

154 FERC ¶ 61,056
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Appalachian Power Company
Kentucky Power Company
Wheeling Power Company
Indiana Michigan Power Company

Docket No. ER16-298-000

ORDER DENYING WAIVER

(Issued January 29, 2016)

1. On November 9, 2015, as amended on November 10, 2015, American Electric Power Service Corporation (AEP), on behalf of its state-regulated utility affiliates within PJM Interconnection, L.L.C. (PJM),¹ requested waiver of Attachment DD, section 10(A)(e) of the PJM Open Access Transmission Tariff (Tariff) and Schedule 8.1(G) of the Reliability Assurance Agreement. Specifically, AEP requests waiver of the assessment of Capacity Performance Non-Performance Charges during the 2019-20 delivery year. For the reasons discussed below, we deny the requested waiver.

I. Background

2. On June 9, 2015, the Commission conditionally accepted PJM's filing to establish a new capacity product with enhanced performance requirements, a Capacity Performance Resource, on a phased-in basis to ensure that PJM's capacity market provides adequate incentives for resource performance, particularly during emergency conditions.² As conditionally accepted by the Commission, PJM's Capacity Performance

¹ These entities are Appalachian Power Company, Kentucky Power Company, Wheeling Power Company, and Indiana Michigan Power Company.

² *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 (2015) (*Capacity Performance Order*).

construct will apply to Capacity Performance Resources, whether procured through PJM's Reliability Pricing Model (RPM) capacity auctions or under PJM's alternative construct, known as the Fixed Resource Requirement alternative. The Commission found it generally appropriate to apply the enhanced performance expectations, including more stringent consequences for failing to deliver energy or reserves during emergency conditions, to Fixed Resource Requirement entities.³

3. As accepted by the Commission, PJM's Capacity Performance construct will limit the quantity of Base Capacity that a Fixed Resource Requirement entity will be permitted to include in its plan for the 2018-19 and 2019-20 delivery years, consistent with the limitations proposed as to RPM capacity auction participants. However, the Commission found that a phase-in of the Capacity Performance rules for Fixed Resource Requirement entities was appropriate since they are subject to long planning horizons and multi-year plans and because they must coordinate with state commissions in developing such plans. The Commission accepted PJM's Capacity Performance construct on the condition that PJM apply the Capacity Performance rules to Fixed Resource Requirement entities only after the conclusion of the Fixed Resource Requirement plans to which these entities are currently obligated as of the date of the *Capacity Performance Order*.⁴

II. Request for Waiver

4. AEP seeks a waiver of Attachment DD, section 10(A)(e) of the PJM Tariff and Schedule 8.1(G) of the Reliability Assurance Agreement, addressing the assessment of Capacity Performance Non-Performance Charges on capacity resources included in a Fixed Resource Requirement entity's Fixed Resource Requirement plan, beginning in the 2019-20 delivery year.⁵ Specifically, AEP seeks a waiver, for the 2019-20 delivery year, of any Non-Performance Charges to which its vertically-integrated utilities might otherwise be subject as Fixed Resource Requirement entities.

5. AEP asserts that this waiver is appropriate, given that the phase-in accommodations for Fixed Resource Requirement entities, as established in the *Capacity Performance Order*, are unduly limited. AEP asserts that, pursuant to these

³ *Id.* P 202. Under the Fixed Resource Requirement alternative, entities fulfill their load-serving obligations through self-supply or other bilateral power purchase arrangements outside of PJM's capacity auctions. See Reliability Assurance Agreement at Schedule 8.1.

⁴ *Capacity Performance Order*, 151 FERC ¶ 61,208 at P 212.

⁵ AEP amended request at 3.

authorizations, it would still be required to elect whether to remain a Fixed Resource Requirement entity by March 7, 2016 for the 2019-20 delivery year. AEP asserts that it requires additional time to consider these elections, given that: (i) Capacity Performance has not yet been implemented and neither PJM nor sellers have had experience with the revised rules; (ii) AEP's state regulators have yet to release their compliance plans in response to a final rule issued by the U.S. Environmental Protection Agency (EPA) Clean Power Plan;⁶ (iii) the federal compliance option implementing the EPA's Clean Power Plan remains pending;⁷ and (iv) state versus federal jurisdiction issues, including the Commission's jurisdiction over demand response, remain subject to judicial review.

6. In support of its request, AEP asserts that the waiver it proposes satisfies the Commission's waiver standard, because: (i) the requested waiver is made in good faith and is limited in scope, (ii) the waiver will resolve a concrete problem; and (iii) the waiver will not cause undesirable consequences or harm.⁸

7. AEP claims that its waiver request is made in good faith and is limited in scope, given that it relates to specific tariff provisions and will apply to a single planning year. AEP adds that it does not seek a blanket waiver from PJM's Capacity Performance construct and does not seek to be exempt from any charges except the Capacity Performance Non-Performance Charges.

8. AEP further claims that its waiver request will resolve a concrete problem, because it will allow AEP to make an informed capacity election for both the 2019-20 and 2020-21 delivery years, without the uncertainty and financial risk associated with PJM's Non-Performance Charges. AEP notes that by March 2017, it will have received initial state guidance, as well as initial federal guidance, on implementation measures for the EPA's Clean Power Plan, working experience under PJM's Capacity Performance construct, and judicial rulings on significant jurisdictional decisions. AEP argues that

⁶ See Environmental Protection Agency, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, Final Rule, Docket No. EPA-HG-OAR-2013-0602 (Aug. 3, 2015).

⁷ AEP amended request at 3. AEP notes that the federal plan for EPA's Clean Power Plan implementation would be enforceable if a State does not submit an acceptable implementation plan.

⁸ AEP amended request at 5 (citing *Indianapolis Power & Light Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,047, at P 64 (2014)).

this information is critical to its long-range resource planning and will greatly influence its determination of the type and scope of investments needed to meet its capacity requirement, which, in turn, is critical to deciding whether to remain a Fixed Resource Requirement entity.

9. AEP also claims that its waiver will not cause undesirable consequences or harm to any party, because Fixed Resource Requirement entities are already subject to existing charges under the Reliability Assurance Agreement and will remain obligated to serve load. AEP adds that its waiver request will not negatively affect reliability and will not shift costs or performance obligations on any other market participant.

III. Notice of Filing and Responsive Pleadings

10. Notice of AEP's waiver request was published in the *Federal Register*, 80 Fed. Reg. 71,789 (2015), with interventions and protests due on or before November 30, 2015. Motions to intervene were timely submitted by the entities noted in the Appendix to this order. In addition, a motion to intervene out-of-time was filed, on December 22, 2015, by the Indiana Utility Regulatory Commission (Indiana Commission). Protests and comments were filed by PJM, the PJM Independent Market Monitor (Market Monitor), the PJM Power Providers Group and the Electric Power Supply Association (Joint Commenters) and the Indiana Commission. An answer to protests was filed by AEP on December 15, 2015.

A. Protests and Comments

11. PJM states that in the Capacity Performance proceeding, notwithstanding AEP's objection, the Commission found it appropriate to apply the increased performance expectations to Fixed Resource Requirement entities. PJM argues that while AEP states it will still populate its Fixed Resource plan for the 2019-20 delivery year with 80 percent Capacity Performance Resources and 20 percent Base Capacity Resources, merely populating its Fixed Resource Requirement plan with the new product types without the associated Non-Performance Charges would not be equitable, given that all the other committed Capacity Performance Resources will be exposed to the increased Non-Performance Charges.

12. PJM, the Market Monitor, and Joint Commenters argue that the regulatory uncertainties AEP describes in its request apply to all market participants. The Market Monitor adds that AEP has not demonstrated that the problem it seeks to remedy is specific to AEP. The Market Monitor further asserts that the uncertainties AEP states will exist for only the 2016 Fixed Resource Requirement election will not necessarily be resolved by the following year, as AEP claims.

13. The Market Monitor and Joint Commenters argue AEP's waiver request fails to satisfy the Commission's waiver requirements. The Market Monitor asserts that PJM market rules appropriately place the risks associated with providing capacity on AEP and that AEP's circumstances, in this regard, do not materially differ from other suppliers and are not extraordinary. The Market Monitor and Joint Commenters further argue that AEP's waiver request is an improper collateral attack on the prior Commission holding in the *Capacity Performance Order*.

14. The Market Monitor also argues that the waiver AEP seeks would weaken Capacity Performance incentives and create the risk that customers paying for capacity will not receive energy when they need it. For Fixed Resource Requirement entities that opt to be subject to physical non-performance assessments,⁹ the Market Monitor argues excusing AEP from the requirement to update its Fixed Resource Requirement entities' capacity plans with additional MW of Capacity Performance Resources would mean that AEP is leaning on the MW provided by other capacity resources without providing compensation. The Market Monitor also argues AEP does not face a concrete problem because it has alternatives to obtaining a waiver and AEP is not required to remain a Fixed Resource Requirement entity. The Market Monitor states AEP could avoid the application of Schedule 8.1(G), which only applies to Fixed Resource Requirement entities, by electing to participate in the RPM capacity auctions.

15. Joint Commenters state the phase-in applicable to Fixed Resource Requirement entities is less stringent than the transitional phase-in applicable to other Capacity Performance Resources. According to Joint Commenters, while other resources are subject to limited penalties during the phase-in of the Capacity Performance construct, in the 2016-17 and 2017-18 delivery years, AEP has no performance obligations, and thus a zero percent penalty rate, until the 2019-20 deliver year. Joint Commenters state a waiver would be detrimental to other, similarly situated generation units that have had to commit to making the needed improvements and investments in their plants to ensure plant reliability. Joint Commenters further argue the Commission rightly determined Fixed Resource Requirement entities, while receiving the initial grace period for Capacity Performance implementation, should follow the same Capacity Performance rules at the RPM resources.

16. The Indiana Commission supports AEP's waiver request and argues the protesters fail to recognize two important distinctions between Fixed Resource Requirement entities and RPM participants. The Indiana Commission states RPM participants do not have to make any decisions about their Capacity Performance resource plan in the first quarter of

⁹ Under the Capacity Performance construct, a Fixed Resource Requirement entity may choose between financial or physical satisfaction of non-performance charges.

2016, and they have additional flexibility to buy out of their future capacity positions in three incremental auctions. Conversely, the Indiana Commission states Fixed Resource Requirement entities, including AEP, are required to make binding decisions in March 2016 and are not provided the same opportunities for reversing that decision later.

B. AEP's Answer

17. AEP responds to intervenors' argument that, with respect to Non-Performance Charges, AEP should not be treated differently relative to any other Capacity Performance Resource, because the uncertainties and risks that these market participants face are equal. AEP argues that, in fact, Fixed Resource Requirement entities have a unique status and face differing obligations, under PJM's rules, while remaining subject to state regulation. AEP adds that Fixed Resource Requirement entities do not receive capacity revenue through PJM's RPM capacity auctions. In addition, AEP asserts that RPM capacity auction participants are not required to make any decisions about their Capacity Performance resource plan in the first quarter of 2016 and have additional flexibility to buy out their future capacity positions in the three incremental auctions.

18. AEP also reiterates the arguments included in its request, including its claims that it has satisfied the Commission's waiver requirements. In addition, AEP responds to intervenors' argument that AEP's requested waiver, if granted, would do harm to PJM's capacity market. AEP argues that Fixed Resource Requirement entities have more existing performance incentives – from their state regulators – than do any other unregulated market participants. Regardless, AEP argues that it is not seeking to be relieved from Capacity Performance compliance and is not seeking to excuse non-performance.

IV. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2015), we will grant Indiana Commission's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept AEP's answer because it has provided information that assisted us in our decision-making process.

V. Commission Determination

21. For the reasons discussed below, we deny Appalachian Power Company, *et al.*'s request for waiver of the PJM Tariff and Reliability Assurance Agreement.

22. The Commission has previously granted waivers of tariff provisions when: (i) the entity seeking the waiver acted in good faith; (ii) the waiver is of limited scope; (iii) a concrete problem required remediation; and (iv) the waiver did not have undesirable consequences, such as harming third parties.¹⁰

23. AEP asserts that its waiver request is made in good faith and is limited in scope, based on its claim that its waiver, if granted, would apply to a single planning year and would not operate as a blanket waiver applicable to any other Capacity Performance rule. We disagree, noting that the waiver request, if granted, would significantly weaken the incentives established by PJM's Capacity Performance construct. As the Commission found in the *Capacity Performance Order*, the "new and substantial penalties for non-performance . . . will help ensure the reliability of the PJM region."¹¹

24. AEP further claims that its waiver request addresses a concrete problem specific to Fixed Resource Requirement entities. We disagree with AEP's argument that it is uniquely situated with respect to PJM's Non-Performance Charges for the 2019-20 delivery year, such that the waiver AEP seeks could be considered a concrete remedy warranted for AEP alone. Specifically, the uncertainties AEP describes, particularly in relation to the EPA's Clean Power Plan, pending judicial determinations addressing state versus federal jurisdiction, and working experience with the Capacity Performance Non-Performance Charge assessment, are not specific to AEP. We agree with the Market Monitor that all market participants face these uncertainties. We also do not find that these uncertainties are discrete to the one year interval for which AEP seeks its waiver.

25. AEP, moreover, has alternative options for remedying the problem it describes. AEP may choose to remain a Fixed Resource Requirement entity or participate in PJM's RPM capacity auctions. If AEP chooses to remain a Fixed Resource Requirement entity, it may elect either a financial or physical assessment, and then reconsider the decision to

¹⁰ *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,058, at P 16 (2014); *accord Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,004, at P 10 (2010); *ISO New England Inc.*, 117 FERC ¶ 61,171, at P 21 (2006); *Great Lakes Gas Transmission LP.*, 102 FERC ¶ 61,331, at P 16 (2003); and *TransColorado Gas Transmission Co.*, 102 FERC ¶ 61,330, at P 5 (2003).

¹¹ *Capacity Performance Order*, 151 FERC ¶ 61,208 at P 15.

participate in PJM's RPM capacity auctions in the following year's commitment period with additional experience of Capacity Performance implementation. We disagree that AEP's election requirements are different from other similarly situated resources deciding whether to select the Fixed Resource Requirement Alternative or to participate in PJM's RPM capacity auction.

26. AEP claims that its waiver request, if granted, will not have undesirable consequences, such as harming third parties, because such a waiver will not eliminate a Fixed Resource Requirement entity's existing obligation to serve load, will not negatively affect reliability, and will not shift costs or performance obligations on any other market participant. We find, however, that granting waiver would be unduly discriminatory to other entities facing a choice between the Fixed Resource Requirement Alternative and participating in PJM's RPM capacity auction for the 2019-20 delivery year, each of which must make this choice by March 2016. Further, we agree with PJM that permitting AEP to choose to remain a Fixed Resource Requirement entity without being subject to Non-Performance Charges would not be equitable compared to other committed Capacity Performance Resources that are exposed to Non-Performance Charges.

The Commission orders:

Appalachian Power Company, Kentucky Power Company, Wheeling Power Company, and Indiana Michigan Power Company request for waiver is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

List of Intervenors

Dynergy Marketing and Trade, LLC, *et al.*
Electric Power Supply Association
Exelon Corporation
FirstEnergy Service Company
Indiana Utility Regulatory Commission *
Monitoring Analytics, LLC, serving as
PJM's Independent Market Monitor
NRG Power Marketers
PJM Interconnection, L.L.C.
PJM Power Providers Group

* Motion to intervene out-of-time