

153 FERC ¶ 61,286  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C.

Docket No. ER14-1579-001

ORDER DENYING REHEARING

(Issued December 10, 2015)

1. On June 23, 2014, H-P Energy Resources LLC (H-P Energy) filed a request for rehearing of the Commission's May 22 Order<sup>1</sup> in the above proceeding. The May 22 Order accepted PJM Interconnection, L.L.C.'s (PJM) Notice of Cancellation of the Upgrade Construction Service Agreement (Upgrade Agreement) entered into among PJM, H-P Energy and Potomac Electric Power Company (PEPCO). As discussed more fully below, we deny H-P Energy's request for rehearing of the May 22 Order.

**I. Background**

2. On March 25, 2014, PJM submitted to the Commission a notice of cancellation of the Upgrade Agreement entered into among PJM, H-P Energy and PEPCO, designated as Original Service Agreement No. 3555.

3. In the March 25 filing, PJM explained 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 stated 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>2</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 up of \$44,000 in return for certain financial rights (financial

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<sup>1</sup> *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,141 (2014) (May 22 Order).

<sup>2</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.

rights).<sup>3</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>4</sup>

4. PJM stated 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 stated that the Upgrade Agreement was being cancelled because it rested 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. PJM requested an effective date of March 28, 2014 for the cancellation.

5. H-P Energy protested the cancellation, explaining, that: (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.

6. PEPCO responded to H-P Energy's protest stating that the Upgrade Agreement permitted cancellation because it incorporates by reference certain provisions of PJM's Open Access Transmission Tariff (Tariff), which state 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>5</sup> PEPCO argued that the entire cost of the upgrade is already included in rate base,<sup>6</sup> and

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<sup>3</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>4</sup> *PJM Interconnection, L.L.C.*, Docket No. ER13-1484-000 (Jun. 21, 2013) (unpublished letter order).

<sup>5</sup> PEPCO April 30, 2014 Answer at 19 (citing PJM Tariff, § 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>6</sup> *Id.* at 7-8 (citing PJM's December 31, 2013 filing in Docket No. ER14-909-000).

therefore it is contrary to the PJM Tariff for the Upgrade Agreement to call the upgrade a Customer-Funded Upgrade. Moreover, PEPCO contended that the PJM Tariff 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>7</sup> Finally, PEPCO argued the mistake of fact was mutual and not unilateral because all parties believed that the substation line metering rating was 3,000 amperes.

7. H-P filed an answer to PEPCO’s response stating that PEPCO, like PJM, failed to satisfy the legal prerequisites for contract rescission. H-P Energy also argued that PEPCO failed 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 argued 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 should be credited to the transmission plant under the Commission’s Uniform System of Accounts.

8. PJM filed an answer to H-P Energy’s answer stating that H-P Energy’s payment was a payment of cash security and not the full cost of the upgrade and that, contrary to H-P Energy’s claims, PEPCO has not received payment for the Upgrade Agreement.

9. H-P Energy filed an answer to PJM’s answer and contended that performance in the Upgrade Agreement was not impossible and it had, in fact, occurred and that H-P Energy relied on PJM’s and PEPCO’s representations in the Upgrade Agreement.

10. PJM filed a second answer to H-P Energy’s answer arguing that H-P Energy was not able to fund construction of the completed upgrade and was, therefore, not entitled to receive any financial rights under the Upgrade Agreement because the Upgrade Agreement specifies that the effectiveness of all rights is conditioned upon the completion of the upgrade by H-P Energy.

11. After considering the arguments, the Commission issued the May 22 Order accepting PJM’s cancellation of the Upgrade Agreement as a filed rate with the Commission, stating that it was cancelling the rate schedule because it could not be performed.<sup>8</sup> The Commission stated that, 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 financial rights can be awarded only

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<sup>7</sup> *Id.* at 20 (citing PJM Tariff, § 234.6 Rate Based Facilities, 0.0.0).

<sup>8</sup> May 22 Order, 147 FERC ¶ 61,141 at P 16.

to one party, the Commission found it could not require specific performance of the Upgrade Agreement as written.<sup>9</sup>

12. With regard to the arguments about the validity of the Upgrade Agreement, the Commission stated that it would not make any findings regarding a party's "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>10</sup> Finally, the Commission asserted that, it would leave the applicability of the *Mobile-Sierra* doctrine to be determined in the appropriate legal forum if a suit were brought.<sup>11</sup>

## **II. H-P Energy Request for Rehearing**

13. On rehearing, H-P Energy argues that the May 22 Order does not identify or apply the correct legal standard. H-P Energy states PJM filed the Upgrade Agreement in Docket No. ER13-1484-000 on May 13, 2013, and this agreement was accepted by Commission shortly thereafter. H-P Energy argues that, once filed, the Upgrade Agreement could not be changed or cancelled absent additional action by the Commission in accordance with section 205 or section 206 of the Federal Power Act (FPA).<sup>12</sup>

14. In the absence of clearly reserved FPA section 205 and 206 rights, H-P Energy states a party seeking to reform or cancel a filed service agreement faces a heavy burden of proof. H-P Energy argues, as stated by the Supreme Court, "[t]he regulatory system created by the [FPA] is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity."<sup>13</sup> Similarly, H-P Energy asserts that the Supreme Court has stated the standard for challenging an existing jurisdictional contract

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<sup>9</sup> *Id.* P 18.

<sup>10</sup> *Id.* P 19.

<sup>11</sup> *Id.* P 19 n.15 (citing *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).)

<sup>12</sup> *See* 16 U.S.C. § 824d (2012); 16 U.S.C. § 824e (2012).

<sup>13</sup> H-P Energy Rehearing at 9 (citing *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968); *see also* *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1981)).

by any party is that “[t]he contract rate must seriously harm the public interest.”<sup>14</sup> H-P Energy avers that the Commission has held that “where parties have negotiated a contract which denies either party the right to change prices unilaterally, the Commission may abrogate that contract only if the public interest requires.”<sup>15</sup>

15. H-P Energy states the May 22 Order does not recognize or apply this standard. Instead, H-P Energy asserts the May 22 Order states, “[b]ecause we are not revising or modifying the [USCA], we leave the applicability of the *Mobile-Sierra* doctrine to be determine in the appropriate legal forum.”<sup>16</sup> H-P Energy contends that this statement is an incorrect reading of the law because the *Mobile-Sierra* doctrine is not so limited and applies to contract cancellation and abrogation as well. H-P Energy argues that the Supreme Court and the Commission have held that abrogation is only permitted in circumstances of unequivocal public necessity or if the public interest so requires. Therefore, H-P Energy states that the Commission should apply the *Mobile-Sierra* doctrine to the facts of this proceeding.

16. Next, H-P Energy asserts that the Commission must adequately explain its reasoning based on substantial evidence in the record and any decision that fails to do so will be set aside by the courts.<sup>17</sup> H-P Energy argues the May 22 Order does not satisfy this requirement and posits two reasons for its assertion.

17. First, H-P Energy states that the Commission incorrectly held in the May 22 Order that the Upgrade Agreement could not be performed. H-P Energy argues that PEPCO agreed to install the upgrade and H-P Energy agreed to pay for it. H-P Energy states that, although PEPCO installed the upgrade before the contract was executed, this is early performance, not impossibility of performance. H-P Energy contends that there is nothing in PEPCO’s early performance that satisfies the *Mobile-Sierra* doctrine’s heavy burden for contract abrogation.

18. Second, H-P Energy asserts the Commission incorrectly reasoned in the May 22 Order that financial rights can be awarded only to one party. H-P Energy states that financial rights were already awarded to H-P Energy in the Upgrade Agreement; thus,

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<sup>14</sup> *Id.* (citing *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, Wash., 554 U.S. 527, 548 (2008)).

<sup>15</sup> *Id.* (citing *Arlington Storage Co., LLC*, 132 FERC ¶ 61,171, at n.57 (2010)).

<sup>16</sup> *Id.* (citing May 22 Order, 147 FERC ¶ 61,141 at P 19 n.15).

<sup>17</sup> *Id.* at 10 (citing *N. States Power Co. v. FERC*, 30 F.3d 177, 182 (D.C. Cir. 1994)).

H-P Energy states that, by the logic of the May 22 Order, H-P Energy, not PEPCO, should continue to hold the financial rights. Moreover, H-P Energy argues the May 22 Order errs in its implicit conclusion that PEPCO could be awarded financial rights for the upgrade. However, H-P Energy contends that these rights may only be awarded to (1) entities that have gone through the processes for Customer-Funded Upgrades, and (2) entities responsible for funding Incremental Rights-Eligible Required Transmission Enhancements under Schedule 12A (b)(i) of the PJM Tariff (which must be at least 500 kV).<sup>18</sup> H-P Energy asserts that PEPCO does not qualify for the first category and the second upgrade category is not at issue in this proceeding. Consequently, H-P Energy states PEPCO could not be eligible for the financial rights at issue in the Upgrade Agreement.

19. H-P Energy argues the May 22 Order fails to give appropriate weight to the fact that H-P Energy provided real value to PEPCO and customers under the Upgrade Agreement. For example, H-P Energy states the May 22 Order fails to recognize that PEPCO and consumers received benefits from H-P Energy's efforts in the development and study of the project for the Upgrade Agreement. H-P Energy argues, without its efforts, PEPCO and PJM would not have identified the mistake in the line rating until some unknown time in the future. H-P Energy argues that, although the May 22 Order gives some consideration to the benefits provided by H-P Energy by stating that further relief might be obtainable in a court of competent jurisdiction, the Commission did not detail how it arrives at this conclusion nor did the Commission explain why it cannot preserve the bargain by rejecting PJM's notice of cancellation.

20. Finally, H-P Energy contends that the May 22 Order fails to resolve disputed issues of material fact prior to accepting the notice of cancellation. H-P Energy claims that the record contains many disputed issues of material fact between the parties and the record of the proceeding is insufficient to resolve them. H-P Energy argues that key disputed issues of material fact include: (1) whether there was unilateral or mutual mistake between the parties; (2) whether H-P Energy was or was not granted Transmission Rights by PJM; and (3) whether PEPCO's error was merely "clerical" in nature. H-P Energy asserts the May 22 Order does not cite evidence to resolve these disputed issues of material fact and the Commission erred by failing to order a trial-type hearing or a paper proceeding before deciding to accept PJM's notice of cancellation. Therefore, H-P Energy argues that the Commission should either order additional fact-finding proceedings here or explain fully why it has failed to do so.

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<sup>18</sup> H-P Energy states that section 234 of the PJM Tariff provides Transfer Rights for Customer-Funded Upgrades; Schedule 12A (b) provides for Transfer Rights for Incremental Rights-Eligible Required Transmission Enhancements which generally must be 500 kV or greater under section 1.14B.01 and Schedule 12.b.1.

21. On July 2, 2014, PEPCO filed an answer to H-P Energy's request for rehearing.

### **III. Discussion**

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

22. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 713(d)(1) (2015), prohibits an answer to a request for rehearing. Therefore, we reject PEPCO's answer to H-P Energy's request for rehearing.

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

23. We deny the request for rehearing. However, we will require that PEPCO reimburse H-P Energy for the direct, out-of-pocket expenses it incurred plus interest as calculated under the Commission's regulations.<sup>19</sup>

24. The Upgrade Agreement was based on the understanding, of all parties, that the Pleasant View – Dickerson 230 kV line had a 3,000 amperes rating. The agreement contemplated that H-P Energy would pay PEPCO \$294,000 for increasing the transfer capability on the PEPCO side of the Pleasant View – Dickerson 230 kV line from 3,000 to 4,000 amperes. PEPCO subsequently discovered it had failed to document that the feeder at the Dickerson substation had already been upgraded from 3,000 amperes to 4,000 amperes as part of another construction project completed prior to H-P Energy submitting its merchant transmission request. The contemplated construction in the contract, therefore, cannot be performed.

25. PJM's Tariff provides that a customer cannot fund upgrades and cannot receive financial rights for projects that are included in a utility's cost-of service.<sup>20</sup> The PJM Tariff further provides that financial rights can be awarded only to a Transmission Interconnection Customer obligated to fund a transmission facility or upgrade.<sup>21</sup>

26. We affirm our finding in the May 22 order that the Commission cannot order specific performance of the contract, since no construction, as contemplated under the

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<sup>19</sup> See 18 C.F.R. 35.19a (2015).

<sup>20</sup> OATT Definitions - C-D, § 1.7A.01 (3.0.0), <http://etariff.ferc.gov/TariffSectionDetails.aspx?tid=1731&sid=180734>; OATT 234.6 Rate-based Facilities (0.0.0), <http://etariff.ferc.gov/TariffSectionDetails.aspx?tid=1731&sid=66550>.

<sup>21</sup> OATT Attachment DD.2 Definitions, § 2.35 (22.0.0), <http://etariff.ferc.gov/TariffSectionDetails.aspx?tid=1731&sid=180736>.

agreement, is possible. Enforcing this contract would be in violation of the PJM Tariff insofar as PJM would have to provide financial rights to a customer that did not fund the upgrade. Moreover, for PJM to award financial rights to H-P Energy for an already completed project could result in added costs to third parties from congestion on those facilities without the contemplated consideration of construction of new capacity.<sup>22</sup> H-P Energy will be in the same position as it was prior to signing the agreement so as long as it receives a full refund for the direct, out-of-pocket expenses it has incurred and PEPCO has indicated that it would pay H-P Energy these costs.<sup>23</sup> Therefore, we affirm our finding in the May 22 order accepting PJM's cancellation of the Upgrade Agreement, as of the date of the notice of cancellation. However, we direct PEPCO to reimburse H-P Energy for the direct, out-of-pocket expenses it has paid under the agreement plus interest calculated pursuant to the Commission's regulations within 60 days of the date of issuance of this order, and then to file with the Commission a refund report within 30 days of making refunds.

27. While H-P Energy maintains that the Commission cannot revise the contract under *Mobile-Sierra*, we do not find that *Mobile-Sierra* requires the Commission to order specific performance of a contract that can no longer be performed according to its terms.<sup>24</sup>

28. As we stated in the May 22 Order, we recognize that H-P Energy, PEPCO, and PJM executed a valid agreement and we continue to make no determination of whether damages may be owed. While, for the foregoing reasons, we uphold our findings in the

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<sup>22</sup> See *Northern Indiana Pub. Serv. Co. v. Carbon Cnty. Coal Co.*, 799 F.2d 265, 280 (7th Cir. 1986) (“the consequences to third parties of granting specific performance, may require that the remedy be withheld”).

<sup>23</sup> PEPCO April 30, 2014 Answer at 21.

<sup>24</sup> For example, *Mobile-Sierra* does not limit the inquiry into the validity of a contract at the contract formation stage. See *Pub. Util. Dist. No. 1 of Grays Harbor Cnty. Wash. v. IDACORP Inc.*, 379 F.3d 641, 652, 652 n.13 (9th Cir. 2004) (“Because such a complaint would go solely to issues of contract formation, the so-called *Mobile-Sierra* standards, which relate to post-hoc contract modification by FERC, are not relevant.”); *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002) (“As we have held, the purpose of the *Mobile-Sierra* doctrine is to preserve the benefits of the parties’ bargain as reflected in the contract, *assuming that there was no reason to question what transpired at the contract formation stage.*”) (emphasis added). In addition, section 17.5 of the upgrade construction service agreement provides that nothing in the agreement shall be construed as “affecting in any way any of the rights of any Party with respect to changes in applicable rates or charges under Section 205 of the Federal Power Act.”

May 22 Order to not order specific performance of the Upgrade Agreement, and to cancel the tariff provision of the contract as of March 28, 2014, a tariff cancellation under the Commission regulations applies only as of the effective date of the cancellation.<sup>25</sup> Prior to that date, the contract remains in effect, and we make no determination as to whether H-P Energy is entitled to damages for contract breach, which it can pursue in a contract action.<sup>26</sup>

The Commission orders:

(A) H-P Energy's request for rehearing is hereby denied.

(B) PEPCO is ordered to reimburse H-P Energy for its direct, out-of-pocket expenses plus interest calculated under the Commission's regulations within 60 days of the date of issuance of this order, and then to file with the Commission a refund report within 30 days of making refunds.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>25</sup> See *e.g.*, *Duke Energy Corp.*, 102 FERC ¶ 61,203 (2003) (stating that cancellation did not affect the remaining issue between the parties, which is the interconnection costs incurred by Duke and owed by GenPower Anderson, LLC prior to cancellation).

<sup>26</sup> See *Villages of Edgerton and Montpelier, Ohio*, 49 FERC ¶ 61,306 (1989) (“with respect to the issue of whether Ohio Power made a legally enforceable commitment to supply the Villages’ full requirements service, we believe that generally the courts would be the appropriate forum for deciding whether two parties entered into a contract”).