

153 FERC ¶ 61,327
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. ER11-4073-002

ORDER ON REMAND

(Issued December 21, 2015)

1. In a decision issued on August 26, 2014, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated in part the Commission's prior orders in this proceeding,¹ and remanded for further explanation.² This proceeding was initiated when PJM Interconnection, L.L.C. (PJM) filed a proposed, unexecuted interconnection agreement that assessed West Deptford Energy, LLC (West Deptford) certain network upgrade costs. PJM proposed to allocate a portion of these costs to West Deptford under a provision of the PJM Open Access Transmission Tariff (tariff) that was no longer in effect as of the date of the interconnection agreement. As discussed below, the Commission finds that the tariff provision in effect at the time that the interconnection agreement was filed should have been applied to PJM's assessment of costs to West Deptford. We direct PJM to make a compliance filing to correct its use of the incorrect tariff provision in the West Deptford interconnection agreement.

I. Background

2. A summary of the facts in this proceeding can be found in the earlier orders.³ The key issue here is which version of PJM's tariff should be applied to the West Deptford project: the version on file with the Commission during the interconnection study

¹ *PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,195 (2011) (September 2011 Order), *order denying reh'g*, 139 FERC ¶ 61,184 (2012) (Order on Rehearing).

² *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10 (D.C. Cir. 2014).

³ See cases cited *supra* note 1.

process (section 37.7⁴) or the revised version (section 219⁵) that was on file and in effect when the interconnection agreement was filed. Under the superseded tariff, new projects like West Deptford must share in the costs of upgrades constructed within five years of the new project's Queue Closing Date. Under the revised tariff, however, new projects must share in the costs only for upgrades constructed within five years of the new project's Interconnection Service Agreement effective date. Since the Queue Closing Date signals the beginning of the interconnection process and the filing of the agreement signals the end of the process, section 219 applies to fewer cases than section 37.7.

3. When West Deptford entered PJM's interconnection queue on July 31, 2006, section 37.7 was applicable to its interconnection request. However, in 2008, when West Deptford was halfway through the interconnection queue, PJM agreed to a settlement in *Dominion*⁶ to resolve a complaint, which settlement included a revision to section 219. As discussed above, under the revised section 219, only a party which signs its Interconnection Service Agreement within five years of the date of the Interconnection Service Agreement for the earlier generation project could be assigned the cost of an already constructed upgrade. West Deptford did not have its unexecuted Interconnection Service Agreement filed until 2011, more than five years from the date that the previously constructed upgrade, Network Upgrade 28, entered service.⁷

4. On July 18, 2011, PJM filed the unexecuted Interconnection Service Agreement, proposing to allocate the costs to West Deptford under section 37.7, the tariff provision on file when West Deptford entered the queue. PJM argued that section 37.7 of the superseded tariff still applied because that was the version on file with the Commission on the date West Deptford entered the PJM interconnection queue and also was the provision on which the various interconnection studies of the West Deptford Project were based. Under PJM's line of reasoning, when the queue closed on July 31, 2006,

⁴ PJM August 23, 2011 Answer at App., <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12740238>.

⁵ [PJM Interconnection, L.L.C./Intra-PJM Tariffs, 219, OATT 219 Inter-queue Allocation of Costs of Transmission Upgrades \(0.0.0\)](#).

⁶ *Dominion Resources Services, Inc. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,025 (2008) (order approving settlement) (*Dominion*).

⁷ Section 219 of the tariff states: "...for a period of time not to exceed five years from the execution date of the Interconnection Service Agreement for the project that initially necessitated the requirement for the Local Upgrade or Network Upgrade." September 2011 Order at P 32. Network Upgrade 28, on the Mickleton-Monroe line, entered service in 2003. *Id.* P 8.

section 37.7 was triggered and West Deptford would be responsible for paying \$10,761,078 toward the cost of a previously constructed transmission upgrade, Network Upgrade 28. However, under West Deptford's line of reasoning, section 219 was triggered when PJM filed the agreement on July 18, 2011, and thus West Deptford owes no upgrade costs.

5. In the September 2011 Order, the Commission accepted the Interconnection Service Agreement, agreeing with PJM's reasoning that section 37.7, the original version of the tariff, would apply. The Commission found that West Deptford had sufficient notice of the continued applicability of the original version of the tariff to satisfy the requirements of the filed rate doctrine. The Commission relied,⁸ in this regard, on a statement in PJM's letter transmitting the *Dominion* settlement in which PJM stated that it "requests [that] the Commission permit an effective date of August 1, 2008, for the attached PJM Tariff sheets.... As discussed below, this effective date is necessary to allow the proposed changes to become effective with the date of the next open queue."⁹ Moreover, in a response PJM filed to a protest in the *Dominion* proceeding, PJM indicated that the proposed change in cost allocation will occur only for those Local Upgrades and Network Upgrades costing less than \$5 million and would be "applied to the U2-Queue (this queue will close on July 31, 2008)."¹⁰ The West Deptford project, in contrast, was in an earlier queue (the "Q Queue").

6. On appeal, the D.C. Circuit vacated in part and remanded. The court explained that, under the filed rate doctrine, PJM could not "charge any rate other than the one on file with the Commission."¹¹ The court concluded that "PJM's 2008 tariff did not identify any effective date for its changed cost-allocation provision, let alone do so 'plainly,'" as required by the Federal Power Act.¹² Thus, the court found the Commission had not justified applying the superseded, 2008 tariff, rather than the

⁸ September 2011 Order at P 37.

⁹ PJM, Revisions to PJM's Open Access Transmission Tariff, Docket No. EL08-36-001, at 2 (filed May 30, 2008), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11720735>.

¹⁰ PJM, Answer To Request For Clarification Of American Municipal Power—Ohio, Inc., Docket No. EL08-36-001, at 4 (filed July 7, 2008), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11737699>.

¹¹ *W. Deptford Energy*, 766 F.3d at 10.

¹² *Id.* at 18.

tariff on file with the Commission when PJM presented West Deptford with the Interconnection Service Agreement.

7. The D.C. Circuit further concluded that the facts in this proceeding did not provide sufficient prior notice that the superseded tariff would apply. The court rejected the Commission's reliance on PJM's letter accompanying the *Dominion* settlement, finding the Commission had failed to explain how the language in such a pleading could apply to a non-party. The court also found the Commission's reliance on PJM's later statements equally lacking. The court found those statements unclear as to the effective date.

8. The D.C. Circuit also ruled that the Commission erred in failing to address the impact of already-exercised Auction Revenue Rights on West Deptford's cost,¹³ and thus remanded this issue to the Commission for further explanation.

II. Additional Pleadings

9. On August 5, 2015, West Deptford filed a motion for expedited Commission action on remand. West Deptford also argues that the Commission should apply the D.C. Circuit's opinion to conclude that West Deptford is not liable for the costs of Network Upgrade 28.

10. On August 20, 2015, Marcus Hook filed an answer opposing West Deptford's motion, in which it argues that the Commission should revisit its earlier determinations. First, Marcus Hook argues that the D.C. Circuit misread the *Dominion* delegated letter order, which endorsed PJM's interpretation of its filed rate. Second, Marcus Hook challenges the court's finding that West Deptford was not on notice of the *Dominion* proceeding because West Deptford's parent, LS Power Associates, L.P., actively participated in the proceeding and settlement. Third, Marcus Hook argues that West Deptford should be bound to the pre-*Dominion* tariff because in 2006, before the *Dominion* proceeding began, that was the tariff to which West Deptford agreed to be bound. Fourth, Marcus Hook argues that West Deptford had actual notice that the pre-*Dominion* tariff would apply. It points out that after the Commission accepted the *Dominion* settlement, West Deptford signed a Facilities Study Agreement contract that specifically bound it to the PJM tariff as it existed in 2006. Marcus Hook argues that since parties have the right to contract for a rate, the Commission should honor the contract, which by referencing the 2006-era enumeration, incorporates the 2006-era tariff as the filed rate.

11. Marcus Hook's final argument is an interpretation of the post-*Dominion* section 219. Marcus Hook attempts to show that, even if this new version of section 219

¹³ *Id.* at 24-25.

were the applicable version, West Deptford remains obligated to reimburse Marcus Hook for network upgrades. When reading the post-*Dominion* section 219, Marcus Hook argues, the Commission incorrectly interpreted “the project that initially necessitated the requirement” as Liberty Electric, which would start section 219’s five-year countdown in 2001. Marcus Hook presents two alternative interpretations. First, it argues that the five-year countdown should begin with Marcus Hook (in 2002), which would place West Deptford’s entry into the queue in 2006 just under the five-year deadline. In the alternative, Marcus Hook argues, the five-year countdown should start with West Deptford itself since, as a matter of engineering, all parties agree that the West Deptford project is the first project to functionally require the Network Upgrade 28 at issue. Through either approach, West Deptford would be liable under the post-*Dominion* section 219.

12. On September 4, 2015, West Deptford answered Marcus Hook’s answer. On September 21, 2015, Marcus Hook answered West Deptford’s answer.

13. Rule 212(a) of the Commission’s Rules of Practice and Procedure permits a motion to be filed at any time, and we permit West Deptford’s motion accordingly.¹⁴ Rule 213(a)(3) permits all timely answers to such motions, and we accept Marcus Hook’s first answer accordingly.¹⁵ Rule 213(a)(2) prohibits an answer to an answer unless otherwise ordered by the decisional authority, and we reject West Deptford’s answer and Marcus Hook’s second answer accordingly.¹⁶

¹⁴ 18 C.F.R. 385.212(a) (2015).

¹⁵ 18 C.F.R. § 385.213(a)(3) (2015).

¹⁶ 18 C.F.R. § 385.213(a)(2) (2015).

III. Discussion

14. On remand, and in light of the D.C. Circuit's decision,¹⁷ we find that West Deptford did not receive adequate notice that PJM intended to phase in the implementation of section 219 based on the interconnection queue of the project, rather than applying the new tariff language immediately upon the tariff's stated effective date. We therefore reverse our earlier finding and find that the tariff provision in effect at the time that the interconnection agreement was filed should have been applied to PJM's assessment of costs to West Deptford. We also therefore direct PJM to make a compliance filing to correct its use of the incorrect tariff provision in the West Deptford interconnection agreement.

15. While PJM's tariff filing in *Dominion* proposed an effective date for section 219 of August 1, 2008,¹⁸ PJM did not state whether section 219 would apply to those pending projects for which an interconnection agreement was not yet signed. In its transmittal letter, PJM noted that it "requests [that] the Commission permit an effective date of August 1, 2008, for the attached PJM Tariff sheets.... [A]s discussed below, this effective date is necessary to allow the proposed changes to become effective with the date of the next open queue."¹⁹ Based on the court's decision, we now find that this statement is not sufficiently clear that PJM intended that the projects in earlier queues would continue to be governed by section 37.7. In its answer, Marcus Hook argues that

¹⁷ The D.C. Circuit identified two specific instances by which a party may be placed on notice of a retroactive rate change: when the tariff provides a formula for calculating rates, rather than a specific number; and when a court invalidates a Commission decision. *W. Deptford Energy*, 766 F.3d at 22. We note that other court precedent indicates that adequate notice of a retroactive rate change may be provided in additional circumstances, as well. *See, e.g., Consolidated Edison Co. v. FERC*, 347 F. 3d 964, 969 (D.C. Cir. 2003) (recognizing, in addition to those factors identified by *West Deptford Energy*, "two circumstances in which a rate adjustment may take effect prior to a section 205 filing: when parties have notice that a rate is tentative and may be later adjusted with retroactive effect, or when they have agreed to make a rate effective retroactively"); *Texas Eastern Transmission Corp. v. FERC*, 102 F.3d 174, 186 (5th Cir. 1996) ("cases make clear that the Commission must look for adequate notice from a variety of sources, including agreements with customers and Commission orders").

¹⁸ PJM, Revisions to PJM's Open Access Transmission Tariff, Docket No. EL08-36-001 (filed May 30, 2008), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11707214>.

¹⁹ *Id.* at 2.

the D.C. Circuit misread the *Dominion* delegated letter order. Marcus Hook also challenges the court's finding that West Deptford was not on notice in *Dominion* and the court's explanation of the legal precedent in other Commission interconnection queue cases. Marcus Hook also argues that West Deptford agreed to be bound to the pre-*Dominion* tariff. We find that these arguments reprise those previously advanced to the court, and the court found that these facts and arguments do not support a finding of sufficient notice to contravene the tariff on file when West Deptford signed its interconnection agreement.

16. We similarly find that PJM's answer to the protest seeking clarification of the projects to which the tariff applied is insufficient to provide notice that the superseded tariff provision would apply. After PJM filed its revised tariff, American Municipal Power - Ohio, Inc. (AMP-Ohio) filed a protest and request for clarification regarding "an area left unclear by PJM's proposal." In its pleading, AMP-Ohio stated: "The ambiguity in PJM's proposal is whether its proposed changes, especially those relating to cost allocation, will apply to existing projects within PJM's interconnection queue."²⁰ PJM responded:

The proposed change in cost allocation will occur only for those Local Upgrades and Network Upgrades costing less than \$5 million. This modification will become effective on August 1, 2008, and will be initially applied to the U2-Queue (this queue will close on July 31, 2008) These changes are all subject to a proposed effective date of August 1, 2008.²¹

The Commission issued a letter order pursuant to delegated authority that accepted PJM's filing, but that delegated letter order merely repeated PJM's statement that the "the modification regarding cost allocation will occur only for those Local Upgrades and Network Upgrades costing less than \$5 million and will be applied to the U2-Queue effective August 1, 2008."²² We now find that these statements are not sufficiently clear to provide the necessary notice with respect to application to projects in earlier queues.²³

²⁰ American Municipal Power - Ohio, Inc., Request For Clarification, Docket No. EL08-36-001 (filed June 20, 2008), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11720735>.

²¹ PJM, Answer, Docket No. EL08-36-001, at 4 (filed July 7, 2008), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11737699>.

²² *Dominion Resources Services, Inc. v. PJM Interconnection, L.L.C.*, Docket No. EL08-36-001 (Aug. 19, 2008) (delegated letter order).

²³ Cf. *Pub. Utilities Comm'n v. FERC*, 988 F.2d 154, 164 (D.C. Cir. 1993) ("the (continued ...)")

None of these statements references the tariff change in question here, that is, the revision to the time period under which later queued projects would be responsible for costs of prior projects; rather, they are reasonably read to refer to other parts of the proposal.²⁴

17. In its answer, Marcus Hook contends that West Deptford was on notice that the prior tariff applied because after the *Dominion* proceeding, West Deptford signed a Facilities Study Agreement contract that effectively bound it to the PJM tariff as it existed in 2006. The Facilities Study Agreement contract has been in the record since West Deptford's initial protest.²⁵ The D.C. Circuit reviewed this contract and other correspondence between West Deptford and PJM, and ruled that they constituted "one-way assertions ... [that] generators have no apparent way to challenge."²⁶

18. Since the new section 219 became effective prior to the filing of the West Deptford unexecuted interconnection agreement in the instant docket, reliance on section 37.7 is misplaced. Rather, the applicable tariff provision is section 219, as it stood at the time that PJM filed the unexecuted agreement in this docket.

19. Marcus Hook in its answer now urges the Commission to interpret the new version of section 219 as obliging West Deptford to pay for Network Upgrade 28. Assuming *arguendo* that this new argument is not procedurally barred as a late-filed argument,²⁷ we find that the new version of section 219 must be read as exempting West Deptford from paying for previously built upgrades. Section 219 reads, in relevant part:

Cost responsibility under this Section 219 may be assigned with respect to any facility or upgrade:

notice provided here, while not inconsequential, is more atmospheric than explicit," although finding notice based on other circumstances).

²⁴ The statement about upgrades costing less than \$5 million would not apply to the West Deptford project since the costs allocated to it are over \$10 million.

²⁵ West Deptford, Protest, Docket No. ER11-4073-000, at Attachment 5, "West Deptford Facilities Study Agreement" (filed Aug. 8, 2011).

²⁶ *W. Deptford Energy*, 766 F.3d at 24.

²⁷ Neither PJM nor Marcus Hook raised an argument that the Marcus Hook project fell within the five year time period of the revised section 219. As the Commission stated in the September 2011 Order, we held, "[t]he parties generally agree that under the [new] version of section 219, West Deptford would be exempt from paying for Network Upgrade 28." September 2011 Order at P 34.

(a) the completed cost of which was \$5,000,000 or more, for a period of time not to exceed five years from the execution date of the Interconnection Service Agreement for the project that initially necessitated the requirement for the Local Upgrade or Network Upgrade....²⁸

20. In short, the question before us is whether the “period of time” exceeds five years. Marcus Hook presents two alternative readings which would make the “period of time” either slightly under five years or zero years.

21. Marcus Hook argues first that West Deptford should be treated as the “project that initially necessitated the requirement for the upgrade,” because the previously constructed upgrade (Mickleton-Monroe) for which Marcus Hook was responsible ended up being unnecessary from an engineering perspective at the time. However, as discussed in an earlier round of orders,²⁹ Marcus Hook and Liberty Electric were the parties necessitating the upgrade, because at the time, the upgrade was necessary for their projects.³⁰

22. Marcus Hook also argues that the revised section 219 is unclear as to the end time for determining whether the new project comes within the five-year window. While the section specifies that the clock starts at the “execution date of the Interconnection Service Agreement for the project that initially necessitated the requirement for the Local Upgrade or Network Upgrade,” it does not clearly specify the event that terminates the five-year period. Marcus Hook contends the five years should be measured to the date on which West Deptford entered the queue, in which case the five-year requirement was met. But the tariff identifies the assignment of cost responsibility (“cost responsibility under this Section 219 may be assigned with respect to any facility or upgrade”) as the

²⁸ [PJM Interconnection, L.L.C./Intra-PJM Tariffs, 219, OATT 219 Inter-queue Allocation of Costs of Transmission Upgrades \(0.0.0\)](#).

²⁹ *FPL Energy Marcus Hook, L.P. v. PJM*, 107 FERC ¶ 61,069, *reh’g denied*, 108 FERC ¶ 61,171 (2004), *aff’d in part and remanded in part*, *FPL Energy Marcus Hook v. FERC*, 430 F.3d 441 (D.C. Cir. 2005), *aff’g original decision*, *FPL Energy Marcus Hook, L.P.*, 118 FERC ¶ 61,169 (2007), *reh’g denied*, 123 FERC ¶ 61,289 (2008).

³⁰ Because an earlier queued project never was constructed, the upgrade from an engineering standpoint would not have been needed. However, by the time the earlier project dropped out, the upgrade already had been mostly constructed and the Commission determined that Marcus Hook and Liberty Electric remained liable for paying the construction costs.

operative date, and that responsibility is not determined until the interconnection agreement is executed. This interpretation also is consistent with the court's determination that the interconnection agreement defines the tariff provisions applicable to the Marcus Hook interconnection. Accordingly, we find that consistent with the tariff and the ruling of the D.C. Circuit, the five years is measured from the date on which Marcus Hook signed its interconnection agreement to the date on which West Deptford signed the Interconnection Agreement, as this is the time when cost responsibility was assigned. Therefore, we find that the Marcus Hook project falls outside the five-year window for cost allocation.

23. Based on the findings in this order, we require PJM to make a compliance filing, within 30 days of this order, to correct its use of the incorrect tariff provision in the West Deptford interconnection agreement.

24. Turning to the other remanded issue, Auction Revenue Rights, we find that the parties' legal disputes about Incremental Auction Revenue Rights were based on the premise that West Deptford would bear some cost for Network Upgrade 28. Since we are now finding that West Deptford bears no such costs, the issue is moot.

The Commission orders:

Within 30 days of the date of this order, PJM must file to correct its use of the incorrect tariff provision and refile the West Deptford interconnection agreement.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.