

111 FERC ¶61,098
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

PJM Interconnection, L.L.C.

Docket Nos. ER05-605-000
EL05-90-000

ORDER ACCEPTING AND SUSPENDING SERVICE AGREEMENTS SUBJECT
TO CONDITIONS AND INSTITUTING SECTION 206 PROCEEDING

(Issued April 19, 2005)

1. In this order we conditionally accept an executed construction service agreement (Construction Agreement) and interconnection service agreement (Interconnection Agreement) between PJM Interconnection, L.L.C. (PJM), Pine Hurst Acres (Pine Hurst), and PPL Electric Utilities Corporation (PPL Electric), subject to the conditions discussed below. In addition, under section 206 of the Federal Power Act (FPA),¹ the Commission is instituting a proceeding in Docket No. EL05-90-000 to examine whether the interconnection portion of PJM's open access transmission tariff (OATT) needs to be modified to allow PJM to enter into conforming interconnection agreements. This order benefits customers because it ensures the smooth processing of interconnection-related agreements.

I. Background

2. On February 18, 2005, PJM filed an executed Construction Agreement and Interconnection Agreement in order to interconnect Pine Hurst's 47 kW generating facility with PJM's transmission system.² PJM states that the Construction Agreement

¹ 16 U.S.C. § 824e (2000).

² Because this generator is less than 20 MW in size, the Commission's large generator interconnection rules do not apply. See *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (2004), FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (2005), FERC Stats. & Regs. ¶ 31,171 (2004), *reh'g pending*. However, PJM's tariff, accepted in *PJM Interconnection, L.L.C.*, 108 (continued....)

and Interconnection Agreement differ slightly from the *pro forma* Construction Agreement and Interconnection Agreement,³ but that the differences are minor and non-substantive. The non-conforming terms and conditions include a stand-alone Tax Safe Harbor Agreement (Construction Agreement Attachment A) and a compendium of selected definitions from various portions of PJM's OATT (Construction Agreement Attachment B and Interconnection Agreement Appendices 1 and 2).⁴ The Interconnection Agreement also includes a typographical correction that differs from the *pro forma* Interconnection Agreement.⁵

3. PJM also states that neither the Construction Agreement or Interconnection Agreement include revisions to PJM's OATT made effective by the Commission after the January 20, 2005 date on which the Construction Agreement and Interconnection Agreement were executed.⁶ PJM also removed certain provisions of the *pro forma*

FERC ¶ 61,025 (2004) (July 8 Order), clarifies that PJM intends to treat small generator interconnections similarly to large generator interconnections. See section 110.5 of PJM's OATT. On March 8, 2005, in Docket No. ER05-462-000, the Commission accepted in an unpublished delegated letter order PJM's Small Generator Interconnection Applicable Technical Requirements and Standards for generators with a maximum capacity of 2 MW or less, subject to the outcome of *Standardization of Small Generator Interconnection Agreements and Procedures*, Notice of Proposed Rulemaking, 60 Fed. Reg. 49,974 (August 19, 2003), FERC Stats. & Regs. ¶ 35,572 (2003) (NOPR).

³ The standard Construction Agreement and Interconnection Agreement in PJM's OATT are referred to as the *pro forma* Construction Agreement and/or Interconnection Agreement. Where we refer to the specific Construction Agreement or Interconnection Agreement at issue in this proceeding, we will call them simply "the Construction Agreement" and/or "the Interconnection Agreement".

⁴ Specifically, Attachment B to the Construction Agreement and Appendices 1 and 2 to the Interconnection Agreement contain selected definitions from section 1 of PJM's OATT, a definition of Station Power from Attachment K of PJM's OATT, and all of the definitions found in the interconnection portion of PJM's tariff (Part IV, Subpart E).

⁵ Section 10.3 of the *pro forma* Interconnection Agreement incorrectly refers to Subpart F of PJM's OATT instead of Subpart E of PJM's OATT.

⁶ Some of the tariff changes ordered in *PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,009 (2005), on February 10, 2005 were made effective July 8, 2004, while others were made effective February 10, 2005. PJM states that the instant agreements contain the changes that were made effective on July 8, 2004, but not those made effective on February 10, 2005.

Construction Agreement and Interconnection Agreement that, while part of PJM's OATT on the day the agreements were executed, do not apply to this particular interconnection (such as those addressing merchant transmission).⁷ Finally, the Construction Agreement and Interconnection Agreement omit definitions for the terms "PJM Manual", "PJM West Region", and "Wholesale Transaction".

4. PJM states that the non-conforming provisions of the Construction Agreement and Interconnection Agreement are consistent with, or superior to, the *pro forma* Construction Agreement because they: (1) indicate that certain sections are not applicable; (2) clarify the parties' tax status; (3) correct a typographical error; and (4) omit language that does not materially affect this Construction Agreement.

5. Finally, PJM requests waiver of the Commission's prior notice requirement to allow the agreements to become effective on January 20, 2005.

II. Notice of Filing

6. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 10,392 (2005), with interventions and protests due on or before March 11, 2005. No protests, adverse comments, or motions to intervene were filed.

III. Discussion

A. Non-Conforming Interconnection Agreements

7. In Order No. 2003, the Commission required Transmission Providers (such as PJM) to file *pro forma* interconnection documents and to offer their customers interconnection service consistent with these documents.⁸ The use of *pro forma* documents ensures that customers are receiving non-discriminatory service and that all Interconnection Customers are treated on a consistent and fair basis. Using *pro forma* documents also streamlines the interconnection process by eliminating the need to negotiate each individual agreement, and reduces the need to file interconnection agreements with the Commission to be evaluated on a case-by-case basis.⁹

⁷ See section 5.0(c) of the Construction Agreement *pro forma* and section 11.2A of the Interconnection Agreement *pro forma*.

⁸ See Order No. 2003, *passim*.

⁹ See Order No. 2003 at P 10 ("it has become apparent that the case-by-case approach is an inadequate and inefficient means to address interconnection issues.")

8. At the same time, the Commission recognized in Order No. 2003 that there would be a certain number of extraordinary interconnections where reliability concerns, novel legal issues or other unique factors would call for the filing of a non-conforming agreement.¹⁰ The Commission made clear that the filing party is responsible for clearly identifying the portions of the interconnection agreement that differ from its *pro forma* agreement and explaining the unique circumstances of the interconnection and why these circumstances necessitate the filing of a non-conforming interconnection agreement.¹¹

9. The Commission will analyze such non-conforming filings, which we do not expect to be common, to ensure that operational or other reasons necessitate the non-conforming agreement.¹² Here, PJM has expressed no operational concerns or reasons that explain the need for the non-conforming changes. PJM itself states that the changes it proposes to make to the *pro forma* Construction Agreement and Interconnection Agreement are non-substantive. We note that the "consistent with or superior to" standard is the standard under which the Commission evaluates modifications to its *pro forma* interconnection agreement and interconnection procedures. A Transmission Provider seeking a case-specific deviation from a *pro forma* service agreement bears an even high burden to justify and explain that its changes are necessary (not merely "consistent with or superior to") changes.¹³

10. Nevertheless, the Commission will conditionally accept the executed Construction Agreement and Interconnection Agreement, subject to PJM's re-filing of the agreements to conform with its *pro forma* Construction Agreement and Interconnection Agreement within 15 days of the issuance of this order, as discussed in more detail below. We also grant PJM's request for waiver of our prior notice requirement, and allow the agreements to become effective on January 20, 2005, as requested.

¹⁰ See Order No. 2003 at P 913-15.

¹¹ See Order No. 2003-B at P 140 ("each Transmission Provider submitting a non-conforming agreement for Commission approval must explain its justification for each nonconforming provision.")

¹² See, e.g., *El Paso Electric Co.*, 110 FERC ¶ 61,163 at P 4 (2005).

¹³ Simply stating that the Parties "negotiated" for the change is not a sufficient justification.

B. Inclusion of Definitions as an Attachment to the Construction Agreement and Interconnection Agreement

11. In its Order No. 2003 filing, PJM proposed to include in an attachment all the definitions found in the interconnection portion of its tariff in effect on the date a Construction Agreement and Interconnection Agreement are executed.¹⁴ In the July 8 Order, we stated that "[t]he Commission does not object to the parties incorporating the standard terms and conditions by attachment as long as *all* of the standard terms and conditions that are part of the [relevant portion of the] tariff at the time the agreement is executed are included."¹⁵

12. The July 8 Order made clear that PJM is not permitted to cherry-pick by adopting in individual agreements certain provisions and not others. If PJM wishes to justify the inclusion of some definitions and the exclusion of others, it must separately and specifically identify which definitions it is proposing to leave out, which it is including, and why the specific needs of this Interconnection Customer make these inclusions and exclusions necessary. Without this specific information, the Commission cannot approve such modifications.

13. Here, PJM proposes to include only certain selected definitions in Attachment B to the Construction Agreement and Appendices 1 and 2 to the Interconnection Agreement. It is unclear to the Commission why some definitions are included and others are not. Since PJM does not provide a substantive justification for these changes, they are rejected. On compliance, PJM is directed to file either all of the definitions from section 1 and/or Subpart F, or none of them, as was directed in the July 8 Order. Further, the Commission clarifies that if PJM includes all the definitions in the Construction Agreement and Interconnection Agreement, consistent with the Commission's determination in the July 8 Order, and does not propose any other changes to the Construction Agreement and Interconnection Agreement, the agreements do not need to be filed as non-conforming agreements.¹⁶

¹⁴ Transmittal letter in Docket No. ER04-457-000, footnote 8. PJM explained that the purpose of attaching portions of its currently effective OATT is to make clear to the parties which version of PJM's OATT governs the terms and conditions of the specific interconnection.

¹⁵ July 8 Order at P 21 (emphasis added).

¹⁶ For instance, if PJM wishes to include definitions from section 1 of its OATT, it must include all the definitions from section 1 of its OATT. Likewise, if it wishes to include definitions from Subpart F, it must include all the definitions from Subpart F.

C. Deletion of Non-Applicable Terms in the Construction Agreement and Interconnection Agreement

14. Additionally, PJM proposes to specify that certain tariff provisions (such as those applicable to merchant transmission) do not apply to this particular interconnection agreement. These modifications to the pro forma are rejected as unnecessary. If a provision of a contract is not applicable, it is not applicable. Unless confusion is likely, modifications to a pro forma agreement that "clarify" matters not in doubt are not necessary. To find otherwise would set the precedent for every PJM non-merchant transmission interconnection to be filed as a non-conforming agreement. This is not what the Commission intended when it approved PJM's Order No. 2003 compliance filing.

D. Exclusion of Terms and Conditions Not Effective on the Date the Agreements were Executed

15. PJM points out that the interconnection portions of its OATT changed between the time the Construction Agreement and Interconnection Agreement were executed and were filed. The Commission accepts PJM's explanation of these changes. PJM's tariff specifies that the effective date of a Construction Agreement or Interconnection Agreement is the later of whenever the Construction Agreement or Interconnection Agreement is executed (subject to filing with this Commission).¹⁷ Thus, the tariff effective on the January 20, 2005 execution date of the Construction Agreement and Interconnection Agreement is the basis for any attachments and the *pro forma* Construction Agreement and Interconnection Agreement. However, we wish to clarify that changes to the tariff that take place between the execution of the agreement and the filing of the agreement do not render the agreement non-conforming.

E. Inclusion of a Separate Tax Agreement

16. Section 82.4 of PJM's OATT states that an Interconnection Customer "shall document its agreement to conform to Internal Revenue Service requirements for such non-taxable status in a writing separate from the Construction Service Agreement and delivered to the Interconnected Transmission Owner and Transmission Provider prior to execution of the Construction Service Agreement." Accordingly, PJM required Pine Hurst to agree to a separate tax agreement which it attached to the Construction Agreement as Attachment A.

¹⁷ See section 80.1 of PJM's OATT.

17. As discussed below, the Commission is instituting a proceeding pursuant to section 206 of the FPA to investigate whether section 82.4 effectively requires that *every* interconnection requiring construction of Interconnection Facilities or Network Upgrades be filed as a non-conforming agreement. However, the Commission will accept the inclusion of Construction Agreement Attachment A as complying with PJM's tariff as it existed on January 20, 2005. There is no reason to disadvantage Pine Hurst or other Interconnection Customers from the benefit of an agreement clarifying each parties' tax responsibility pending the clarification of PJM's tariff.

F. Section 206 Investigation into Section 82.4 of PJM's OATT

18. Section 205(c) of the FPA requires that all "contracts which in any manner affect or relate to . . . rates, charges, classifications, and services" related to the transmission of electricity in interstate commerce be filed with the Commission.¹⁸ As discussed above, section 82.4 of PJM's OATT requires any Interconnection Customer paying for construction of interconnection facilities or network upgrades to enter into a separate agreement clarifying each party's tax responsibilities.

19. Such an agreement appears to be a contract of the type required to be filed with the Commission under section 205 of the FPA. Since the PJM OATT does not contain a *pro forma* tax agreement, it appears that every Construction Agreement entered into by PJM and the relevant tax agreement are *required* to be filed with the Commission as non-conforming agreements. To require the filing of each Construction Agreement and Interconnection Agreement delays the processing of interconnections for no reason and defeats the purpose of Order No. 2003 to streamline the interconnection process.

20. Thus, we establish Docket No. EL05-90-000, and direct PJM to make a filing within 30 days of the issuance of this order to either: (1) modify its *pro forma* Construction Agreement and Interconnection Agreement to include a *pro forma* tax agreement; (2) to remove this requirement; or (3) explain why this provision will not necessitate the filing of virtually every PJM Construction Agreement and Interconnection Agreement as non-conforming agreements.¹⁹

21. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund

¹⁸ 16 U.S.C. § 824d(c) (2000).

¹⁹ PJM is also directed to revise section 10.3 of the *pro forma* Interconnection Agreement to correct the typographical error discussed above.

effective date that is no earlier than 60 days after publication of notice of the Commission's investigation in the *Federal Register*, and no later than five months subsequent to expiration of the 60-day period. We will establish the statutorily-directed refund effective date at the earliest date allowed,²⁰ 60 days after publication of the order initiating the Commission's investigation in Docket No. EL05-90-000 in the *Federal Register*.

22. In addition, section 206 requires that, if no final decision has been rendered by the refund effective date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by July 29, 2005.

The Commission orders:

(A) The Construction Agreement and the Interconnection Agreement accepted for filing, subject to the conditions discussed in the body of this order.

(B) The request for waiver of the Commission's prior notice requirement is hereby granted, as discussed in the body of this order.

(C) PJM is directed to file within 30 days changes to section 82.4 of its OATT and section 10.3 of its *pro forma* Interconnection Agreement, as discussed in the body of this order.

(D) The refund effective date in Docket No. EL05-90-000, established pursuant to section 206 of the Federal Power Act, will be 60 days from the date of publication in the *Federal Register* of notice of the initiation of this proceeding.

(E) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding in Docket No. EL05-90-000.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

²⁰ See, e.g., *Canal Electric Co.*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).