

156 FERC ¶ 61,167
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. ER14-1579-000

ORDER ACCEPTING REFUND REPORT AND DENYING
REQUEST FOR ATTORNEYS' FEES AND CONSULTANT'S EXPENSES

(Issued September 9, 2016)

1. PJM Interconnection, L.L.C. (PJM) filed on behalf of Potomac Electric Power Company (PEPCO) a refund report detailing the amounts PEPCO refunded to H-P Energy Resources LLC (H-P Energy), as directed by the Commission,¹ for out-of-pocket expenses incurred under the Upgrade Construction Service Agreement (Upgrade Agreement) entered into among PJM, H-P Energy and PEPCO (collectively, the parties). H-P Energy challenges the refund report because it does not include or provide for H-P Energy's request for attorneys' fees and consultant's expenses. As discussed more fully below, we accept PEPCO's refund report for informational purposes and deny H-P Energy's request to order attorneys' fees and consultant's expenses incurred in the adjudication of this proceeding before the Commission.

I. Background and Details of Filing

A. Procedural 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.

¹ See, *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,286 (2015) (December 10 Order).

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.² 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 (Transfer Rights).³ 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, 2013.⁴

4. PJM stated that, in July 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 protested the cancellation and PJM, PEPCO and H-P Energy filed several rounds of replies. After considering the arguments, the Commission issued an 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 the Upgrade Agreement could not be performed.⁵ The Commission stated that, because the upgrade

² 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.

³ “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.

⁴ *PJM Interconnection, L.L.C.*, Docket No. ER13-1484-000 (Jun. 21, 2013) (unpublished letter order).

⁵ *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,141, at P 16 (2015) (Cancellation Order).

to the Dickerson substation that is the subject of the Upgrade Agreement was already completed before the parties executed the Upgrade Agreement, and because Transfer Rights can be awarded only to one party, the Commission found it could not require specific performance of the Upgrade Agreement as written.⁶

6. With regard to the arguments made by the parties 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."⁷ 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.⁸

7. H-P Energy filed a request for rehearing of the Cancellation Order. H-P Energy requested, among other things, that the Commission reverse its decision to accept the cancellation of the Upgrade Agreement. H-P also reiterated its argument that it was entitled to the Transfer Rights associated with the Upgrade Agreement regardless of whether the construction upgrades had been completed before the agreement was executed.

8. On December 10, 2015, the Commission denied H-P Energy's request for rehearing and reaffirmed its finding in the Cancellation Order that the Commission could not order specific performance of the contract, since no construction was possible. The Commission stated that the PJM Tariff provides that the Transfer Rights can be awarded only to a Transmission Interconnection Customer obligated to fund a transmission facility or upgrade.⁹ Therefore, the Commission opined that enforcing the contract would violate the PJM Tariff because PJM would be required to provide Transfer Rights to a customer that did not fund the upgrade. Finally, the Commission stated that it would require PEPCO to reimburse H-P Energy "for the direct, out-of-pocket expenses it incurred plus

⁶ *Id.* P 18.

⁷ *Id.* P 19.

⁸ *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)).

⁹ OATT Attachment DD.2 Definitions, § 2.35 (22.0.0), <http://etariff.ferc.gov/TariffSectionDetails.aspx?tid=1731&sid=180736>.

interest as calculated under the Commission's regulations" and require PEPCO to file a refund report.¹⁰

B. Details of Filing

9. In its refund report, PEPCO states that, in accordance with the Commission's December 10 Order, it refunded H-P Energy a total refund of \$12,013.06, for H-P Energy's out-of-pocket expenses incurred under the Upgrade Agreement.¹¹ PEPCO states that the out-of-pocket expenses were determined in consultation with PJM to be those costs that H-P Energy incurred and paid to PJM for study costs related to the project addressed in the Upgrade Agreement.

II. Notice and Responsive Pleadings

10. Notice of the refund report was published in the *Federal Register*, 81 Fed. Reg. 9837 (2016), with interventions or protests due on or before March 14, 2016. On March 14, 2016, H-P Energy filed a protest. On March 23, 2016, PEPCO filed an answer to H-P Energy's protest.

11. In its protest, H-P Energy argues that it incurred an additional \$166,385.49 in attorneys' fees and consultant's expenses in adjudication of this proceeding before the Commission, which are not listed in PEPCO's refund report.¹² H-P Energy asserts that it submitted detailed documentation of these expenses to PEPCO on January 29, 2016, and that PEPCO refused payment, stating in a letter dated February 8, 2016, that such expenses were attorneys' and consultant's fees that the Commission does not have authority to award under the Federal Power Act (FPA).¹³

12. H-P Energy contends that it believes the Commission's intent in the December 10 Order was to make H-P Energy whole for all of its out-of-pocket expenses incurred under the Upgrade Agreement. H-P Energy asserts that there is no dispute that PEPCO was

¹⁰ December 10 Order, 153 FERC ¶ 61,286 at P 23.

¹¹ PEPCO Refund Report at 1. PEPCO states that the refund amount was \$10,730.14, plus an extra \$1,282.92 in interest.

¹² H-P Energy states that it has included Attachment 1 to its protest detailing the monthly expenses paid.

¹³ 16 U.S.C. § 824d (2012). H-P Energy Protest at 2.

wholly at fault for the “mistake” culminating in the Commission’s cancellation of the agreement, and that H-P Energy was wholly blameless.¹⁴ H-P Energy argues that it incurred attorneys’ and consultant’s fees advancing its case before the Commission in good faith and the only way to put H-P Energy in the same position as it was prior to signing the Upgrade Agreement is for H-P Energy to be reimbursed for these fees.

13. H-P Energy states that, in a letter to H-P Energy, PEPCO cited *State of Cal. Ex rel. v. B.C. Power Exchange Corp.*,¹⁵ where the Commission stated that no statute confers authority on the Commission to award attorneys’ fees in support of its argument that the Commission cannot award such fees. However, H-P Energy urges the Commission to reconsider this perspective in light of the circumstances of this case and the United States Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit) recent opinion in *Xcel Energy Services v. FERC*.¹⁶ H-P Energy states that in *Xcel Energy* the D.C. Circuit found that the Commission has broad remedial authority under section 309 of the FPA¹⁷ to provide retroactive relief.¹⁸

14. H-P Energy states that the Commission should exercise its broad remedial authority in this case, arguing that the Commission has a duty to ensure that all contracts affecting jurisdictional rates and charges must be just and reasonable. H-P Energy also points to *Electric Power Supply Assoc. v. FERC*,¹⁹ where, according to H-P Energy, the United States Supreme Court stressed that the Commission has the “authority—and, indeed, the duty—to ensure that rules or practices affecting wholesale rates are just and reasonable.”²⁰

¹⁴ H-P Energy Protest at 2.

¹⁵ *Id.* (citing *State of Cal. Ex rel. v. B.C. Power Exchange Corp.*, 139 FERC ¶ 61,213 (2012)).

¹⁶ *Id.* at 3 (citing *Xcel Energy Services, Inc. v. FERC*, 817 F.3d 947 (2016) (*Xcel Energy*)).

¹⁷ 16 U.S.C. § 825h (2012).

¹⁸ H-P Energy Protest at 3 (citing *Xcel Energy*, 817 F. 3d at 954).

¹⁹ *Id.* (citing *Electric Power Supply Assoc. v. FERC*, 136 S.Ct. 760 (2016) (*EPSA*)).

²⁰ *Id.* at 4 (citing *EPSA*, 136 S.Ct. at 764).

15. Finally, H-P Energy argues that, if the Commission concludes it cannot place H-P Energy in the position it would have been but for PEPCO's alleged mistake by requiring PEPCO to reimburse H-P Energy for its attorney and consultant expenses, H-P Energy requests that the Commission provide H-P Energy with the benefit of the bargain under the Upgrade Agreement. H-P Energy states the Commission can do this by directing PJM to reinstate H-P Energy's Transfer Rights and requiring H-P Energy to pay PEPCO for the cost of the upgrade as H-P Energy agreed to do under the agreement. In the alternative, H-P Energy states the Commission could rescind its cancellation of the Upgrade Agreement.

16. In its answer, PEPCO states the Commission should reject H-P Energy's protest and accept the refund report filed by PEPCO as fully compliant with the December 10 Order. PEPCO asserts the December 10 Order affirmed the Commission's decision to accept PJM's cancellation of the Upgrade Agreement. PEPCO contends that the Commission's directive in the December 10 Order for PEPCO to reimburse H-P Energy for its direct, out-of-pocket expenses plus interest was an acknowledgement of PEPCO's previous offer to put H-P Energy in the position it was in prior to signing the agreement.²¹ PEPCO argues that the Commission was referring to costs paid "under the Upgrade Agreement"²² and that the Commission did not discuss the legal and consultant fees paid in the process of litigation. PEPCO asserts that fees paid 'under the agreement' can only be read to refer to study costs and any other similar costs involved to effect the now-cancelled Upgrade Agreement. Moreover, PEPCO states the offer upon which the Commission relied in the December 10 Order was made in September 2013 and did not relate to any additional costs that H-P Energy voluntarily incurred thereafter.²³

17. PEPCO argues that the Commission has explained in previous cases that, unlike federal courts, it does not have the authority to direct an award of attorneys' fees.²⁴ PEPCO states that, consistent with this precedent, the Commission has denied other requests for attorneys' fees.²⁵ PEPCO asserts that, given this alleged long-standing

²¹ PEPCO Answer at 5-6 (citing December 10 Order, 153 FERC ¶ 61,286 at P 28).

²² *Id.* (citing December 10 Order, 153 FERC ¶ 61,286 at P 27).

²³ *Id.* at 6.

²⁴ *Id.* at 7 (citing *B.C. Power*, 139 FERC ¶ 61,213 at P 24).

²⁵ *Id.* (citing *Midcontinent Independent System Operator, Inc.*, 153 FERC ¶ 61,371, at P 42 (2015); *Newmont Nevada Energy Investment LLC v. Sierra Pacific Power Co.*, 147 FERC ¶ 61,030, at P 42 (2014) (*Newmont*)).

precedent of denying attorneys' fees, if the Commission intended to award such fees in the December 10 Order, the Commission would have had to justify this departure from its precedent.²⁶ Moreover, PEPCO states that the Commission has recognized the high bar that must be met for courts to award attorneys' fees because the "American Rule" requires that parties to litigation generally pay their own costs.²⁷

18. Further, PEPCO contends that H-P Energy wrongly relies on the D.C. Circuit's recent decision in *Xcel Energy* to support its argument that the Commission can award attorneys' fees in this matter. PEPCO argues that *Xcel Energy* has nothing to do with attorneys' fees. Instead, PEPCO states that *Xcel Energy* stands for the proposition that the Commission has remedial authority under section 309 of the FPA to remedy a legal error the Commission made in an initial rate order.²⁸ In this case, PEPCO avers that the Commission did not err in its decision, so there is nothing to correct.

19. Finally, PEPCO argues that the Commission should reject as an untimely request for rehearing H-P Energy's alternative requests that the Commission either direct PJM to reinstate H-P Energy's Transfer Rights or rescind cancellation of the Upgrade Agreement. PEPCO asserts that the 30-day time limit for seeking rehearing cannot be waived,²⁹ and the time for seeking rehearing of the December 10 Order has long since passed.

III. Discussion

A. Procedural Matters

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2016), prohibits an answer to a protest unless otherwise ordered by the

²⁶ *Id.* at 8 (citing *Williams Ga Processing-Gulf Coast Co. v. FERC*, 373 F. 3d 1335, 1341 (D.C. Cir. 2004) (agency must explain its departure from its precedent)).

²⁷ *Id.* at 7 (citing *B.C. Power*, 139 FERC ¶ 61,213 at P 24). PEPCO states that, while H-P Energy characterizes its litigation costs as incurred under the Upgrade Agreement, in its own words, these costs were incurred by H-P Energy in the adjudication of this proceeding before the Commission.

²⁸ *Id.* at 8-9 (citing *Xcel Energy*, 815 F.3d at 954).

²⁹ *Id.* at 10-11 (citing 16 U.S.C. § 825l(a) (2012); 18 C.F.R. § 385.713 (2016); The 30-day time period cannot be waived)).

decisional authority. We accept PEPCO's answer because it has assisted us in our decision-making process.

B. Substantive Matters

21. We accept PEPCO's refund report for informational purposes and find that PEPCO has complied with the Commission's directive in the December 10 Order to reimburse H-P Energy for its direct, out-of-pocket expenses incurred plus interest, calculated under the Commission's regulations, and to file with the Commission a refund report.³⁰ In accepting the report, we note that H-P Energy does not dispute the amounts reflected in the report for study costs related to the project addressed in the Upgrade Agreement.

22. With regard to H-P Energy's request for attorneys' fees and consultant's expenses, we deny the request. The Commission in the December 10 Order required PEPCO to reimburse H-P Energy for the costs of the PJM studies and other direct, out-of-pocket expenses in executing the Upgrade Agreement.³¹ The Commission did not require payment of attorney fees and consultant costs incurred as a result of the litigation resulting from PJM's cancellation filing. The attorneys' fees and consultant's expenses are not "the direct, out-of-pocket expenses it has paid under the [Upgrade Agreement]"³² but rather these expenses occurred after the execution of the Upgrade Agreement. H-P Energy's protest, therefore, goes beyond the scope of this proceeding. H-P Energy failed to seek timely rehearing of the Commission's order with respect to litigation expenses and cannot properly raise that issue in a protest to a compliance refund report.³³

³⁰ December 10 Order, 153 FERC ¶ 61,286 at P 26.

³¹ May 22, 2014 Order, 147 FERC ¶ 61,141 at P 10.

³² See December 10 Order, 153 FERC 153 FERC ¶ 61,286 at P 26.

³³ Pursuant to section 313(a) of the FPA (16 U.S.C. § 8251(a) (2012)) and Rule 713 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 785 (2016)) an aggrieved party must file a request for rehearing within thirty (30) days after the issuance of the Commission's order; see also, *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) ("The 30-day time requirement of the [FPA] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing.").

23. Even if its request for litigation expenses was timely and properly raised, H-P Energy cites no precedent that supports it. Although H-P Energy points to *Xcel Energy* and *EPSA* in support of its position, those cases are inapposite. At issue in *Xcel Energy* was the Commission's remedial authority to direct refunds where, on rehearing, it admitted legal error in the underlying rate order, circumstances not relevant here. *EPSA* addressed the Commission's authority to regulate compensation for demand response, not the extent of the Commission's remedial authority under FPA section 309. Indeed, the Commission has previously found that no statute empowers the Commission to award attorneys' fees,³⁴ and nothing convinces us to find otherwise here.

24. Finally, H-P Energy requests that, if we do not award it attorneys' fees and consultant's expenses, the Commission either direct PJM to reinstate H-P Energy's Transfer Rights or rescind cancellation of the Upgrade Agreement. H-P Energy's requests constitute an untimely request for rehearing and are therefore denied.

The Commission orders:

(A) PEPCO's refund report is hereby accepted for informational purposes.

(B) H-P Energy's request for attorneys' fees and consultant's expenses is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁴ *B.C. Power*, 139 FERC ¶ 61,213 at P 24. See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,371, at P 42 (2015) (request for attorneys' fees denied); *Newmont*, 147 FERC ¶ 61,030 (No statute confers on the Commission the authority to award attorneys' fees); *Columbia Gas Transmission Corp.*, 53 FERC ¶ 61,169 (1990) (denying motion for attorneys' fees); *Pennsylvania Power Co.*, 24 FERC ¶ 61,114 (1983) (denying request for attorneys' fees); *Consolidated Edison Co. of N.Y., Inc.*, 53 F.P.C. 539 (1975) (Commission stated that it could not order the reimbursement of litigation costs and fees).