

120 FERC ¶ 61,295
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellingshoff.

Duquesne Light Company

v.

Docket No. EL07-98-000

PJM Interconnection, L.L.C.

ORDER DISMISSING COMPLAINT

(Issued September 28, 2007)

1. In this order, the Commission dismisses the complaint filed by Duquesne Light Company (Duquesne) against PJM Interconnection, L.L.C. (PJM) requesting the Commission to direct PJM to exclude the Duquesne Zone load in upcoming PJM capacity auctions.

I. Background

A. Complaint

2. Duquesne, a public utility company in western Pennsylvania, is a transmission owner and Load Serving Entity (LSE) in PJM. It filed the instant complaint on September 13, 2007. Duquesne asks the Commission to order PJM to exclude the Duquesne Zone load from the Base Residual Auction for capacity for Delivery Year 2009, to be held beginning on October 1, 2007.

3. Duquesne states that it notified PJM on September 12, 2007, that it intends to withdraw from PJM and is in discussions with the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) to join it on or about January 1, 2008. Duquesne asserts that its withdrawal fully complies with the terms of the PJM Transmission Owners' Agreement and the PJM Reliability Assurance Agreement (RAA), and that those agreements will not prevent Duquesne's withdrawal from PJM by January 1, 2008. Duquesne states that it is currently preparing filings under section 205 of the Federal Power Act (FPA) to seek the Commission's approval of its withdrawal from PJM.

4. Duquesne states that it is withdrawing from PJM due to the high costs of capacity that have emerged from the first two Base Residual Auctions under PJM's new Reliability

Pricing Model (RPM) capacity market mechanism, which is the vehicle for determining PJM Daily Unforced Capacity Obligations.¹ PJM determines its capacity requirements based on peak load forecasts and the installed reserve margin. The Reliability Requirements that PJM derives through this process are then used to determine the capacity obligation for loads. Duquesne further states that, in light of its greatly increased capacity costs, its continued membership in PJM no longer constitutes an economically reasonable course of action for it and its customers.

5. As Duquesne notes, PJM is currently in transition to full implementation of RPM. It has already held Base Residual Auctions for capacity Delivery Years 2007 and 2008, and it plans to hold the Base Residual Auction for Delivery Year 2009 beginning on October 1, 2007. Duquesne states that it informed PJM on August 24, 2007 that it did not want the Duquesne Zone load to be included in the upcoming Base Residual Auction or further auctions, since the proposed effective date of Duquesne's withdrawal is well in advance of the Delivery Years of those auctions. According to Duquesne, PJM confirmed that it would be able to remove the Duquesne Zone load from the forecasts and other data inputs into the RPM Base Residual Auction, but would do so only if the Commission specifically ordered it to do so.

6. Duquesne states that including the Duquesne Zone load in the October 1 and subsequent auctions would cause load in the Duquesne Zone to incur liability for capacity obligations that will not be necessary after Duquesne's withdrawal. It also states that such inclusion would unnecessarily inflate capacity obligations throughout PJM, result in incorrect capacity pricing, and complicate the issue of Duquesne's withdrawal. Duquesne asserts that a Commission decision granting its Complaint will not require that the Commission prejudge Duquesne's upcoming approval to withdraw from PJM, and

¹ *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 (2006); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006), *order on reh'g and clarification*, 119 FERC ¶ 61,318 (2007). Under the RPM program, PJM determines the capacity requirement for the entire PJM Regional Transmission Organization (RTO), which is based on the individual capacity requirements of all of PJM's LSE members. An LSE can either select the Fixed Resource Requirement (FRR) alternative, or can participate in the three-year forward auction procurement mechanism created by PJM's RPM program. Under this program, PJM holds a series of auctions (an initial Base Residual Auction, and subsequent auctions) for each Delivery Year (June 1 – May 31), beginning three years in advance of that Delivery Year, and purchases sufficient capacity to cover PJM's capacity needs. Subsequently, it recovers the costs of that capacity by billing its LSE members closer to and during the Delivery Year. Since Duquesne did not select the FRR option (which it could have done, for purposes of the October 1 auction, as late as August 1, *see* RAA, Schedule 8.1, section C.1), it was included in the RPM program.

that, if, for any reason, Duquesne is still in PJM by the time of the Delivery Year beginning June 1, 2009, Duquesne will still be subject to all reserve and capacity obligations applicable to LSEs in PJM. According to Duquesne, no third party will be adversely affected by a Commission order granting its request, while denial of the complaint could have an adverse impact on capacity sellers, customers, LSEs and others. Therefore, Duquesne asks the Commission to order PJM to remove the load in the Duquesne Zone from the auction to be held on October 1.

B. PJM Answer

7. Notice of Duquesne's complaint was published in the *Federal Register*, with answers, protests, and motions to intervene due on September 21, 2007.² Timely motions to intervene were filed by BP Energy Company, Ohio Consumers Counsel, Macquarie Cook Power, Dayton Power and Light Company, Con Edison Energy, BOC Energy Services, Rockland Electric Company, FPL Energy Generators, Ameren Services Company, North Carolina Electric Membership Corporation, Williams Power Company, Mirant Parties, and American Electric Power Services Corporation. Timely motions to intervene, comments, answers and motions for rejection or related relief were filed by Allegheny Energy Companies (Allegheny), American Municipal Power-Ohio (AMP-Ohio), Constellation Energy (Constellation), Coral Power, Dominion Retail, Duquesne Industrial Intervenors (Duquesne Industrials), Duke Energy Corporation/Edison Mission Energy (Duke/Edison), Dynegy Power Marketing, the Electric Power Supply Association (EPSA), Exelon Corporation, FirstEnergy Service Company (FirstEnergy), NRG Companies, Pennsylvania Public Utility Commission (Pennsylvania Commission), Pepco Holdings, PJM Power Providers Group, PPL Electric Utilities Corporation (PPL), PSEG Companies (PSEG), Reliant Energy (Reliant), and Strategic Energy. The Pennsylvania Office of the Consumer Advocate and the Baltimore Gas and Electric Company filed motions to intervene out of time. PJM filed a timely answer in opposition to the complaint. On September 24, Duquesne filed an answer to the motions to reject or dismiss the complaint, as well as the comments and answers filed by PJM and other parties. Reliant, PJM and Constellation and PSEG subsequently filed answers to Duquesne's answer.

8. In its answer to the complaint, PJM opposes Duquesne's request on the basis that Duquesne's intention to withdraw from PJM leaves significant unanswered questions, and Duquesne provides no clear plan how it might meet its announced exit date, or how it will ensure reliability in the Duquesne Zone and meet the terms of the recently approved PJM capacity market tariff, should it not achieve its intention to leave PJM by January 1, 2008.

² 72 Fed. Reg. 54023 (2007).

9. PJM further asserts that, under the terms of its tariff, it cannot provide the relief requested by Duquesne. According to PJM, one of the most important features of its new RPM program is the three-year-forward procurement mechanism, under which PJM procures capacity on behalf of its LSE members three years in advance. PJM states that this feature encourages investment by suppliers and improves the competitiveness of the markets by stimulating new entry.

10. PJM states that, under section 5.10(a)(vi)(B) of Attachment DD of its Open Access Transmission Tariff (OATT), it was required to determine the reliability requirement for the PJM region (and for each local area within PJM) before the first Base Residual Auction for the first Delivery Year in which LSEs' capacity obligations will be determined through the RPM program. Once that reliability requirement was determined in February 2007, PJM was obligated to use this information for the transitional auctions that determine its member LSEs' capacity obligation during the transition period to full implementation of RPM. Pursuant to section 5.10(a), PJM determined the entire reliability requirement for all LSEs in PJM, excluding those who opted to meet their own needs and not participate in the RPM program.³ Duquesne did not elect to meet its own capacity needs, and PJM therefore included Duquesne's load in its total reliability requirement for PJM. It notified participants of this determination on February 2, 2007. PJM market participants, including Duquesne, had ample opportunity to review the data and parameters used in determining the reliability requirement, as provided for in sections 5.10 and 5.11 of Attachment DD.⁴ Duquesne notified PJM of its intention to withdraw from PJM on September 13, 2007, more than seven months later, at which point two of the transitional auctions had already occurred and just two weeks remained before the third transitional auction.

11. PJM states that RPM was "designed to allow market participants to put into place . . . preparatory arrangements" in reliance on, among other things, the reliability requirement developed by PJM. PJM then states that:

Article 5 of the [PJM Reliability Assurance Agreement
(RAA)] requires that Duquesne must in order to withdraw

³ An entity that elects to meet its own needs is required to commit capacity resources to meet its daily unforced capacity obligations. Failure to commit the required resources would result in PJM's assessing an FRR Commitment Insufficiency Charge, and rendering that entity ineligible to continue under the FRR Alternative. Thus, that LSE would be required to acquire capacity for its load under RPM for the Delivery Year in question and subsequent Delivery Years. *See* PJM Manual 18, *PJM Capacity Market*.

⁴ There is no provision in the tariff that allows market participants to challenge PJM's capacity determination after the announcement is made, since the RPM Settlement mandates finality of the announced figures for the initial three-year period.

(i) satisfy all of its obligations, including those related to the incorporation of its load in the transitional auction parameters set under . . . the RAA. . . . PJM simply cannot alter the posted [preliminary reliability requirement] nor has Duquesne set forth a basis for reopening the recently settled RPM tariff.⁵

12. Thus, PJM states, it must administer its tariffs in accordance with their provisions, and cannot exclude Duquesne's load from the upcoming Base Residual Auction. PJM argues that Duquesne's obligations are not solely a function of future capacity auctions, but rather, are already established, and that granting the relief Duquesne requests would harm those PJM members who have planned and prepared for participation in PJM's three-year-forward capacity market in reliance on other members, including Duquesne, fulfilling their obligations. According to PJM, Duquesne views its obligation for Delivery Year 2009 as "tentative" prior to the conduct of the Base Residual Auction for Delivery Year 2009, but this position fails to recognize that the October 1 auction is a part of a longer process that has been underway for months. PJM states that all of the auctions conducted in 2007 – including the upcoming October auction – take as a reference point the obligations determined in February 2007, and other market participants have been preparing for the entire sequence of auctions on this basis. PJM argues that, if this process is disrupted by Duquesne's withdrawal, that withdrawal may undermine the crucial three-year-forward commitment that is fundamental to the RPM design.

13. The majority of the commenters oppose Duquesne's complaint, pointing to the possibility of severe impacts on other PJM market participants if the requested relief is granted. They also assert that the very uncertainty of those impacts makes the granting of relief to Duquesne on an emergency basis inappropriate. They state that Duquesne's right to withdraw should only be exercised in an orderly manner after consideration of the complex issues involved, so as not to cause harm to other market participants, undermine the RPM market, and negatively impact reliability. In particular, they note that:

- Market participants have already formulated strategies and made economic and financial decisions and commitments (such as long-term contracts, de-listing decisions, and hedging strategies), and exclusion of Duquesne Zone load just prior to the auction will be disruptive to RPM and harmful to market participants (Constellation, Duke/Edison);
- It is imprudent to approve the exclusion of the Duquesne Zone load from the auction, which is only one aspect of the transition to Midwest ISO, on this

⁵ PJM answer at 4-5.

expedited basis without a comprehensive examination of all of the implications of Duquesne's withdrawal from PJM (Allegheny; Coral Power; Duke/Edison);

- Duquesne offers no specific or definitive alternative plans for meeting reliability obligations, hence it cannot be relieved of reliability responsibilities (Constellation); and
- For various reasons, Duquesne's proposed timetable is unlikely to be met and it may even decide not to withdraw after a complete assessment of the costs of its obligations (Dynergy, EPSA).

14. Certain other intervenors (AMP-Ohio, Dominion, Duquesne Industrials, and the Pennsylvania Commission) would not oppose granting Duquesne's complaint provided that other LSEs and retail ratepayers are not adversely affected. Dominion asks the Commission to set the matter for hearing.

II. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214 (2007)), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to an answer unless otherwise ordered by the decisional authority. Duquesne is permitted to answer the motions to reject and dismiss, and we will accept its answer to the comments and answers because it has assisted us in our decision making. However, we will reject Reliant's, PJM's, Constellation's and PSEG's answers to Duquesne's answer.

III. Discussion

17. The Commission dismisses the complaint, finding that Duquesne failed to establish a basis for excluding load in its Zone from the October 1, 2007 RPM auction.

18. At the outset, we note that Duquesne has not articulated a clear legal basis for its complaint. Though its complaint appears to argue that provisions in certain PJM agreements and the tariff allow the relief it requests, in its answer it alleges that unnamed provisions in PJM's tariff and agreements implementing RPM are unjust and unreasonable because they do not allow a withdrawing entity to remove its load from capacity auctions for delivery periods that fall after the withdrawing entity's departure

date.⁶ In either case, however, Duquesne has not provided the Commission sufficient basis to decide the issue it raises.

19. As to the proper interpretation of the PJM agreements and tariff, Duquesne states that section 5.1 of the RAA and section 3.2 of the Transmission Owners' Agreement set forth the manner in which an LSE may withdraw from PJM and cease meeting its reliability obligations under the RAA.⁷ Duquesne fails, however, to harmonize sections 5.1.2 and 5.1.4 of the RAA in the context of the October 1, 2007 auction.⁸ In other words, Duquesne does not explain the meaning of section 5.1.2 with respect to its responsibility for RPM auction costs arising from the October 1, 2007 auction. Nor does it explain how the Commission can interpret section 5.1.2 without predetermining its ruling on Duquesne's as-yet-unfiled FPA section 205 application to withdraw from PJM and the RAA under section 5.1.4. Duquesne also fails to provide argument as to the differences between the various obligations it has agreed to undertake under the RAA and the legal effect of its September 12, 2007 notice on each of those obligations. The Commission is unable to interpret these and other provisions of the PJM agreements and

⁶ Duquesne answer at 3.

⁷ Under section 3.2 of the Transmission Owners' Agreement, a transmission owner may withdraw from PJM upon 90 days notice to PJM, although such withdrawal does not become effective until the Commission approves a filing to withdraw made under section 205. Under section 5.1 of the RAA, an LSE may withdraw from the RAA effective upon the completion of its obligations under the RAA.

⁸ Section 5.1.2 of the RAA provides that:

A Party's obligations hereunder shall be completed as of the end of the last month for which such Party's obligations have been set at the time said notice is received, except as provided in Article 13, or unless the Members Committee determines that the remaining Parties will be able to adjust their obligations and commitments related to the performance of this Agreement consistent with such earlier withdrawal date as may be requested by the withdrawing Party, without undue hardship or cost, while maintaining the reliability of the PJM Region.

Section 5.1.4 of the RAA, however, provides that:

Any withdrawal from this Agreement shall be filed with FERC and shall become effective only upon FERC's approval.

tariff absent further legal argument and briefing on their meaning and intent, which was not possible under the accelerated schedule requested by Duquesne (i.e., that the Commission issue an order allowing Duquesne out of the auction by October 1).

20. Similarly, the Commission lacks an adequate record to determine whether Duquesne has met its burden of proving that the RPM-related provisions in PJM's tariff and agreements are unjust and unreasonable. In its answer, Duquesne argues that those provisions are unjust and unreasonable because they do not allow a withdrawing entity to remove its load from capacity auctions for delivery periods that fall after the withdrawing entity's departure date. Assessing Duquesne's argument requires examination of the inter-relationship of those provisions with other provisions of PJM's tariff and agreements, and the above-noted deficiencies in Duquesne's explanations preclude such examination on the existing record.

21. Duquesne also fails to address "the practical, operational, or other nonfinancial impacts . . . including, where applicable, the environmental, safety or reliability impacts of" PJM's exclusion of the Duquesne Zone load from the October 1 auction.⁹ Duquesne does not believe that any third-party will be adversely affected by a Commission order granting the relief Duquesne requested. As evidenced by the extensive comments on Duquesne's complaint, however, multiple parties take the position that the relief requested by Duquesne will have significant adverse impacts on them.¹⁰ For the Commission to understand and assess the impacts of the relief Duquesne seeks on generators and other LSEs in the Duquesne Zone, and in the remainder of PJM, these issues would have to be fully briefed by all parties.¹¹ The accelerated schedule requested

⁹ Rule 206(b) also provides that a complainant must indicate "the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction, including, where applicable, the environmental, safety or reliability impacts of the action or inaction" (Rule 206(b)(5)). 18 C.F.R. § 385.206(b)(5) (2007).

¹⁰ *See, e.g.*, comments of Pepco, Constellation, Reliant, FirstEnergy. We note that other LSEs in the Duquesne Zone are concerned that exclusion of the Duquesne Zone load from the October 1, 2007 auction could potentially raise their costs if Duquesne ultimately decides not to exit PJM. Duquesne has disclaimed responsibility for such impacts on other market participants, *see* Duquesne answer at 10 ("Duquesne has not agreed to assume [the risk of exclusion from the auction] for other load in the Duquesne zone").

¹¹ Regardless of whether Duquesne remains a member of PJM, it is obligated to ensure that it can meet its system needs and to comply with all reliability requirements.

by Duquesne failed to allow such necessary briefing. Indeed, Duquesne's complaint implies that the effect of granting the relief it requests is as yet impossible to assess.¹²

22. Finally, Duquesne does not address the question of how reliability will be maintained if the load in its Zone is removed from the October 1, 2007 auction, but then Duquesne does not withdraw from PJM on its proposed schedule. Duquesne states that "[i]f . . . Duquesne is still in PJM at the time of the Delivery Year beginning June 1, 2009, Duquesne will still be subject to all reserve and capacity obligations applicable to load-serving entities in PJM."¹³ Since the adoption of RPM, however, PJM's means of ensuring that its LSE members have sufficient capacity is to procure that capacity for them three years in advance. It is difficult, therefore, to understand how Duquesne can be assured of meeting those capacity obligations on a stand-alone basis at the very beginning of the Delivery Year. Yet, Duquesne provides no further elucidation of its proposal on this critical question.

23. As noted above, both the Transmission Owners' Agreement and the RAA require that an LSE seeking to withdraw from PJM must make a filing with the Commission under section 205 before that withdrawal becomes effective. As the Commission has previously stated, to fulfill its responsibility under section 205 to ensure that rates are just and reasonable, it must review RTO withdrawal filings to determine whether "all of the elements in the filed arrangements" are consistent with that goal.¹⁴ That necessary

¹² Duquesne states that "both [the Transmission Owners' Agreement and the RAA] assert liability on a withdrawing entity regarding obligations that are incurred or set prior to the date of withdrawal," Complaint at 10, but makes clear that this question is still in doubt in that "[t]he amount of such liability will be discussed between PJM and Duquesne, and, if necessary, determined through the Commission proceeding to consider Duquesne's withdrawal application," *Id.* at 10, n. 8.

¹³ Complaint at 8.

¹⁴ In *Pennsylvania-New Jersey-Maryland Interconnection*, 105 FERC ¶ 61,294 (2003), the Commission modified a settlement so as to require that a transmission owner's withdrawal from PJM could only be made pursuant to a section 205 filing with the Commission. We stated there:

The proposal to prohibit section 205 review of withdrawals from an RTO (or ISO) is inconsistent with the RTO/ISO Access and Withdrawal Rights Policy Statement, [104 FERC ¶ 61,248 at P 2], where the Commission held that "arrangements to join or exit an RTO or ISO will be reviewed [by the Commission] in the context of filings made under section 205." This review is necessary, we indicated, in order to determine whether all of the elements contained in the filed

section 205 filing, rather than this complaint requesting relief on an emergency basis, is the appropriate vehicle for resolving all of the issues related to Duquesne's withdrawal from PJM. We rule here only that the emergency relief requested has not been justified, without prejudgment of any issues that may be raised in the section 205 filing or other filings made by Duquesne.

The Commission orders:

Duquesne's complaint is hereby dismissed, for the reasons stated above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.

arrangements meet the principles of Order No. 2000 and are just and reasonable pursuant to section 205 of the FPA. Given these requirements, the Settlement Agreement's provisions relating to RTO withdrawal rights must be, and are, rejected.

Id. at P 36 (footnotes omitted).