceed the applicable energy market clearing price to receive a make-whole payment covering the difference between their costs and the clearing price.² The Independent Market Monitor for PJM (IMM), the Maryland Public Service Commission (Maryland PSC), and the PJM Industrial Customer Coalition (Industrial Customers) requested rehearing of the January 24 Order. In this order, we grant in part and deny in part the IMM's request for rehearing and deny Industrial Customers' and Maryland PSC's requests for rehearing.

I. Background

2. On January 23, 2014, in response to unprecedented spikes in fuel costs caused by recurring extreme cold weather events, PJM filed a request for temporary waiver of provisions of the Operating Agreement and the Tariff to permit make-whole payments to Generation Capacity Resource sellers who are barred by the \$1,000/MWh offer cap from including all legitimate costs in their offers. PJM requested that the waiver commence on

¹ Capitalized terms used but not defined herein are intended to have the meaning given to such terms in the Operating Agreement and the Tariff, as applicable.

² *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,041 (2014) (January 24 Order).

January 24, 2014 and end on the earlier of March 31, 2014 or the date on which the Commission granted a related waiver request that PJM intended to supersede the waiver request in the instant proceeding.³ PJM requested expedited relief due to impending, extreme weather conditions.

3. PJM explained that the Operating Agreement provides that resources that have been committed as capacity shall submit offers into the day-ahead energy market for the available capacity of their resources; however, the Operating Agreement also provides that offers in the day-ahead energy market shall not exceed an energy offer price of \$1,000/MWh. PJM explained that record-setting prices and unprecedented high gas prices could equate to a marginal energy cost for a simple-cycle combustion turbine generator of approximately \$1,200/MWh. PJM also noted that, on January 21, 2014, it saw approximately 5,000 MW of energy market offers in the day-ahead market at a price of \$999/MWh, implying that the costs for these resources was above \$1,000/MWh but their offers were constrained by the offer cap.

4. PJM stated that the situation was untenable because affected generators did not have an opportunity to recover their costs of generating the energy that they are required to offer into the PJM market. PJM's requested relief would permit Generation Capacity Resources to recover legitimate costs that are in excess of the applicable clearing price. Specifically, PJM requested a waiver of Operating Agreement, Schedule 1, sections 1.10.1A(d) (the \$1,000/MWh offer cap) and 3.2.3 (defining the costs eligible for make-whole treatment), the equivalent Tariff sections of Attachment K-Appendix, and any other related Operating Agreement and Tariff provisions, as necessary, to permit sellers who are barred by the \$1,000/MWh offer cap from including all legitimate costs in their offers to receive a make-whole payment covering the difference between their costs and the clearing price. PJM noted that the seller's marginal costs must be as determined, and documented, in accordance with the cost development guidelines and procedures in PJM's Manual 15.⁴ PJM sought to recover such make-whole payments in the same manner as is permitted for other similar make-whole payments in the energy market.

³ Concurrently with the waiver request in the instant docket, PJM submitted, in Docket No. ER14-1145-000, a waiver request to allow cost-based offers to exceed the offer cap of \$1,000/MWh and requested that that relief supersede the waiver requested in the instant docket. The Commission issued an order granting the waiver request in Docket No. ER14-1145-000 on February 11, 2014. *See PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078 (2014) (February 11 Order).

⁴ PJM January 23, 2014 Filing at 7.

5. On January 24, 2014, the Commission granted PJM's request for temporary waiver, finding it necessary to address reliability concerns posed by extreme cold weather in the PJM region and maintain confidence in market operations.⁵

II. Requests for Rehearing

6. The IMM, Maryland PSC, and Industrial Customers timely requested rehearing of the January 24 Order.⁶

7. The IMM requests clarification of three aspects of January 24 Order. First, the IMM notes that the January 24 Order granted relief only to Generation Capacity Resources, but the IMM argues that other natural gas-fired generation resources that are not Generation Capacity Resources (i.e., energy-only resources that are not subject to the day-ahead must-offer requirement) should also receive the same relief the order granted, in order to not deter such resources from participating in PJM energy markets. Therefore, the IMM requests that the waiver be extended to include such resources. Second, the IMM requests that the Commission change the effective date of the January 24 Order from January 24, 2014, to January 22, 2014, because, according to the IMM, the events giving rise to PJM's waiver request began on the natural gas day starting at 10:00 a.m. on January 22, 2014. Third, the IMM requests that the Commission find that the make-whole payments permitted by the waiver should not include the 10 percent adder that resources are allowed to include in certain cost-based offers in the energy market. The IMM contends that the allowance of the 10 percent adder is based on a Tariff provision originally intended to account for the uncertainty in calculating hourly operating costs of combustion turbines under ambient conditions.⁷ The IMM maintains that the cost and volumes of natural gas subject to the waiver are known precisely, and, therefore, the 10 percent adder is unnecessary to provide the relief sought in the waiver and would result in "an unjust and unreasonable windfall."

⁵ January 24 Order, 146 FERC ¶ 61,041 at P 7.

⁶ On January 30, 2014, the Maryland PSC filed a request for rehearing, styled as a protest, in the instant docket and Docket No. ER14-1145-000. On February 6, 2014, the Maryland PSC filed a request for rehearing, styled both as an answer to PJM's answer filed in Docket No. ER14-1145-000 and as a request for clarification of the January 24 Order. Although styled as a protest and a request for clarification, the Maryland PSC's filings in the instant docket are, in substance, requests for rehearing of the January 24 Order and we will treat them as such.

⁷ IMM January 29, 2014 Request for Clarification at 2-3.

8. The Maryland PSC requests that the Commission require the IMM to submit, and require Commission staff to review, “a thorough report . . . fully identifying all applications” for make-whole payments and the basis on which the allowed price was determined in any resulting payments.⁸ The Maryland PSC also requests that the Commission permit uplift compensation only for generators that have actual, demonstrated operating cost levels above the price cap as a result of natural gas price spikes.⁹

9. Industrial Customers argue that the January 24 Order was arbitrary and capricious¹⁰ and that PJM’s proposed make-whole payments accepted in the January 24 Order constitute retroactive ratemaking because the Commission changed the obligations that attached to Generation Capacity Resources that cleared in a Base Residual Auction. Industrial Customers state that such *post hoc* changes unjustly and unreasonably raise prices for consumers by restructuring Generation Capacity Resources’ obligations to the market. Industrial Customers argue that the Commission granted PJM’s emergency request for temporary waiver on January 24, 2014, one day after it was filed, and, in doing so without issuing a Notice of Filing, the Commission denied interested parties their procedural and substantive due process rights. Industrial Customers also argue that the January 24 Order did not identify any evidence that PJM’s filing met the Commission’s standards for granting a tariff waiver. Specifically, Industrial Customers assert that the Commission failed to find that: (1) the waiver is limited in scope; (2) a concrete problem must be remedied; and (3) the waiver does not have undesirable consequences such as harming third parties.

10. Industrial Customers allege that the temporary waiver request was not limited in scope because the record contained no evidence in that regard and the waiver was not limited to certain zones within PJM, but rather applied region-wide. Therefore, Industrial Customers argue, waiving the \$1,000/MWh offer cap “will have significant and potentially long-lasting adverse impacts on customers,” which cannot meet the Commission’s limited-in-scope standard.¹¹ Industrial Customers also argue that generators’ failure to appropriately hedge against their exposure to potential price spikes in the natural gas market does not constitute a concrete problem that needed to be addressed. Finally, Industrial Customers assert that the January 24 Order harms third

⁸ Maryland PSC January 30, 2014 Protest at 9.

⁹ Maryland PSC February 6, 2014 Answer at 6.

¹⁰ Industrial Customers February 24, 2014 Request for Rehearing at 3.

¹¹ Industrial Customers Request for Rehearing at 8.

parties by forcing wholesale and retail customers to pay higher prices due to poor decision-making by natural gas-fired generators.

III. Commission Determination

A. Procedural Matters

11. On February 21, 2014, the Maryland PSC filed an answer to the IMM's rehearing request. On March 11, 2014, PJM filed an answer to the IMM's and Industrial Customers' rehearing requests. On April 4, 2014, Old Dominion Electric Cooperative (Old Dominion) filed an answer to the IMM's rehearing request and to PJM's answer. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R § 385.713(d) (2014), prohibits an answer to a rehearing request. Accordingly, we reject the answers submitted by PJM, the Maryland PSC, and Old Dominion.¹²

B. Substantive Matters

12. We grant in part and deny in part the IMM's request for rehearing and deny Maryland PSC's and Industrial Customers' requests for rehearing, as discussed below.

13. We grant the IMM's request for rehearing on the issue of the 10 percent adder, and we find that it is not appropriate to include the 10 percent adder in the make-whole payments. We agree with the IMM that the 10 percent adder was included in the definition of cost-based offers to account for "the uncertainty of calculating the hourly operating costs of [combustion turbines] under changing ambient conditions."¹³ Resources subject to the waiver granted in the January 24 Order, however, will receive make-whole payments by documenting the cost and volumes of natural gas needed to generate electricity. This type of *ex post* determination does not contain any inherent uncertainty that would warrant an adder whose purpose in *ex ante* offers is solely to

¹² We note that Old Dominion styles its April 4, 2014 answer as an answer to the IMM's "motion for clarification" on whether the make-whole payments allowed under the January 24 Order should include the 10 percent adder. However, as noted above, the IMM's filing is in substance a request for rehearing, not a motion for clarification, on that issue. Therefore, we reject Old Dominion's April 4, 2014 answer as an impermissible answer to a request for rehearing. However, we also note that even if we were to allow Old Dominion's answer, Old Dominion's contention regarding the 10 percent adder would fail on the merits because, as explained below, we find it inappropriate to include the 10 percent adder in make-whole payments that are intended to provide *ex post* compensation for actual costs.

¹³ IMM January 29, 2014 Request for Clarification at 3.

enable resources to recover uncertain or difficult-to-quantify costs. Therefore, we find that it would be inappropriate to include the 10 percent adder in the make-whole payments permitted by the January 24 Order.

14. As to the Maryland PSC's request that the Commission require the IMM to submit "a thorough report . . . fully identifying all applications" for make-whole payments and the basis on which the allowed price was determined in any resulting payments, the Commission already directed the IMM to submit such a report in the January 24 Order.¹⁴ On March 26, 2014, the IMM submitted its report identifying, among other things, the number of market participants requesting make-whole payments, the number of units for which the requests were submitted, the amount of make-whole compensation sought, and the amount of total uncompensated costs for the units requesting make-whole payments.¹⁵ We are not persuaded that it is necessary for the IMM to identify the applications submitted for make-whole payments more fully than it already has, and, accordingly, we deny the Maryland PSC's request for rehearing on this issue.

15. We also deny Maryland PSC's request that the Commission further clarify the method for calculating above-cap generation costs for purposes of make-whole payments made pursuant to the January 24 Order. The January 24 Order permitted Generation Capacity Resources "for whom the price of natural gas results in documented costs that exceed PJM's \$1,000/MWh offer cap to receive a make-whole payment covering the difference between their costs and the clearing price."¹⁶ The IMM has filed the required report, and neither Maryland PSC nor any other party has challenged the determination of payments. We see no need to address this issue in the abstract.

16. We deny the IMM's request that make-whole payments under the January 24 Order extend to natural gas-fired generation resources that are not Generation Capacity Resources. PJM's filing requested a temporary waiver only for Generation Capacity Resources and, therefore, we will not extend the waiver to other generators. Further, no party in this proceeding has presented evidence that natural gas-fired generators other than Generation Capacity Resources had documented costs above the market-clearing price.

¹⁴ *Id.* P 6.

¹⁵ IMM March 26, 2014 Informational Report at 2-4. We note that the IMM calculated the total uncompensated costs for the units requesting waivers to be \$9,118.43.

¹⁶ January 24 Order, 146 FERC ¶ 61,041 at P 5.

17. We also deny the IMM's request to change the effective date of the January 24 Order from January 24, 2014, to January 22, 2014. PJM requested, and the Commission granted, the waiver to be effective January 24, 2014. The IMM fails to establish that sufficient notice was provided for any day earlier than the date of filing.

18. We deny Industrial Customers' request for rehearing. Industrial Customers argue that the January 24 Order constituted retroactive ratemaking by "fundamentally restructur[ing]" Generating Capacity Resources' obligations after they were undertaken in the Base Residual Auction or Incremental Auction.¹⁷ We disagree. PJM filed its waiver request to modify the terms and conditions of its Tariff for a short period on January 23, 2014, to be effective prospectively commencing January 24, 2014. The Commission did not waive the Tariff provisions at issue in any period prior to January 24, 2014, nor did the Commission provide a remedy for resources' under-recovery in prior periods. The Commission accepted PJM's waiver filing prospective from the date of notice, which does not violate the filed rate doctrine or the rule against retroactive ratemaking.¹⁸ The Commission has previously found that changing elements of the energy market rules by which capacity resources must abide does not necessarily constitute retroactive ratemaking.¹⁹ To the extent market participants' expectations regarding the offer cap were in fact upset, we are not persuaded that their reliance on the offer cap outweighs the benefits of waiving that cap to address the reliability concerns and maintain confidence in market operations during the sustained extreme weather event that prompted PJM's waiver request.

19. Industrial Customers also argue that the Commission arbitrarily and capriciously deviated from its standard for granting a waiver. We disagree. While Industrial Customers correctly note that the Commission has granted waivers where the waiver request is limited in scope, remedies a concrete problem, and does not have undesirable consequences, such as harming third parties,²⁰ the Commission has also granted waiver

¹⁷ Industrial Customers Request for Rehearing at 4.

¹⁸ See *Columbia Gas Transmission Corporation v. FERC*, 895 F.2d 791, 795 (1990) (utilities may file to revise tariff rates prospectively from the date of filing if the Commission waives notice requirements); *ISO New England Inc.*, 145 FERC ¶ 61,095, at P 28 (2013).

¹⁹ See *ISO New England Inc.*, 145 FERC ¶ 61,095 at P 28 (concluding that any expectations of market participants, as distinguished from retroactive ratemaking, do not outweigh the reliability benefits resulting from the change in rates).

²⁰ See, e.g., *Southwest Power Pool, Inc.*, 139 FERC ¶ 61,264 (2012).

requests for good cause shown in circumstances involving emergency situations.²¹ The circumstances necessitating PJM's waiver request—emergent reliability concerns and threats to confidence in the market caused by a sustained extreme weather event—constituted just such an emergency, and we, therefore, find that the January 24 Order is consistent with the Commission's precedent on waiver requests.²²

20. Lastly, we disagree with Industrial Customers' argument that the January 24 Order denied interested parties their due process rights by granting PJM's waiver request, without notice, one day after it was filed. In this case, PJM provided parties with notice of its filing, and the Commission chose to depart from its usual notice procedures to approve the filing quickly in order to ensure that Generation Capacity Resources knew they would be able to recover their costs when they submitted bids. Delaying the issuance of the order could have threatened reliability by discouraging generators from making their units available. The lack of advance notice did not deprive parties of due process since they had the opportunity to raise their arguments on rehearing.²³ The Commission provided the opportunity for parties to intervene and present their arguments concerning the waiver request on rehearing, multiple parties timely did so, and we have considered those arguments. Thus, we find that interested parties have not been deprived of an opportunity to raise their arguments and hence have not been deprived of their due process rights in this proceeding.

²¹ See, e.g., *Powerex Corp.*, 138 FERC ¶ 61,099 (2012); *Entergy Services, Inc.*, 124 FERC ¶ 61,226 (2008); *accord Southwest Power Pool, Inc.*, 139 FERC ¶ 61,264 (2012).

²² See, e.g., *Southwest Power Pool, Inc.*, 139 FERC ¶ 61,264 (explaining that the Commission's analysis of a waiver request depends on the circumstances of the request, including whether it involves an emergency situation); *Entergy Services, Inc.*, 124 FERC ¶ 61,226 (granting waiver to allow companies to manage their resources during emergency conditions caused by hurricane, without applying the standard that Industrial Customers argue applies in the instant case).

²³ See, e.g., *State of Cal. ex rel. Lockyer v. FERC*, 329 F.3d 700, 711 (2003) (“Even assuming *arguendo* that the Commission initially deprived the petitioners of an opportunity for a hearing by approving the NEG applications after only a few days of public comment, the petitioners still would have no legal basis for complaint. In this case, the Commission provided all the procedural protections required by the Fifth Amendment and FPA when it carefully considered all the evidence and arguments that the petitioners offered in their petitions for rehearing and motions to intervene.”); see also *ANR Pipeline Co. and TC Offshore LLC*, 143 FERC ¶ 61,225, at PP 57, 60 (2013).

The Commission orders:

The IMM's request for rehearing is hereby granted in part and denied in part, and Industrial Customers' and Maryland PSC's requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.