

121 FERC ¶ 61,315
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Industrial Customer Coalition v. PJM
Interconnection L.L.C.

Docket No. EL08-12-000

ORDER DENYING COMPLAINT

(Issued December 31, 2007)

1. On November 20, 2007, the PJM Industrial Customer Coalition (PJMICC or Complainant) filed a complaint (Complaint) under section 206 of the Federal Power Act (FPA) alleging that certain sunset provisions of PJM Interconnection L.L.C.'s (PJM) existing tariff, pursuant to which certain subsidy payments under PJM's Economic Load Response Program (Economic Program) will expire on December 31, 2007, are unjust and unreasonable. PJMICC requests that the Commission find that the sunset provisions are not just and reasonable and also requests that the Commission approve a proposed mechanism submitted by PJMICC for continuing the subsidy payments. For the reasons discussed below, the Commission denies the Complaint.

Background

2. On June 1, 2002, PJM instituted a temporary Economic Load Response Program (Economic Program) in the Real-time and Day-ahead Energy Markets under which, during periods of high wholesale prices and scarcity, PJM compensates Economic Program participants who voluntarily choose to reduce consumption. The Real-time and Day-ahead Economic Program provides a mechanism by which qualified Load Serving Entities (LSE) or Curtailment Service Providers¹ (CSP) offer end-use customers the opportunity to commit to a reduction of load in real time or in advance of operations and receive payments based on the Real-time or Day-ahead locational marginal prices (LMP), respectively, for the reductions.

3. The Economic Program also includes a subsidy payment to end-use customers to enhance the ability and opportunity for reduction of consumption when PJM LMPs are

¹ A Curtailment Service Provider is a PJM Member that acts on behalf of end-use customers (Non-Members) who wish to participate in PJM Load Response Programs.

high. When the LMP is lower than \$75/MWh, Economic Program participants receive the LMP price net of avoided generation and transmission charges. When the market price is above \$75/MWh, Economic Program participants get paid the full LMP (without the reduction for the generation and transmission charges). When the LMP exceeds \$75/MWh, the cost of the full LMP payment, or subsidy payment, is socialized among the LSEs within the zone of the Economic Program participant. The subsidy payment portion of the Economic Program was initially to remain in effect until December 1, 2004. In September 2004, PJM sought an extension through December 31, 2007. The Commission granted the request on October 29, 2004.²

4. In 2006, the Commission granted a PJM request to make the Economic Program permanent.³ In the same proceeding, parties challenged the continued use of the subsidy payments. As part of its approval, the Commission accepted PJM's request to allow the subsidy payments to remain a temporary feature of the Economic Program. It noted that in accepting the subsidy payment provisions, it had found that they were a "short-term incentive...needed to help institute this program which provides significant benefits to the entire PJM market."⁴ Thus, under the terms of the current PJM Tariff and Operating Agreement, the subsidy payment portion of the Economic Program will terminate on December 31, 2007.

Complaint

5. PJMICC alleges in its Complaint that allowing the subsidy payments to expire would violate the justness and reasonableness provisions of the FPA because they are "necessary, in some form, to ensure at least minimal levels of demand elasticity in the market and, thus, serve as one of the 'checks' on the exercise of market power."⁵ Complainants assert the Commission has held that in the absence of an Economic Program, PJM's tariff is unjust and unreasonable. They also assert that termination of the subsidy payments would be unjust and unreasonable because according to PJMICC, market power is still prevalent, demand elasticity remains low, and the provisions deliver net benefits to customers. While acknowledging that the Commission anticipated that the subsidy payments would only be required for a finite amount of time, PJMICC asserts that "little has changed to justify any reduction or erosion of demand response payments."⁶ Complainants contend that the PJM Market Monitoring Unit's (MMU)

² Unpublished Letter Order issued in Docket No. ER04-1193-000.

³ *PJM Interconnection, LLC*, 114 FERC ¶ 61,201 (2006).

⁴ *Id.* P 41.

⁵ Complaint at 2-3.

⁶ Complaint at 13.

2006 State of the Market Report recommends that PJM should evaluate “additional actions to increase demand-side responsiveness to price in both Energy and Capacity Markets.”⁷

6. PJMICC also argues that allowing the subsidy payments to terminate would be inconsistent with the rules approved by the Commission for the New England and New York ISOs. PJMICC notes that both ISO New England and the New York ISO have subsidy mechanisms to encourage participation in their respective load response programs, and that the Commission approved New York ISO’s request to make its subsidy mechanism permanent. PJMICC argues that if the Commission finds the demand side of PJM’s market is underdeveloped, then it would be unjust and unreasonable for PJM’s demand response rules to be any less favorable than those in ISO New England and the New York ISO.⁸

7. PJMICC’s proposed replacement for the subsidy payments is identical, with one exception, to a “compromise” proposal discussed by the PJM stakeholders that did not receive sufficient stakeholder approval to be filed under section 205.⁹ PJMICC contends that this alternate extension proposal addresses concerns about cost allocation and cost-benefit relationships. PJMICC asserts that the proposal attempts to create a closer linkage between program costs and those who receive wholesale market benefits by ensuring that only those market participants who benefit from the load reductions pay the

⁷ Complaint at 13, (*quoting* PJM Market Monitoring Unit, 2006 State of the Market Report, section 2, at 37 (March 8, 2007)).

⁸ ISO New England’s demand response programs are scheduled to end on June 1, 2010, when the first commitment period for the Forward Capacity Market begins.

⁹ *See* Complaint at 3. The compromise proposal to extend the payment subsidy provisions includes alternative price thresholds and certain other rule modifications. PJMICC states that price thresholds under the proposal are \$58/MWh for day-ahead and \$124/MWh for real-time demand response, figures that PJMICC claims are based in a large part on a cost benefit analysis prepared by PJM. PJMICC further states that while it agrees with the level proposed for day-ahead demand response, the one exception it takes to the proposal is the appropriate threshold for participation in the real-time market. PJMICC proposes a recalculation of that threshold to correct what PJMICC describes as the “overly conservative assumptions of the PJM Staff.” Complaint at 17. In an affidavit attached to the Complaint, PJMICC explains that PJM’s Staff analysis “significantly under-estimates the number of MWhs being priced at the real-time LMP because the Staff analysis only looked at net sub-account positions in PJM for each market participant, and not at the actual pricing of the commodity to retail loads.” Affidavit of Paul R. Williams at 3.

cost associated with the curtailment. PJMICC contends that under the current program, load serving entities (LSE) that may not benefit from the load reduction could still end up paying the costs associated with reducing output. PJMICC also contends that load reduction should occur only when the benefit to the market is greater than the costs of the program.

8. PJMICC asserts that its proposed threshold setting process is based on cost benefit analyses that define the threshold levels at which the demand response will be beneficial to the subset of market participants that receive the direct benefit of the load. It contends the process is more price-responsive than the current method, provides for a one-time review of the threshold levels after each new threshold goes into effect, and subjects accepted threshold levels to bi-annual analyses by PJM staff. PJMICC contends that modifying the thresholds to the ostensibly more responsive price levels it recommends will attract a higher level of Economic Program participation via PJM dispatch as opposed to self-scheduling, and should entice more participation in the day-ahead market, thus promoting more efficient dispatch and operations.

9. PJMICC states that its proposed replacement subsidy payment program addresses concerns about “free-ridership” in the Economic Program. PJMICC contends that its proposal was also designed to ensure that the demand responder is actually doing something to cause a reduction in its consumption and making that power available for use by the market. The proposal is meant to preclude all forms of “free-ridership,” including (1) having a highly variable load that will allow for settlements in the program when the end user is operating in its normal daily manner; (2) doing nothing other than putting in a settlement for reduction when the actual load just happens to be less than the customer baseline load (CBL) for that hour; (3) putting in settlements every day to lock in an old CBL that no longer represents the actual load of the end user; and (4) using generator meter data to imply a demand response during a high cost hour when the generation is really the same all the time. PJMICC asserts that the hard threshold floors contained in the proposal would significantly limit the hours of participation in the real-time market.

Notice of Filings and Responsive Pleadings

10. Notice of PJMICC’s filing was issued on November 21, 2007, with interventions, answers and protests due on or before December 6, 2007. Timely notices and motions to intervene were filed by the District of Columbia Public Service Commission, the Public Service Commission of Maryland (Maryland PSC), Exelon Corporation, the Pennsylvania Public Utility Commission, Jersey Central Power and Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, FirstEnergy Solutions Corp., Steel Dynamics Inc., Nucor Steel, the New Jersey Board of Public Utilities (New Jersey BPU), the North Carolina Electric Membership Corporation, the Borough of Chambersburg, Pennsylvania, American Municipal Power – Ohio, Inc., Duke Energy

Corporation, Constellation New Energy Inc., the Public Utilities Commission of Ohio (PUC Ohio), Enerwise Global Technologies, BP Energy Company, FPL Energy Generators, and Reliant Energy Inc. Timely motions for intervention together with protests or comments were filed by American Electric Power Service Corp. (AEP), the District of Columbia Office of the People's Counsel, Dayton Power and Light Company (DP&L), the Office of the Ohio's Consumers' Counsel, PPL Parties, Energy Connect, Inc., Allegheny Power and Allegheny Energy Supply (Allegheny), EnerNOC, Inc., Integrys Energy Services, Inc., Electricity Consumers Resource Council (ELCON), Old Dominion Electric Cooperative (ODEC), Pepco Holdings, Inc., PJM Power Providers Group (Power Providers), Public Service Electric and Gas Company and PSEG Energy Resources & Trade, LLC (PSEG), Joint Consumer Advocates, and the Portland Cement Association (PCA). Motions to intervene out of time were filed by Dominion Resources Inc., Consolidated Edison Solutions, and Mirant Parties. PJM filed an Answer to the Complaint on December 6, 2007. An out of time motion to intervene and comments were filed by Rockland Electric Company. Out of time comments were filed by the District of Columbia Public Service Commission (DC PSC), the Pennsylvania Public Utility Commission, the Delaware Public Service Commission, New Jersey BPU, and supplemental comments were filed by the Designated FirstEnergy Companies. The Maryland PSC filed an out of time Motion Requesting Prompt Action To Extend Tariff Provisions and Establish Settlement Procedures on December 13, 2007. PJMICC filed an answer to the protests and an answer to the Maryland PSC request that settlement procedures be established. ODEC filed an answer to the answers of PJM and PJMICC. PUC Ohio filed an out of time motion to extend the tariff provisions.

Filings and Protests

PJM's Answer

11. PJM states that it has been working hard through the stakeholder process to arrive at a resolution of the subsidy payments issue without success. PJM agrees with PJMICC that economic demand response in PJM has not matured; however, PJM does not support the PJMICC proposal as a permanent replacement to the existing program structure.¹⁰ PJM thus proposes that the Commission direct settlement discussions to address the appropriate long-term revisions to the program. PJM suggests that the Commission should include verification rules for actual reductions and enhanced CBL, already the subject of separate stakeholder discussions and a part of the PJMICC proposal, in such a settlement proceeding. PJM further indicates that immediate resolution of this issue is not necessary and will not have a significant impact on demand response providers as the

¹⁰ PJM believes that a time-limited incentive program that targets incremental new demand response, not unlike the tax incentives offered to wind power developers that are time limited site by site, is the more appropriate approach.

subsidy payments are more relevant in the summer than in the winter. PJM takes no position on allowing the current program to sunset versus extending the subsidy payments until such time as an alternative is implemented. It likewise does not take a position on the justness and reasonableness of allowing the sunset.

Other Filings and Protests

12. Several consumer representatives filed in support of the Complaint.¹¹ They argue that the subsidy payment provisions should not be allowed to sunset until an effective replacement program is approved. They assert that the Economic Program benefits customers and the market and injects demand elasticity into the market. They contend generally that termination of the subsidy payments would likely result in a decline in participation in the Economic Program during high priced hours and diminish customer savings.

13. The Maryland PSC filed a late motion seeking expedited action extending the tariff provisions and requesting that the Commission appoint a settlement judge. It agrees with Complainants that the subsidy payment provisions are necessary to ensure minimal elasticity in the market and asserts that there may be attrition among demand response participants if the provisions are allowed to terminate. It further contends that because the subsidy payments have been in place since 2001, that there is no harm to a “relatively short” continuation of the status quo.¹²

¹¹ See Motions to Intervene and Comments of the Office of the Ohio Consumer’s Counsel, the Office of the People’s Counsel of the District of Columbia, Joint Consumer Advocates (Pennsylvania, Illinois and Maryland) and the Electricity Consumers Resource Council. In addition, Pepco Holdings, Inc. filed in support of the PJM DSRWG proposal, but against the PJMICC modification to that proposal.

¹² New Jersey BPU supports a Commission facilitated dispute resolution process or assignment of a settlement judge. PUC Ohio supports initiation of a mediation process. ODEC supports continuation of the stakeholder process facilitated by PJM senior staff. Delaware supports extension of the programs pending a long-term resolution. While supporting the sunset provision, the Designated FirstEnergy Companies provided comments on the scope of settlement procedures.

14. Several public utilities in PJM filed protests or in opposition to the Complaint.¹³ They argue that while they support continuing load response programs, the subsidy payments are no longer necessary to spur involvement in the Economic Program and that the subsidy payment allows certain customers to “double dip” at the expense of others. Noting that the subsidy payment was designed to be eliminated once the Economic Program became viable in PJM, they state that both the PJM Market Monitor and the Commission have recognized that customers are participating in the Economic Program and that it is having a positive effect on the market. They point out that there is no indication that the subsidy payments are the only reason for this participation. They also note that it is only the subsidy payments, not the entire Economic Program, that will terminate.

15. DP&L asserts that PJMICC’s claims that the stakeholder process is deadlocked in an attempt to resolve this issue is simply not true but that PJMICC is simply unhappy that “its self interest driven efforts at cost-reallocation have been frustrated by the stakeholder process working as it should in this case.”¹⁴ Noting that it is supportive of efforts to combat potential gaming of the demand side programs in PJM, DP&L requests that the Commission not perpetuate an artificial, subsidized system that runs contrary to any market approach and allow the expiration of subsidy payments. Similarly, Allegheny and ODEC assert that the Commission should reject the Complaint, disallow circumvention of the stakeholder process, and allow the issue to be further explored by stakeholders.

16. AEP argues that there is a flaw in the Economic Program in that it does not address the problem of demand response customers in states with bundled retail rates who participate in a program designed for wholesale markets. Relying on the PJM MMU’s observations that the goal of the Economic Program is to provide accurate wholesale price signals to customers and that it should not be used to address retail rate issues, AEP argues that if the subsidy payments are allowed to continue, then “customers will continue to benefit from the arbitrage between embedded average cost and market and have no incentive to work with the utility ... to manage their load based on offerings from the vertically integrated utilities.”¹⁵

¹³ See Motion to Intervene and Protest of AEP, Motion to Intervene and Comments of DP&L, Motion to Intervene and Protest of PPL Parties (PPL), Motion to Intervene and Protest of Allegheny, Motion to Intervene and Protest of ODEC, Motion to Intervene and Protest of the Power Providers, and Motion to Intervene and Protest of PSEG.

¹⁴ Motion to Intervene and Comments of DP&L at 3.

¹⁵ Motion to Intervene and Protest of AEP at 5.

17. AEP also argues that the subsidy payments result in “double dipping” by some customers. According to AEP, LMP can run well above the costs included in bundled rates. Thus, an Economic Program participant derives an additional benefit from the subsidy payments at the expense of other customers in the zone. Not only does the participating customer not pay the host utility for the energy, it gets to sell that free energy at the full LMP. AEP claims that in states with unbundling, the effect is minimal because the subsidies are spread among a number of competitive suppliers who benefit along with their customers by a lower LMP in the region. In states that still have bundled retail markets, the retail customers do not receive the benefit of the lower LMP unless the utility has to go to the market and buy power during those periods, which is generally not the case because those utilities serve the bulk of their load with power from their own generators. Yet the utility and customers in that situation still must absorb the cost of the subsidy payments.

18. Power Providers oppose the PJMICC proposal, citing recent statements by the PJM Market Monitoring Unit (MMU) in which the MMU asserted that “from an economic perspective, the optimal program design for the [Economic Program] should include payments to reduced load equal to the LMP less the generation component of retail rates, regardless of market price.”¹⁶

19. PPL, Allegheny, ODEC, PSEG and Power Providers argue that PJMICC has failed to meet its burden of proof to demonstrate that the existing provisions that require termination of the subsidy payments are unjust and unreasonable, or that its proposed modifications to the tariff are just and reasonable. PPL contends that PJMICC’s proposed triggers for subsidy payments are unreasonably low, that LMP customers should not participate in the Economic Program, and that the subsidy payments should be restricted to new participants, consistent with a desire to jump-start new participation.

Discussion

20. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the notices of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given the parties’ interests, the early stage of the proceeding, and the absence of undue prejudice or delay, we will grant the untimely motions to intervene.

21. We treat MD PSC’s late-filed motion as a protest. 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 a protest or to an answer unless otherwise ordered by the

¹⁶ Power Providers citing MMU White Paper: PJM Demand Side Response Program, PJM Market Monitoring Unit, December 4, 2007.
<http://www.pjm.com/markets/market-monitor/downloads/20071204-dsr-whitepaper.pdf>

decisional authority. We are not persuaded to accept either the answers to the protests or the answers to answers, and therefore we reject them.

22. Under section 206 of the Federal Power Act, in order to require a continuation of the subsidy payments, the Commission must find that the existing PJM tariff under which the subsidy payments terminate is unjust and unreasonable, and the Commission must then establish the just and reasonable replacement rate.¹⁷ Under section 206(b), “the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant.”¹⁸ For the reasons discussed below, the Commission finds that PJMICC has not met this burden, and thus, we deny the Complaint.

23. As noted in our previous orders, the Commission supports demand response because it helps make markets more efficient. The Commission has issued a number of orders supporting demand response in the markets it regulates. *See inter alia*, *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274, at P 10 (2006) (CAISO MRTU Order), *order on reh’g*, 119 FERC ¶ 61,076 (2007) (allowing loads with demand-response capability to participate in the California ISO day-ahead, real-time, and ancillary services markets under comparable requirements as supply, and receive the equivalent market value); *Midwest Indep. Transmission Sys. Operator Corp.*, 116 FERC ¶61,292, at P 1, 55 (2006) (requiring Midwest ISO to explain any pre-conditions for its Energy Only Market implementation, such as demand-response programs); *Southwest Power Pool*, 116 FERC ¶ 61,289, at P 44, 62 (2006) (directing the Southwest Power Pool (SPP) to make tariff modifications to put in place a \$1,000/MWh bid cap until such time that there are sufficient demand-response programs in SPP’s market to permit the lifting of the bid cap); *Devon Power LLC*, 115 FERC ¶61,340, at P 22, *order on reh’g*, 117 FERC ¶ 61,133 (2006) (approving a settlement that provided ISO-New England with a Forward Capacity Market in which demand resources can compete with supply-side resources for capacity payments); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 31 (2006) (clarifying that demand-response resources may participate in RPM auctions, may set the market clearing price, and may receive revenues for load reductions as Interruptible Load Resources).

24. It is important to remember here that even without the subsidy payments, PJM will have in place an emergency demand response program, under which PJM compensates customers who voluntarily reduce load during emergency conditions, as well as the Economic Program under which customers have the incentive to reduce or cut load in response to the appropriate wholesale price signal. The subsidy payment provisions that

¹⁷ *See* 16 U.S.C. § 824e (2000).

¹⁸ 16 U.S.C. § 824e(b) (2000).

sunset on December 31, 2007, do not terminate PJM's demand response program. Demand responders in PJM will still have an economic incentive to reduce load.

25. The only issue in this case is a limited one: whether PJMICC has shown under section 206 of the FPA that the existing PJM tariff provision at issue is unjust and unreasonable. While, as PJMICC notes, we have accepted payment programs proposed by ISOs, we have not mandated that subsidy payments be included, and we cannot find that PJMICC has presented sufficient evidence in this proceeding to warrant a finding that the tariff is not just and reasonable unless it contains one. Besides general statements about the benefits of demand response (with which we agree), the Complaint does not provide evidence that demonstrates that the Economic Program requires that participating customers be eligible for a subsidy payment. PJMICC, for example, makes broad statements about the continued prevalence of market power and low demand elasticity in the PJM market, but provides no solid evidence showing that the subsidy payments are necessary to produce just and reasonable rates.

26. Even without the subsidy payments, the Economic Program provides customers within PJM the incentive to reduce load based on the wholesale rates they confront. For those customers paying retail rates below the applicable wholesale rate, PJM reimburses them for the difference between the wholesale rate and their retail rate. That payment provides customers under retail rates with the same economic incentive to curtail load as if they were paying the wholesale rate itself.¹⁹ It is true that customers currently paying the wholesale price of energy will no longer receive subsidy payments if they curtail load. However, because these customers are paying the applicable wholesale price, they already have an incentive to curtail load.²⁰ PJMICC has provided no evidence showing that the subsidy payments are needed to ensure just and reasonable rates.

¹⁹ That is, the financial benefit without the subsidy payment to a customer that reduces its consumption is equal to the LMP for each MWh of reduction. The financial benefit is comprised of two components: (i) the retail rate that is avoided by not consuming, and (ii) the payment received under the program, which is equal to the difference between the LMP and the retail rate. For example, if the LMP is \$600/MWh and the retail rate is \$50/MWh, the customer who reduced consumption would avoid the \$50/MWh retail charge and would receive a payment under the program of \$550/MWh (i.e., \$600-\$50), for a total financial benefit of \$600/MWh, which is the value of the LMP. But with the subsidy payment, the financial benefit for reducing consumption would exceed the LMP. That is, with the subsidy payment, the customer would receive a payment of \$600/MWh (i.e., the LMP) and in addition would avoid the \$50/MWh retail rate, for a total financial benefit of \$650.

²⁰ Customers will curtail purchases when the cost of the product is greater than the perceived value to them of purchasing the product. Put another way, if the value of

27. PJMICC argues that “little has changed to justify a reduction or erosion”²¹ of the subsidy payments, and that PJM has not demonstrated a sufficient increase in demand elasticity to warrant termination of the subsidy payment portion of the program. In the first place, PJM does not have the burden to justify removal of the subsidy payment provisions; PJMICC has the burden to establish that the tariff without the subsidy payments is unjust and unreasonable. Secondly, the Commission approved the subsidy payments on an interim basis in order to provide customers with an incentive to participate in the demand response program and to provide reimbursement for start-up expenses of such participation. The subsidy payment provisions have been in place for over five years to provide customers with a chance to participate in demand response. We cannot find it unreasonable for the PJM stakeholders to conclude that customers interested in demand response have already had sufficient opportunity to recover start-up costs, so that a subsidy payment is no longer necessary to create an incentive to participate in the program.

28. PJMICC contends that the subsidy payments must be maintained because they are the equivalent of cap and trade pollution systems where those who can reduce pollution will be paid by those who cannot. It maintains the subsidy payment is a payment by those who cannot reduce load to those who can. But trading in cap and trade systems is voluntary among parties, while the demand response subsidy is a mandatory payment.

29. Accordingly, based on this record, we do not find sufficient evidence to require PJM to continue the subsidy payment program. We recognize, however, that properly tailored demand response incentives may produce just and reasonable rates. In this regard, MD PSC has filed a motion requesting that the Commission establish settlement procedures. As previously noted, several other parties have filed comments in support of a Commission facilitated settlement process.²² Yet other parties have indicated that they continue to work closely with PJM on the Economic Program.²³ Because we have denied the complaint, the Commission is without authority under section 206 to order settlement

producing a product, such as steel, is greater than the cost of the electricity and other inputs, it is more efficient for the manufacturer to continue production rather than curtail production. For example, based on the numbers in the prior footnote, under the subsidy payment provision, customers paying LMP-based rates would receive a financial benefit of \$1200 (\$600 avoided cost plus the subsidy payment of \$600), which is twice the LMP, and could lead them to curtail cost-effective production.

²¹ Complaint at 13.

²² See, e.g., New Jersey BPU, PUC Ohio, DC PSC, the Designated FirstEnergy Companies.

²³ See, e.g., Allegheny Protest at 11.

judge procedures. Our action, however, does not preclude the parties from utilizing the Commission's on-call settlement judge or Dispute Resolution Service if they choose to take advantage of it. In this regard, we strongly encourage PJM and the parties to continue discussions to reach agreement on an efficient demand response program, and we look to PJM and its senior staff's participation in a timely and well-ordered process to identify, analyze, and resolve remaining issues on the Economic Program.

The Commission orders:

- (A) The Complaint is hereby denied.
- (B) The Motion of the Maryland PSC is hereby denied.

By the Commission. Commissioner's Kelly and Wellinghoff dissenting with a joint statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Industrial Customer Coalition
v. PJM Interconnection, L.L.C.

Docket No. EL08-12-000

(Issued December 31, 2007)

WELLINGHOFF and KELLY, Commissioners, dissenting:

Today's order addresses a complaint in which the PJM Industrial Customer Coalition (PJMICC) asks the Commission to find unjust and unreasonable the sunset provisions of the PJM tariff pursuant to which certain payments under PJM's Economic Load Response Program (Economic Program) are about to expire. Unfortunately, the Commission responds to PJMICC's complaint by mischaracterizing the payments at issue and squandering the opportunity to develop a more complete record, through hearing or settlement judge procedures, on what compensation is appropriate for demand response providers in PJM's energy market. Therefore, we respectfully dissent.

The Commission's first error is characterizing the payment of the full locational marginal price (LMP) to a demand response provider as a "subsidy". As an initial matter, when the benefits to all customers outweigh the costs, there is no subsidy to be borne by other customers. The record in this proceeding indicates that the benefits of the existing Economic Program, including the payments that are about to expire, outweigh the costs. For example, as noted by several parties, PJM's independent Market Monitoring Unit (MMU) recently stated that the potential market efficiency benefits of increasing demand side responsiveness are large and exceed by a wide margin the relatively small program costs.¹ In addition, several commenters refer to an LMP Impact/Cost analysis performed by PJM that shows that the benefits of demand response outweigh the costs associated with the expiring payments.² Specifically, looking at PJM's actual aggregate supply curve, PJM's analysis found that the benefit of the reduction of 1 MW of supply through use of demand response exceeds the cost of the demand response when the LMP is above \$54 in the Day Ahead Market and above \$125 in the Real-Time Market.³

¹ See, e.g., PJMICC Complaint at 11.

² See, e.g., *id.* at 16, n.49 and 18-19.

³ The Carnegie Mellon Electricity Industry Center, an engineering and public policy center, also recently published a working paper that analyzes the Economic Program. The working paper finds that the social welfare gains of the existing program provide a net benefit to the PJM system. The working paper also finds that the expiring

Second, LMP generally reflects the market value of an energy resource. Payment of LMP to demand response providers participating in PJM's energy market is comparable to LMP payments made to generators. By contrast, offsetting LMP by the demand response provider's "avoided" retail rate ignores the fact that the load-serving entity (LSE) is avoiding generation and transmission costs that it would have incurred to serve the customer providing demand response. Because those costs are avoided by both seller and customer, there is no "subsidy" to recover from other customers. If the LSE would have supplied the customer from its own generation, rather than from the PJM market, the LSE also has the opportunity to sell the "freed-up" energy into the market at LMP.⁴

These facts explain why the Commission previously has not characterized the payments at issue here as a subsidy. In 2002, the Commission recognized that these payments constitute "a short-term incentive that is properly viewed as a form of start-up cost that is needed to help institute this program which provides significant benefits to the entire PJM market."⁵ And earlier this year, the Commission repeated its characterization of an "incentive program".⁶ The Commission does not explain in today's order this stark and unsupported departure from our past policy.

The Commission's second error is squandering the opportunity to develop the record regarding cost-effective and appropriate compensation for demand response in

payments provide a mechanism to correct the under-provision of demand response in the PJM energy market. R. Walawalker, S. Blumsack, J. Apt, S. Fernands; *Analyzing PJM's Economic Demand Response Program*, Carnegie Mellon Electricity Industry Center Working Paper CEIC-07-13.

⁴ It is also problematic that the Commission undertakes, in Footnote 20 of today's order, an estimate of the total benefit to a customer that provides demand response. The majority's illustrative \$600 "avoided cost" estimate is an overstatement of the customer's actual savings from its demand reduction, as this figure would mean that the customer receives \$0 for its steel production. The majority's theory ignores the potential profits that the customer loses by curtailing its energy usage as well as the costs it incurs by altering its manufacturing processes to curtail its energy usage. Lacking precise knowledge of the customer's revenues and costs precludes an accurate estimate of the actual financial benefit to the customer from reducing its load. Therefore, it is not possible to accurately quantify the customer's financial benefit from the incentive payment. Nor is doing so necessary or appropriate, as the primary issue should be the benefit to the electric system, not the customer's financial benefit from participation.

⁵ *PJM Interconnection, LLC*, 99 FERC ¶ 61,227 at 61,935-36 & n.15 (2002).

⁶ *PJM Interconnection, LLC*, 119 FERC ¶ 61,280 at P 27 (2007).

PJM's energy market.

PJMICC is correct that the rationale for the expiring payments is as valid today as it was when the Commission initially approved them.⁷ As noted above, the Commission approved this aspect of the Economic Program as a short-term incentive needed to help institute a program that provides significant benefits to the entire PJM market.⁸ In February 2006, the Commission rejected arguments to eliminate the aspect of the program at issue here.⁹

Consistent with those previous Commission findings, PJM stated in this proceeding that now may not be the proper time to eliminate the payments at issue here because the condition that initially supported the need for these payments still exists and the market needs to mature further.¹⁰ Similarly, the PJM MMU's 2006 State of the Markets Report indicates that PJM's economic demand response market is not yet mature and that "targeted incentive payment structures could be considered."¹¹ The Joint Consumer Advocates of Pennsylvania, Illinois, and Maryland also state that the Economic Program has provided value to customers throughout the PJM Region and that allowing the payments to expire without an effective replacement would compromise this value.¹² Several state regulatory commissions express similar concerns in their filings in this proceeding.¹³

⁷ PJMICC Complaint at 2-3.

⁸ *PJM Interconnection, LLC*, 99 FERC ¶ 61,227 at 61,935-36 & n.15 (2002).

⁹ *PJM Interconnection, LLC*, 114 FERC ¶ 61,201 at P 41 (2006). The Commission also found insufficient evidence of need from those who proposed to extend this aspect of the program. *Id.* P 42.

¹⁰ PJM Answer at 2, 6-7.

¹¹ *Id.* at 7.

¹² *See, e.g.*, Joint Consumer Advocates Comments at 5. In addition, the Joint Consumer Advocates submit that failing to continue the existing payment structure will likely decrease participation in the Economic Program during high-priced hours and diminish the substantial savings to customers that currently result from the program. *Id.* at 6. This concern is consistent with statements made by demand response providers that expiration of some of the Economic Program rules, with no successor provisions known or knowable at this point, makes continuing to enroll customers in economic load response programs exceedingly difficult. *See* ENERNOC Comments at 3-5.

¹³ *See, e.g.*, Maryland Public Service Commission Comments at 2; Pennsylvania Public Utility Commission Comments at 2; Delaware Public Service Commission Comments at 1.

Nevertheless, the Commission today seems to conclude otherwise. Today's order states that the expiring payments have been in place for five years and that it is not unreasonable for stakeholders to conclude that customers interested in demand response have had sufficient opportunity to recover start-up costs, so that the expiring payments are no longer necessary. For the reasons discussed above, that finding is contrary to the preponderance of the evidence in the record to date. It also fails to recognize the continuing need for new entry by demand resources.

At a minimum, the record in this proceeding highlights disputed issues of material fact as to the maturity of demand response in PJM's energy market and whether the expiring payments remain necessary to ensure just and reasonable rates. The Commission should have set the complaint for hearing to develop a more complete record on those important issues. In light of the fact that PJMICC proposed an alternative to the expiring payments, that hearing also could have developed the record on appropriate, cost-effective compensation for demand response providers in PJM's energy market.¹⁴

Finally, by declining to establish further procedures at the Commission, today's order disregards the views of many neutral observers. PJM itself has informed the Commission that its stakeholder process has proven unsuccessful on this issue, and that Commission intervention would be "extremely helpful" to assist its members in resolving the impasse.¹⁵ In addition, many state regulatory commissions support the Commission establishing settlement procedures to resolve these disputed issues.¹⁶ While we recognize the importance of RTO stakeholder processes, under these circumstances the Commission should have taken these parties' advice, set the complaint for hearing, and held that hearing in abeyance to allow for settlement procedures supervised by an Administrative Law Judge. The Commission, however, takes none of these steps. Instead, today's order is built on a mischaracterization and fails to provide the guidance or structure necessary to resolve in a timely fashion the important issue of appropriate compensation to an essential component of a competitive market.

¹⁴ In considering appropriate, cost-effective compensation for demand response, it may be noteworthy that generators participating in PJM's energy market may be eligible to receive payments in addition to LMP that currently are not available to demand response providers. Such consideration may also account for instances in which demand response is incorporated into a transmission planning process.

¹⁵ PJM Answer at 1, 13-14.

¹⁶ The commissions making this point in their filings include the Maryland Public Service Commission, the New Jersey Board of Public Utilities, the Public Utilities Commission of Ohio, and the Public Service Commission of the District of Columbia.

For all of these reasons, we respectfully dissent.

Jon Wellinghoff
Commissioner

Sudeen G. Kelly
Commissioner