

152 FERC ¶ 61,181  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

New Jersey Energy Associates, a Limited Partnership

Docket No. ER15-952-000

ORDER ON PETITION FOR WAIVER

(Issued September 4, 2015)

1. On January 30, 2015, pursuant to Rule 207(a)(5) of the Commission's Rules of Practice and Procedure,<sup>1</sup> New Jersey Energy Associates, a Limited Partnership (NJEA) filed a petition for waiver of certain provisions of the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (OATT) and Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (Operating Agreement) so that it can be made whole for costs incurred to comply with scheduling instructions from PJM during the cold weather events in January 2014. As discussed in the body of this order, we deny NJEA's request for waiver.

**I. Background**

2. NJEA states that it owns and operates the 290 MW South River combined cycle gas-fired power plant located in Sayreville, New Jersey (South River CC). NJEA states that NextEra Energy Power Marketing, LLC (NEPM) is its agent with respect to participation in the PJM energy markets.

**II. Waiver Request**

3. NJEA requests waiver of section 1.10.2 of Schedule 1 of the Operating Agreement and mirror provisions of the Tariff, and any other provisions of the Operating Agreement and Tariff necessary, to allow for recovery of \$1,334,280 of unrecovered costs incurred by NEPM during the Polar Vortex weather events in January 2014. NJEA states that the unrecovered costs relate to out-of-market scheduling instructions by PJM with regards to

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<sup>1</sup> 18 C.F.R. § 385.207(a)(5) (2014).

the South River CC. NJEA states that, despite assurances from PJM generation dispatchers that NEPM would be made whole for its loss, PJM later rejected NEPM's request for cost recovery, concluding that the Tariff and Operating Agreement restrict PJM's ability to compensate NEPM for the costs incurred to comply with PJM's changes to its out-of-market scheduling instructions.

4. NJEA states that PJM's scheduling decision on Thursday, January 23, 2014 gives rise to this petition for waiver. NJEA states that at 14:40 ET on Thursday, January 23, 2014, PJM contacted NEPM and requested that the South River CC and several other units operated by NEPM be available for dispatch on Monday, January 27, 2014, at 04:00 ET. NJEA states that NEPM informed PJM that the South River CC had a planned outage beginning on Sunday, January 26, 2014, and asked if the outage should be cancelled. NJEA states that PJM asked if it would be "really bad news" if the planned outage was cancelled and whether contractors could be shuffled. NJEA states that NEPM replied that it would contact the plant to see what could be done. NJEA states that at 16:41 ET on Thursday, NEPM contacted PJM and stated that the planned outage for the South River CC had been cancelled. PJM then confirmed the request that the South River CC be online and available for dispatch on Monday beginning at 04:00 ET and continuing through 24:00 ET that same day. NJEA also states that PJM indicated that it was scheduling the unit for conservative operations and that the unit would be subject to offer caps.<sup>2</sup>

5. NJEA states that, on Friday morning, NEPM procured 15,000 Dekatherms (Dths) for gas day January 26 and 15,000 Dths for gas day January 27, costing a total of \$2,700,000 (at a price of \$90/Dth) to support operations at the South River CC plant. NJEA states that, at 15:55 ET on Friday, PJM contacted NEPM and extended the unit's schedule to remain online through Wednesday at 23:59 ET, running the unit at minimum output for off-peak hours (23:00 ET to 05:00 ET) and then following economic dispatch for remaining hours (05:01 ET through 22:59 ET). NJEA also states that, at 13:00 ET on Saturday, NEPM spoke with PJM regarding pricing information PJM requested and PJM stated that it understood that it had committed to compensate the South River CC for its fuel costs given the advance scheduling of the unit. NJEA states that, on Sunday, NEPM submitted an offer for the South River CC in PJM's Day-ahead Energy Market, but the unit did not clear the Day-ahead Energy Market. NJEA states that its offer for the South River CC was higher than the clearing price of \$255.14/MW-hour at the Sayreville node. NJEA states that, nonetheless, NEPM still prepared the unit for conservative operations on Monday.<sup>3</sup>

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<sup>2</sup> NJEA Transmittal at 4-7.

<sup>3</sup> *Id.* at 7-9.

6. NJEA states that, at 23:29 ET on Sunday, PJM contacted NEPM to advise it was changing the schedule for the South River CC by delaying its start time until 16:00 ET on Monday. NJEA states that PJM stated that it understood that NEPM had already purchased gas and that PJM “would take care of that ... because we did give a verbal commitment and ah we’re changing that at this point.” NJEA states that any gas changes were due to Public Service Electric and Gas Company (PSE&G) no later than 18:00 ET on Sunday, nearly six hours before they had been contacted by PJM, so the 15,000 Dths for gas day January 26 (up until 10:00 ET) had to be cashed out for a loss of \$667,140 (sold at \$45.524/MMBtu).<sup>4</sup>

7. NJEA states that, at 08:30 ET on Monday, PJM once again contacted NEPM and stated that it was canceling the 16:00 ET schedule for the South River CC and instead, the unit was instructed to be online and dispatchable in a one-by-one configuration at 03:00 ET on Tuesday; thus, the unit no longer had an electric schedule for Monday. NJEA states that the South River CC experienced transmitter issues late Monday evening caused by the extreme cold, with lines freezing over due in part to the repeated extension of the unit’s start-time. NJEA states that NEPM decided to cash out the remaining 15,000 Dths (for gas day January 27) at the same loss of \$667,140. NJEA states that on Tuesday, consistent with PJM’s earlier instructions, NEPM emailed Market Settlement Operations to request reimbursement. NJEA states that, subsequently, on February 6, 2014, PJM notified NEPM that PJM did not have the authority to grant NEPM’s request under the Tariff or Operating Agreement.<sup>5</sup>

8. NJEA requests waiver of section 1.10.2 of Schedule 1 of the Operating Agreement and mirror provisions of the Tariff, and any other provisions of the Operating Agreement and Tariff necessary, to allow for recovery of the \$1,334,280 of natural gas costs incurred to comply with PJM’s schedule for the South River CC unit on Monday, January 27, 2014. NJEA claims that section 1.10.2 of Schedule 1 of the Operating Agreement covers a generator’s startup costs if PJM cancels its selection of the generator as a pool-scheduled resource and notifies the generator of the cancellation before it is synchronized. NJEA states, however, that by its express terms, section 1.10.2 provides cost recovery only for units scheduled during or after the Day-ahead Energy Market clearing, and it caps the recovery of costs at the unit’s start-up costs, which is less than a third of NJEA’s unrecovered gas costs for the Monday schedule. If the Commission declines to grant NJEA’s requested waivers, NJEA states that, at a minimum, it should find that PJM can compensate NJEA for its start-up costs pursuant to section 1.10.2.

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<sup>4</sup> *Id.* at 9-11.

<sup>5</sup> *Id.* at 11-13.

NJEA states that, while this would only be a fraction of its actual unrecovered costs, it would provide some compensation to offset NJEA's loss.

9. NJEA argues that the waiver meets the Commission's requirements for waiver of a tariff provision. First, NJEA states that this one-time waiver is of limited scope, as it is predicated on a defined set of facts involving unprecedented weather conditions and repeated assurances by PJM that NJEA would recover its costs in its good faith effort to respond to PJM's dispatch. Second, NJEA states that the waiver addresses a concrete problem needing to be remedied. NJEA states that NEPM took responsive action, well in advance of the normal day-ahead cycle to maintain reliability, but taking that action while also failing to commit the unit through the Day-ahead Energy Market is what disqualified NEPM for cost recovery under the Operating Agreement and Tariff. NJEA states that the problems associated with generator cost recovery led the Commission to take the unusual action of approving a PJM Make Whole Waiver request the day after it was filed, without any opportunity for public comment.<sup>6</sup> Lastly, NJEA argues that the waiver would not have any undesirable consequences, such as harming third parties, because its fuel procurement was undertaken to support reliable operations of the bulk power system. NJEA states that the natural gas purchases would not have been made but for PJM scheduling the unit for conservative operations, given that the unit was scheduled for a planned outage approved by PJM.<sup>7</sup>

10. NJEA states that if the Commission determines that the indemnification provision of the Tariff authorizes PJM to make NJEA whole, it will withdraw its waiver request.<sup>8</sup>

### **III. Notice of Filing and Responsive Pleadings**

11. Notice of NJEA's request for waiver was published in the *Federal Register*, 80 Fed. Reg. 7,444 (2015), with protests and interventions due on or before December 3, 2014. Timely motions to intervene were filed by Electric Power Supply Association (EPSA), PJM Power Providers Group (P3), PSEG Companies,<sup>9</sup> Exelon Corporation,

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<sup>6</sup> *Id.* at 17 (citing *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,041, at P 5 (2014)).

<sup>7</sup> *Id.* at 13-17.

<sup>8</sup> NJEA Transmittal at 1-3. In a complaint filed on May 2, 2014, Duke Energy Corporation argues that the indemnification provisions in section 10.3 of PJM's Tariff and Operating Agreement authorize PJM to reimburse generators for their unrecoverable fuel costs.

<sup>9</sup> PSEG Companies include Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC.

NRG Companies,<sup>10</sup> Old Dominion Electric Cooperative, and PJM. Comments were filed by P3, EPSA, and PJM.

12. P3 and EPSA filed comments in support of NJEA's waiver request. P3 states that a generator should not be economically punished for "doing the right thing" when a regional transmission organization (RTO) dispatches them under a moment of uncertainty when the grid is under stress. P3 states that, in this situation, NJEA was performing as directed by PJM and should be compensated for its losses. P3 warns that failure to compensate market participants who incur a loss as a result of complying with an RTO directive would lead to an untenable market construct where market participants would be forced to question or even ignore the RTO. P3 states that the facts in this case speak to broader issues relating to coordination between the gas and electric markets, but the Commission should ensure market participants are not harmed by following a directive from the RTO. P3 requests that the Commission grant any and all waivers that are necessary in order to allow NJEA to recover the full amount of its losses.<sup>11</sup>

13. Similarly, EPSA states that NJEA's waiver request underscores the fact that rule changes are needed so that market participants know which actions to take under certain situations. EPSA points out that, if generators cannot be confident of a fair opportunity to recover their costs, they will be forced to make decisions that incidentally but detrimentally impact future reliability. EPSA also states that the instant waiver request highlights the continued need for the Commission to direct independent system operator (ISO) and RTO market improvements. EPSA notes that the instant filing also highlights the misalignment of the electric and natural gas markets - specifically the impact on reliability during extreme weather. EPSA states that NJEA's waiver request demonstrates the need for the Commission to make sure meaningful improvements are made.<sup>12</sup>

14. PJM filed comments generally supporting the NJEA waiver request. PJM admits that there is no Tariff or Operating Agreement provision that permits recovery of gas balancing costs and that the gas balancing losses NJEA experienced are generally a routine cost of doing business for generators under normal operations that are not recoverable under the Tariff or Operating Agreement. However, PJM contends that not

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<sup>10</sup> NRG Companies include NRG Power Marketing LLC and GenOn Energy Management, LLC.

<sup>11</sup> P3 Comments at 3-5.

<sup>12</sup> EPSA Comments at 1-7 (citing *Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines & Pub. Utilities*, 146 FERC ¶ 61,201 (2014)).

allowing NJEA to recover these extraordinary losses would result in an inequitable and confiscatory outcome. PJM states that it will not opine on the justness and reasonableness of the specific costs from NJEA, but states that, as a matter of policy, it believes that it is appropriate and equitable to make NJEA whole for reasonable unrecovered fuel costs it incurred during the extreme weather events, minus any offsetting revenues, given the operational challenges of illiquid gas markets, the extraordinarily high price of gas at the time, existing pipeline rules, lack of transparency of the gas market, and lack of coordination between the gas and electric markets.<sup>13</sup>

15. PJM states that stakeholders have been examining a host of issues since January 2014 on gas-electric coordination, but have not endorsed any rule changes related to recovery of gas balancing losses because PJM and its stakeholders are awaiting Commission action on three similar previously submitted waiver requests<sup>14</sup> before re-examining whether changes are needed to PJM's governing documents to allow for recovery of gas balancing costs.<sup>15</sup>

16. PJM states that it supports the NJEA waiver request because PJM needs to be able to rely on the owners and operators of generation resources in the PJM Region to comply with PJM's dispatch instructions and that if generation owners and operators incur extraordinary losses due to the combination of current gas market rules, the disconnect between the gas and electric markets, and price volatility in the gas markets, they may hesitate to comply with PJM's dispatch instructions. PJM also states that it agrees with NJEA that the request for waiver satisfies the Commission's standards for granting such a waiver.<sup>16</sup>

17. PJM also states that it does not believe that the indemnification provision in section 10.3 allows generators to recover costs from gas balancing losses. PJM states that it never "directed" NJEA to buy gas, but rather "instructed" them to buy gas. PJM explains that "directives" have a very specific meaning in the context of PJM's operators' communications to PJM Members' operators, most notably because they are related to

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<sup>13</sup> PJM Comments at 1-3.

<sup>14</sup> Citing then pending proceedings in *Duke Energy Corp., et al. v. PJM Interconnection, L.L.C., et al.*, Docket No. EL14-45-000, *Old Dominion Electric Cooperative*, Docket No. ER14-2242-000, and *Calpine Energy Services, L.P.*, Docket No. ER15-376-000.

<sup>15</sup> PJM Comments at 3-4.

<sup>16</sup> *Id.* at 4.

the reliability of the bulk power system and the North American Electric Reliability Corporation (NERC) standards.<sup>17</sup>

#### **IV. Discussion**

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

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>18</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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

19. As discussed below, the Commission denies NJEA's request for waiver. The Commission has issued orders on two similar requests for waiver, in *Duke Energy Corp.*<sup>19</sup> and *Old Dominion Electric Cooperative*,<sup>20</sup> in these same circumstances and denied those waivers as violative of the filed rate doctrine and the rule against retroactive ratemaking. The Commission therefore finds no basis for treating NJEA's waiver request differently and denies the waiver request.

20. NJEA seeks a retroactive waiver so that it may recover natural gas-related costs totaling \$1,334,280 incurred prior to the date on which it made its waiver filing. The filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."<sup>21</sup> The related rule

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<sup>17</sup> *Id.* at 4-6. PJM states that section 4.2.4 of PJM Manual 01 distinguishes dispatch or operating instructions from directives. PJM states that the distinction is that directives are imminently vital to the reliability and operations of the bulk electric system and are related to real-time operations. PJM states that dispatch or operating instructions are also important to operations but do not have the real-time or reliability criticality as do directives. PJM states that instructions include communications such as day (or multiple days') scheduling conversations, responding to operations questions, etc. PJM states that these communications have the benefit of time to allow for additional discussion, clarification, and escalation which are not possible with directives.

<sup>18</sup> 18 C.F.R. § 385.214 (2014).

<sup>19</sup> 151 FERC ¶ 61,206 (2015).

<sup>20</sup> 151 FERC ¶ 61,207 (2015).

<sup>21</sup> *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

against retroactive ratemaking also “prohibits the Commission from adjusting current rates to make up for a utility’s over- or under-collection in prior periods.”<sup>22</sup> When evaluating whether granting the requested relief would violate either the filed rate doctrine or the rule against retroactive ratemaking, the Commission considers whether the ratepayers had sufficient notice that the approved rate was subject to change.<sup>23</sup>

21. In this case, ratepayers had not received any prior notice of NJEA’s requested relief, which was sought roughly twelve months after the events in question. We therefore conclude, as we did in the similar *Duke* and *ODEC* cases, that the relief sought by NJEA is prohibited by the filed rate doctrine and rule against retroactive ratemaking.

22. NJEA also states that, at a minimum, the Commission should find that it can be reimbursed for its start-up costs pursuant to Section 1.10.2 of Schedule 1 of the OATT. Section 1.10.2 provides that a generator shall receive its actual costs incurred, if any, up to a cap of the resource’s start-up cost, if PJM cancels its selection of the resource as a pool-scheduled resource and notifies the generator before the resource is synchronized. Pool-scheduled resources are those resources:

...for which Market Participants submitted offers to sell energy in the Day-ahead Energy Market and offers to reduce demand in the Day-ahead Energy Market, which the Office of the Interconnection scheduled in the Day-ahead Energy Market as well as generators committed by the Office of the Interconnection subsequent to the Day-ahead Energy Market.

23. Sometime after 16:41 ET on Thursday afternoon, January 23, 2014, PJM confirmed its request that the South River CC be online and available for dispatch at 04:00 ET on Monday continuing through 24:00 ET that same day and confirmed that it was scheduling the unit to run for conservative operations. Just before midnight on January 26, 2014, PJM advised NEPM that it was changing the schedule for the South River CC by delaying the start time on Monday, January 27, 2014, from 04:00 ET to

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<sup>22</sup> *Towns of Concord v. FERC*, 955 F.2d 67, 71& n.2 (D.C. Cir. 1992).

<sup>23</sup> See *Pub. Utils. Comm’n of Cal. v. FERC*, 988 F.2d 154, 164 (D.C. Cir. 1993); see also, *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078, at P 46 (2014) (“The waiver is effective prospectively, as of the date of this order, and therefore does not retroactively change the rules . . . . Further, the instant filing put market participants on notice regarding a possible rule change.”); *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 794-97 (D.C. Cir. 1990) (applying same concepts in waiver context); *Consolidated Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 968-70 (D.C. Cir. 2003) (applying same concepts in waiver context).

16:00 ET. The next morning, the South River CC 16:00 ET Monday schedule was cancelled. Based on these facts, which PJM does not dispute, we find that the South River CC was committed subsequent to Thursday's Day-ahead Energy Market and, therefore, is a pool scheduled resource eligible for start-up cost recovery under section 1.10.2.

24. We add that, notwithstanding our denial of waiver here, the Commission has instituted a section 206 proceeding finding that PJM's OATT and Operating Agreement may be unjust, unreasonable, or unduly discriminatory or preferential.<sup>24</sup>

The Commission orders:

NJEA's request for waiver is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Moeller is dissenting in part with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>24</sup> *Duke Energy Corp.*, 151 FERC ¶ 61,206.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

New Jersey Energy Associates, a Limited Partnership

Docket No. ER15-952-000

(Issued September 4, 2015)

MOELLER, Commissioner, *dissenting in part*:

After recognizing that certain aspects of PJM's current market construct may be unjust and unreasonable and initiating a proceeding under section 206(b) of the Federal Power Act based, in part, on circumstances nearly identical to those here,<sup>1</sup> the majority is unwilling to provide appropriate relief to ensure that NJEA recovers the costs that it incurred to maintain system reliability during the extraordinary cold weather events of 2014.<sup>2</sup>

As I explained in previous dissenting statements,<sup>3</sup> PJM is the only regional transmission organization that does not allow market participants to submit day-ahead offers that vary by hour or to update their offers in real time, including in emergency situations. This inflexibility contributed to the inability of generation units, like those of NJEA, to recover legitimate fuel costs incurred during the polar vortex of January 2014. PJM recognizes the need to provide cost recovery and supports granting NJEA's waiver request. However, the majority once again fails to apply its own standard for considering tariff waivers and instead relies on a faulty interpretation of the prior notice rule and prohibition against retroactive ratemaking to reject NJEA's request. At the very least, this matter should have been set for hearing and settlement judge procedures to consider potential avenues for amicably resolving this dispute and providing appropriate compensation to NJEA.

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<sup>1</sup> *Duke Energy Corp.*, 151 FERC ¶ 61,206, at P 73 (2015) (Moeller, Comm'r, dissenting in part).

<sup>2</sup> While I support the Commission's finding that the South River CC is a pool scheduled resource eligible for start-up cost recovery under section 1.10.2, NJEA has made clear that this finding would allow it to recover only a fraction of its costs.

<sup>3</sup> The Commission has failed to grant similar relief in other matters. *Duke Energy Corp.*, 151 FERC ¶ 61,206; *Old Dominion Electric Cooperative*, 151 FERC ¶ 61,207 (2015) (Moeller, Comm'r, dissenting).

In expressing its support for NJEA's waiver request, PJM stated that "PJM cannot sustain long term reliable operations if generation owners and operators hesitate to comply with dispatch instructions because they fear they will incur costs they cannot recover under the Tariff or Operating Agreement."<sup>4</sup> Generators in PJM need to recover their fuel costs to ensure that they are able to provide service during emergency conditions. In response to the Commission's initiation of a proceeding under section 206(b), PJM has conceded that reforms to its market construct are needed, but contends that they cannot be implemented until November 1, 2016.<sup>5</sup> In light of this delay in reforming PJM's markets, the majority's repeated failure to guarantee cost recovery for generators acting in good faith to ensure system reliability may regrettably impact reliability during the approaching winter of 2015-2016.

Accordingly, I respectfully dissent in part.

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Philip D. Moeller  
Commissioner

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<sup>4</sup> PJM February 20, 2015 Comments, Docket No. ER15-952-000, at 4.

<sup>5</sup> PJM July 10, 2015 Report, Docket No. EL15-73-000, at 1-2.