

124 FERC ¶ 61,307  
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 Interconnection, L.L.C. Docket No. ER08-1339-000

PJM Interconnection, L.L.C. Docket No. ER08-1345-000

ORDER ACCEPTING AGREEMENTS,  
SUBJECT TO CONDITIONS

(Issued September 30, 2008)

1. On July 31, 2008, in Docket No. ER08-1339-000, PJM Interconnection, L.L.C. (PJM) submitted for filing, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> an executed agreement with Duquesne Light Company (Duquesne) and 13 proposed unexecuted agreements between PJM and each of the remaining load serving entities (LSEs) serving load in the Duquesne zone, addressing the Duquesne zone LSEs' obligations to pay capacity payment charges, as incurred under PJM's Reliability Pricing Model (RPM) protocols (collectively, the Capacity Payments Agreements).<sup>2</sup> PJM states that the Capacity Payments Agreements address the special circumstances presented by Duquesne's request to withdraw from PJM and join the Midwest Independent Transmission System Operator, Inc. (Midwest ISO).<sup>3</sup> PJM proposes that the Capacity Payments Agreements be made effective on the date Duquesne joins the Midwest ISO.

---

<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> The 13 LSEs are: Borough of Pitcairn, PA; Constellation NewEnergy, Inc. (Constellation); Dominion Retail, Inc.; Duquesne Power LLC; FirstEnergy Solutions Corp. (FirstEnergy); Hess Corporation; Integrys Energy Service, Inc.; Linde Energy Services, Inc.; Pepco Energy Services, Inc. (Pepco); Reliant Energy Power Supply LLC (Reliant); Sempra Energy Solutions; Strategic Energy LLC; and Suez Energy Resources NA, Inc.

<sup>3</sup> See *Duquesne Light Company*, 122 FERC ¶ 61,039 (2008) (January 17 Order) (addressing Duquesne's conditional request to withdraw from PJM and join the Midwest ISO); See also *Midwest Independent Transmission System Operator, Inc. and Duquesne*

(continued...)

2. In a separate filing made by PJM on August 1, 2008, in Docket No. ER08-1345-000, PJM submitted an agreement entered into by PJM and the Midwest ISO addressing the portability of PJM's RPM capacity following Duquesne's withdrawal from PJM (Portability Agreement). PJM states that the Portability Agreement complies with the requirements of the January 17 Order. PJM requests an effective date contemporaneous with Duquesne's withdrawal from PJM and integration into the Midwest ISO.

3. For the reasons discussed below, we accept, subject to condition and a compliance filing, the Portability Agreement and the Capacity Payments Agreements, to become effective on the date that Duquesne withdraws from PJM and joins the Midwest ISO.

## **I. Background**

### **A. Duquesne's RTO Withdrawal Request**

4. On November 8, 2007, Duquesne submitted a petition, in Docket No. ER08-194-000, requesting that the Commission grant its conditional request to transfer Duquesne's membership in the PJM regional transmission organization (RTO) to the Midwest ISO RTO, effective May 31, 2008.<sup>4</sup> The Commission, in the January 17 Order, addressed Duquesne's request, including its obligations as a departing LSE, under the PJM Reliability Assurance Agreement (RA Agreement). Specifically, the Commission, in the January 17 Order, found that Duquesne, following its departure from PJM, would remain responsible for its RPM capacity commitments and thus would be required to pay all RPM charges attributable to those RPM auctions in which its load forecasts had been included.<sup>5</sup> However, the January 17 Order also directed PJM to support reasonable mechanisms to permit Duquesne and all other departing Duquesne zone LSEs to utilize

---

*Light Company*, 124 FERC ¶ 61,219 (2008) (September 3 Order) (addressing a revised proposal, including an integration plan, jointly made by Duquesne and the Midwest ISO).

<sup>4</sup> Duquesne's requested withdrawal date was tied to the Midwest ISO's anticipated implementation of certain market revisions, including centralized balancing, as proposed in Docket No. ER07-1372-000, *et al.* See *Midwest ISO Transmission System Operator, Inc.*, 107 FERC ¶ 61,191 (2004). The Midwest ISO's implementation of these market changes (and thus Duquesne's anticipated integration into the Midwest ISO) has since been deferred temporarily by the Midwest ISO. See Notice of the Midwest Independent Transmission System Operator, Inc.'s Deferral of Effective Dates, Docket No. ER07-1372-002, *et al.* (August 26, 2008).

<sup>5</sup> January 17 Order, 122 FERC ¶ 61,039 at P 93. This same obligation extends to all other Duquesne zone LSEs, all of whom will be removed from PJM as a result of Duquesne's withdrawal from PJM.

their RPM capacity in satisfying their Midwest ISO reliability obligations.<sup>6</sup> The January 17 Order also found that because, under the RA Agreement, the payment obligations of a departing LSE are not specifically addressed, it would be acceptable for PJM to allocate the Duquesne zone LSEs' capacity costs based on determinations to be made in the relevant delivery year, i.e., consistent with the RA Agreement approach applicable to all other PJM LSEs.<sup>7</sup>

5. On July 3, 2008, Duquesne and the Midwest ISO made a joint filing, in Docket No. ER08-1235-000, outlining the procedures pursuant to which Duquesne would join the Midwest ISO RTO. In its filing, Duquesne requested clarification that, upon its withdrawal from PJM, it will be permitted to mitigate its RPM exposure by selling, to third parties, any capacity that may not be required under the Midwest ISO's resource adequacy rules. The Commission, in the September 3 Order, declined to rule on Duquesne's request, finding that the use of RPM in the Duquesne zone, following Duquesne's migration, should be considered in the context of PJM's proposed portability provisions, as presented herein.<sup>8</sup>

#### **B. The Portability Agreement**

6. PJM states that the Portability Agreement complies with the requirements of the January 17 Order by describing the procedures for use of RPM capacity committed to the Duquesne zone to satisfy Midwest ISO reliability obligations through May 31, 2011. PJM states that the Portability Agreement gives Duquesne zone LSEs the benefits of the capacity for which they will be paying RPM charges following the transfer of the Duquesne transmission assets from the control of PJM to the control of the Midwest ISO.

7. The Portability Agreement provides, at paragraph 1 (Level of Service), that the level of reliability afforded to the Duquesne zone load, following Duquesne's migration to the Midwest ISO, shall be no less than, and no greater than, that afforded to all other load zones in PJM. Paragraph 1 obligates PJM to take all necessary steps, including emergency procedures, to serve the Duquesne zone load during an emergency through May 31, 2011.<sup>9</sup>

---

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* P 99.

<sup>8</sup> September 3 Order, 124 FERC ¶ 61,219 at P 123.

<sup>9</sup> The Portability Agreement defines an emergency as a North American Electric Reliability Corporation (NERC) EEA Level 1 or above event.

8. Paragraph 2 (Energy Scheduling) provides that PJM will work with Duquesne zone LSEs to ensure that they have the opportunity to schedule, from PJM's energy market, any quantity of energy required to be scheduled under the Midwest ISO's Open Access Transmission and Energy Markets Tariff (TEMT) to serve the loads of such LSEs. Paragraph 2 further provides that any energy scheduled or delivered from the PJM energy market will be subject to all charges and costs under the PJM Open Access Transmission Tariff (OATT). In addition, Paragraph 2 clarifies that the capacity supporting PJM's energy deliveries under the Portability Agreement will not be tagged from, or attributable to, any specific PJM generating units.

9. Paragraph 3 (Emergencies) states that PJM's service to load in the Duquesne zone will be provided via an energy transaction from PJM to the Midwest ISO, the total of which shall not exceed the Duquesne zone's real-time load. Paragraph 3 further provides that PJM shall not provide energy to serve load in the Duquesne zone during a PJM emergency unless the Midwest ISO also is in, or is about to enter into emergency procedures.<sup>10</sup> PJM states that under such circumstances, PJM will make energy available to Duquesne zone LSEs as necessary to serve actual, real-time loads in the Duquesne zone. In addition, Paragraph 3 specifies that Duquesne zone LSEs will have the right, but not the obligation, to purchase energy during a PJM emergency at the prevailing locational marginal price (LMP) and such transactions will not be charged the 150 percent multiplier that is otherwise applicable to emergency transactions under the PJM OATT.<sup>11</sup>

10. Paragraph 4 (No Ancillary Services) clarifies that PJM will be under no obligation to provide any portion of the Duquesne zone load's ancillary service obligations once the Duquesne zone load integrates with the Midwest ISO balancing authority.<sup>12</sup>

---

<sup>10</sup> PJM notes that if PJM has not declared an emergency, Duquesne zone LSEs may purchase energy from PJM under existing PJM OATT provisions (and subject to transmission service limitations) without regard to whether the Midwest ISO is in an emergency, or whether the energy so purchased exceeds the real-time load of the Duquesne zone.

<sup>11</sup> See PJM Operating Agreement, Schedule 1, section 3.5.1.

<sup>12</sup> In addition to the aforementioned paragraphs, the Portability Agreement includes standard contract provisions, including provisions addressing confidentiality, indemnification, third-party beneficiaries, successors and assigns, force majeure, amendments, notices, and governing law.

### C. The Capacity Payments Agreements

11. PJM states that the Capacity Payments Agreements comply with the requirements of the January 17 Order by addressing the obligations of the Duquesne zone LSEs, over the next 32 months (through May 31, 2011), to pay for the capacity procured by PJM on their behalf through PJM's RPM auctions. Each agreement commits a Duquesne zone LSE to pay its allocated share of capacity costs incurred by PJM to serve loads in the Duquesne zone.

12. PJM states that these agreements also address price fluctuations, i.e., the factors that may result in a price change between the date of PJM's RPM auction and the date the capacity at issue is delivered. Specifically, PJM states the Capacity Payments Agreements list the causes that may give rise to such a price change, including price changes attributable to incremental auctions, the certification of interruptible load for reliability, or the rehearing or appeal of the January 17 Order.

13. PJM states that the Capacity Payments Agreements also provide that Duquesne or the Midwest ISO will provide PJM the data needed to allocate capacity costs in the Duquesne zone in the same manner as those allocations are done today. PJM states that the Capacity Payments Agreements make clear that solely for purposes of applying the RA Agreement's provisions on allocating capacity costs and calculating locational reliability charges, the terms "Party" or "LSE" shall include LSEs in the Duquesne zone, regardless of whether the LSE is a signatory to the RA Agreement, i.e., the payment obligations will apply to any new LSE serving load in the Duquesne zone through the applicable obligation period.<sup>13</sup> PJM states that the Capacity Payments Agreements also provide that all existing and new Duquesne zone LSEs shall remain responsible for the charges in the PJM OATT by which PJM recovers its costs of administering the capacity program.<sup>14</sup>

14. PJM states that the Capacity Payments Agreements further provide that the billing, payment, and creditworthiness provisions of the PJM tariffs shall apply to all payments

---

<sup>13</sup> The Capacity Payments Agreements also provide, at section 2.1.2, that Duquesne or the Midwest ISO will use its best efforts to notify PJM of any new LSEs that will serve load in the Duquesne zone in order to allow PJM and those new entrants the opportunity to execute their own Capacity Payments Agreement. PJM states that because all LSEs in the Duquesne zone receive the benefit of the capacity procured under RPM on behalf of the zone, all LSEs should share in the costs of the capacity, consistent with the intent of the RA Agreement to allocate costs as of the delivery year.

<sup>14</sup> The applicable charges are set forth under Schedules 9-5 and 9-6(d)(v) of the PJM OATT.

and obligations made under the agreements. In addition, the Capacity Payments Agreements provide that each Duquesne zone LSE, other than Duquesne, will remain a member of PJM during the term of the agreement, while Duquesne will be treated as a member for the sole purpose of billing and payment.

15. The Capacity Payments Agreements also provide, at section 2.1.3, that nothing in these agreements preclude the LSE from offering capacity resources for sale in any incremental auction for any affected delivery year, subject to compliance with all applicable terms and conditions of the PJM OATT and RA Agreement. The agreements further clarify that those entities with the ability to reduce demand in the Duquesne zone in a way that qualifies as a demand resource under PJM rules may offer that reduction capability into an incremental auction, or may obtain certification as interruptible load for reliability. PJM states that, as such, while payment of RPM charges does not provide any LSE in PJM with a tradable right to any identifiable generation, LSEs do have certain options under the existing RPM rules to monetize their demand. PJM adds that Duquesne zone LSEs that qualify under these programs can mitigate their RPM charges in the same way as any other PJM LSE.

16. The Capacity Payments Agreements provide, at section 3.1, that the agreements will remain in effect until the LSE has satisfied all of its obligations under the agreement, the PJM OATT, the RA Agreement and the PJM Operating Agreement.

17. Finally, the Capacity Payments Agreements provide, at section 3.2, that in the event the Commission or any court on rehearing and/or judicial review of the January 17 Order modifies the January 17 Order to eliminate or reduce Duquesne's obligations to be financially responsible for Duquesne's allocated portion of the just and reasonable costs for capacity acquired on behalf of the Duquesne zone, the Agreement will be terminated and a replacement agreement will be negotiated to reflect the requirements of any such Commission order or court decision.

#### **D. Effective Dates**

18. PJM proposes that the Portability Agreement and Capacity Payments Agreements be made effective on the date Duquesne withdraws from PJM and integrates into the Midwest ISO. PJM clarifies, however, that these agreements are only intended to be effective if and when Duquesne moves to the Midwest ISO.

## **II. Notice of Filings and Responsive Pleadings**

19. Notice of PJM's filings was published in the *Federal Register*<sup>15</sup> with interventions and protests due on or before August 21, 2008, in Docket No. ER08-1339-000, and on or before August 22, 2008, in Docket No. ER08-1345-000. Motions to intervene and notices of intervention were timely filed by the entities listed in the appendix to this order. On August 27, 2008, in Docket No. ER08-1339-000, a motion to intervene out-of-time was filed by Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (collectively, Constellation). On September 23, 2008, in Docket No. ER08-1345-000, a motion to intervene out-of-time was filed by Dominion Retail, Inc. (Dominion).

### **E. Responsive Pleadings Addressing PJM's Proposed Portability Agreement**

20. Comments were submitted by Exelon Corporation (Exelon) and Constellation. Protests were submitted by Duquesne, PSEG Companies (PSEG), FirstEnergy Service Company (FirstEnergy) and Reliant Energy, Inc. (Reliant).

21. First, intervenors raise concerns regarding the interplay between the rights and obligations arising under the Portability Agreement and the resource adequacy requirements and related provisions arising under the Midwest ISO TEMT and PJM OATT. PSEG argues that the respective commitments of PJM and the Midwest ISO, in this regard, should be set forth in the applicable RTO tariffs. Constellation agrees, noting that the Portability Agreement will operate as an exception to the Midwest ISO TEMT provisions addressing (at Module B) source and sink requirements and (at Module E) must-offer obligations. Constellation argues that, as such, the resource adequacy exceptions outlined in the Portability Agreement (and an appropriate sunset date) should be set forth expressly in the TEMT.

22. Similarly, Reliant asserts that the Duquesne zone LSEs' exemptions from the Midwest ISO TEMT should be set forth expressly in the TEMT itself. FirstEnergy adds that the Portability Agreement appears to impose the Midwest ISO's must-offer obligation on Duquesne zone LSEs, even though units in PJM providing RPM capacity to LSEs in the Duquesne zone will already be subject to a must-offer obligation in the PJM day-ahead energy market. FirstEnergy asserts that the Portability Agreement neither addresses nor resolves the issue of how both of these must-offer obligations could be met by the same units in PJM.

---

<sup>15</sup> 73 Fed. Reg. 41,532 and 41,924 (2008).

23. PSEG notes that as it reads the Portability Agreement, PJM will retain responsibility for emergency operations and load-shedding management in the Duquesne zone through the 2011 delivery year. PSEG asserts that, if so, clarification is required regarding the respective roles that will be played by PJM and the Midwest ISO regarding the Duquesne zone load during the period in which Duquesne zone LSEs will continue to have RPM obligations, including the respective roles that will be played by PJM and the Midwest ISO as to NERC functions.

24. Intervenors also raise concerns regarding the scheduling obligations imposed on Duquesne zone LSEs under the Portability Agreement. Reliant argues that a clarification is required that Duquesne zone LSEs will not be responsible for scheduling energy associated with portable RPM capacity to address a Midwest ISO emergency.<sup>16</sup> Exelon argues that while paragraph 2 requires PJM to work with former Duquesne zone LSEs that are required to pay RPM charges to ensure that they have the opportunity to schedule from PJM's energy market any quantity of energy required by the Midwest ISO TEMT, there is no indication regarding how such scheduling will take place during both normal operations and emergencies. Duquesne also seeks clarification that paragraph 2 does not require that PJM RPM capacity be bundled with PJM energy as opposed to Midwest ISO energy. Duquesne submits that the Duquesne zone, following its integration into the Midwest ISO, should have full availability to supply its load from the Midwest ISO energy markets.<sup>17</sup>

25. Exelon also takes issue with the obligation set forth in paragraph 9 (Cooperation) which requires PJM and the Midwest ISO to meet annually to determine whether any changes should be made to "the manner in which the transition of the Duquesne Zone to the Midwest ISO is to progress, to the energy pricing mechanism set forth herein, or the manner in which PJM serves the Duquesne zone load." Exelon seeks clarification that the parties will be required to submit any such changes to the Commission under FPA section 205.

26. Duquesne argues that the Portability Agreement fails to provide capacity purchasers in the Duquesne zone with any rights to resell some or all of the capacity procured under PJM's RPM protocols.<sup>18</sup> Duquesne argues that this capacity should be

---

<sup>16</sup> See also FirstEnergy protest at 8-9.

<sup>17</sup> Duquesne states that it intends to supply a portion of its load from the Midwest ISO spot market and that it will need to buy from that market from time to time to serve changing load.

<sup>18</sup> Duquesne Industrial Intervenors (DII) make the same argument as it relates to the Capacity Payments Agreements. In addition, this argument was raised by Duquesne (continued...)

treated like the asset commodity that it is and thus should be both usable and transferrable whether outside or inside PJM. Duquesne adds that an ability to resell capacity obligations is especially important given that the capacity markets of PJM and the Midwest ISO are structured differently and impose differing capacity requirements on LSEs.

27. Reliant argues that the Midwest ISO should be required to set forth in its tariff the procedures for verifying the amount of each Duquesne zone LSE's monthly capacity resources at least 120 days in advance of the annual March 1 deadline for LSEs to submit resource plans. Reliant further submits that given the complex nature of the issues addressed by the Portability Agreement, Duquesne's integration into the Midwest ISO should be deferred until at least June 1, 2009.

28. FirstEnergy argues that the Portability Agreement should be made subject to a stakeholder process. FirstEnergy also asserts that the Portability Agreement fails to address how PJM's incremental auctions will be handled with respect to the Duquesne zone. Finally, FirstEnergy argues that the Portability Agreement should require that Duquesne hold LSEs in the Duquesne zone harmless with respect to any new costs it may impose on LSEs with respect to scheduling matters.

**F. Responsive Pleadings Addressing PJM's Proposed Capacity Payments Agreements**

29. Comments generally supportive of the Capacity Payments Agreements were submitted by Duquesne, Pepco Energy Services, Inc. (Pepco) and Reliant. A protest was submitted by DII.

30. Pepco asserts that the Capacity Payments Agreements should be approved by the Commission with terms that are materially identical as to each. Pepco further asserts that PJM should be required to re-file these agreements, once they are executed, and make them available on their website. Pepco and Reliant also request certain clarifying revisions to their respective agreements acknowledging certain operational circumstances relevant to each. Pepco requests that section 3.1 (Term) be revised to include the following italicized language: "[t]his Agreement . . . shall remain in effect until [the LSE] has satisfied all of its RPM obligations *for the Duquesne transmission zone through the 2010-2011 Delivery Years* under this Agreement, the PJM [OATT], [RA Agreement]

---

in its Midwest ISO integration plan filing, in Docket No. ER08-1235-000. In the September 3 Order, the Commission held that this issue should be addressed in the context of the Portability Agreement. *See* September 3 Order, 124 FERC ¶ 61,219 at P 123.

and Operating Agreement.” Pepco states that this revision acknowledges the fact that Pepco will remain a PJM member following Duquesne’s withdrawal from PJM.

31. Reliant proposes that a recital be added to the PJM/Reliant Capacity Payments Agreement setting forth that Reliant is responsible for purchasing capacity, energy and ancillary services for retail load served by its affiliate in the Duquesne zone and that PJM procured capacity under RPM for the benefit of the Duquesne zone load currently served by Reliant. Reliant also proposes to revise section 2.1 to clarify that the PJM/Reliant Capacity Payments Agreement does not apply to, or otherwise affect, Reliant’s rights and obligations with respect to load served by its affiliates outside the Duquesne zone. Reliant also proposes to revise section 2.1.4 to state that nothing in the PJM/Reliant Capacity Payments Agreement limits Reliant’s eligibility to remain a member of PJM after its obligations under the PJM/Reliant Capacity Payments Agreement have been satisfied.

32. Reliant also proposes adding a new section 2.2 stating that the parties’ rights and obligations are subject to pending requests for rehearing and clarification of the January 17 Order, other Commission orders, agreements or tariff amendments that may be issued to implement such obligations and rights, and billing adjustments made pursuant to the PJM OATT. Reliant also proposes to revise section 3.2 to provide for termination of the Capacity Payments Agreement in the event of any Commission or court order modifying the parties’ obligations as set forth in the January 17 Order. Reliant also proposes to add a new section 4.11 to the PJM/Reliant Capacity Payments Agreement providing that the FPA just and reasonable standard will apply to any unilateral request seeking to modify the parties’ agreements.

33. In addition, DII proposes that the Capacity Payments Agreements be revised to clarify how the revenues generated from incremental auction sales, or third party sales, will be used to offset an LSE’s capacity costs.

34. PSEG also proposes to revise section 2.1 of the PJM/Duquesne Capacity Payments Agreement to clarify that Duquesne will retain the capacity obligation for other Duquesne zone LSEs until and when PJM can properly verify the transfer of any underlying load obligation to a new LSE and establish that LSE’s capacity obligation. PSEG also proposes that section 2.1.2 of each Capacity Payments Agreement be revised to: (i) remove references purporting to bind the Midwest ISO, or in the alternative add the Midwest ISO as a party; (ii) state that Duquesne shall provide all data and information required by PJM and that Duquesne cannot delegate such responsibility to the Midwest ISO; and (iii) include as an attachment to each agreement, the procedures by which Duquesne will provide data and information to PJM.

35. Finally, intervenors assert that certain tariff revisions will be required in addition to the issues addressed by the Capacity Payments Agreements. DII argues that additional

rules must be adopted for allocating the costs of remarketed capacity to the loads that originally pay for this capacity. Reliant requests that the Midwest ISO be directed to amend the TEMT to require that current and future Midwest ISO market participants serving load in the Duquesne zone be required to execute a Capacity Payments Agreement.

### **G. PJM's Answer**

36. On September 8, 2008, PJM submitted an answer responding to protests and comments regarding both the Portability Agreement and the Capacity Payments Agreements.

#### **1. PJM's Response Regarding the Portability Agreement**

37. PJM responds to intervenors' concerns regarding the appropriate interplay between the parties' obligations under the Portability Agreement and the corresponding obligations arising under the PJM OATT and/or Midwest ISO TEMT. First, PJM responds to PSEG's argument that PJM tariff changes are required to further memorialize PJM's commitments under the Portability Agreement. PJM responds that no such revisions are necessary because, under the Portability Agreement, Duquesne zone LSEs will be granted the same assurances granted to all other LSEs under the PJM OATT and RA Agreement. PJM also responds to Reliant's and FirstEnergy's concerns that the Portability Agreement may not satisfy the resource adequacy obligations of LSEs under the Midwest ISO TEMT. PJM responds that the Portability Agreement is intended to provide a means for Duquesne zone LSEs to fully satisfy these requirements. PJM adds that at a recent stakeholder conference the Midwest ISO provided this same assurance.<sup>19</sup>

38. PJM also responds to PSEG's assumption that PJM, through the delivery year period addressed in the Portability Agreement, will retain responsibility for emergency operations and load-shedding management in the Duquesne zone. PJM clarifies that the Midwest ISO, not PJM, will be the transmission operator and balancing authority for the Duquesne zone, following Duquesne's migration to the Midwest ISO. PJM states that it will simply deliver energy to the Midwest ISO during emergencies as an interchange transaction.<sup>20</sup>

---

<sup>19</sup> PJM answer at 10, *citing* Midwest ISO August 13, 2008 webcast presentation on capacity portability at 3 ([www.midwestiso.org/publish/Document/81d7e\\_11b6e66e758\\_-7bdf0a48324a/8.13.08\\_Duquesne%20Capacity%20Portability%20v2.pdf?action=download&\\_property=Attachment](http://www.midwestiso.org/publish/Document/81d7e_11b6e66e758_-7bdf0a48324a/8.13.08_Duquesne%20Capacity%20Portability%20v2.pdf?action=download&_property=Attachment)).

<sup>20</sup> PJM notes that, as such, the Portability Agreement's reference to curtailment is a reference to a curtailment of this interchange transaction, not the shedding of any loads  
(continued...)

39. PJM also responds to intervenors' concerns regarding the scheduling obligations imposed on Duquesne zone LSEs under the Portability Agreement. First, PJM responds to Exelon's argument that the Portability Agreement is vague and should be clarified regarding scheduling of energy and operations during emergencies. PJM states that these concerns are valid and are currently being discussed by PJM and the Midwest ISO. PJM states that while any resulting proposed changes to the Portability Agreement will be filed with the Commission, certain clarifications can be made here. First, PJM notes that when the RTOs are not in emergency conditions, Duquesne zone LSEs should be free to purchase energy from the PJM energy market, or to choose not to purchase such energy, in the same way as any other market participant.<sup>21</sup>

40. PJM adds, however, that during emergencies, Duquesne zone LSEs should receive the benefits of the capacity procured for the Duquesne zone under RPM, i.e., the assurance that their loads will be served on the same basis as any other PJM loads that pay RPM charges. PJM notes that, in these circumstances, PJM will deliver energy to the Midwest ISO in the amount required to serve Duquesne zone loads, as an RTO to RTO transaction that will not require scheduling by an LSE.

41. Finally, PJM responds to Duquesne's and DII's argument that Duquesne zone LSEs should be allowed to sell any unneeded capacity acquired under PJM's RPM protocols, following Duquesne's migration to the Midwest ISO. PJM responds that these requests would amount to an unwarranted special treatment not available to any other loads in PJM that pay RPM charges. Specifically, PJM notes that PJM's RPM protocols do not grant any LSE a tradable right to any quantity of capacity, i.e., LSEs participating in PJM's RPM auctions have no vested rights in identifiable generation capacity resources that could be re-marketed. PJM further asserts that reliability considerations argue against such an allowance, given that Duquesne's and DII's requests would require PJM to deliver energy under emergency conditions to meet the needs of unknown loads in unknown locations without the benefit of a feasibility study. PJM adds that while RPM capacity cannot be resold, LSEs like Duquesne do have the right to reduce their loads.<sup>22</sup>

---

in the Midwest ISO. PJM adds that, similarly, when the Portability Agreement refers to matching the level of the Duquesne zone loads, its referring to the level of that interchange transaction.

<sup>21</sup> PJM asserts that to the extent Duquesne zone LSEs choose to schedule such purchases, these purchases should be on the same terms as any other market participant.

<sup>22</sup> PJM states that its RPM rules recognize this value by allowing market participants to offer qualifying demand reduction capability into the PJM auctions,

(continued...)

## 2. PJM's Response Regarding the Capacity Payments Agreements

42. PJM responds to Pepco's argument that the Capacity Payments Agreement should be identical for each LSE in all material respects. PJM responds that, in fact, these agreements are identical in all material respects, except as to certain variations applicable to Duquesne, reflecting Duquesne's role as the electric distribution company for the Duquesne zone. PJM notes that any additional variations sought with respect to Duquesne or any other LSE will be submitted for Commission review under FPA section 205.

43. PJM states that it supports the clarifying revisions proposed by Pepco and most of the revisions proposed by Reliant as they relate to these LSEs' individual agreements with PJM. Specifically, PJM states that it supports Pepco's proposed addition to section 3.1 and Reliant's proposed recital and proposed revisions to sections 2.1 and 2.1.4. PJM asserts that these proposed clarifying revisions appropriately reflect the unique operating circumstances applicable to Pepco and Reliant. However, PJM states that it objects to Reliant's proposal to add new section 2.2 and revise section 3.2. PJM notes that the January 17 Order is no longer subject to rehearing on the question of whether the Duquesne zone LSEs must pay for RPM capacity procured by PJM on behalf of the Duquesne zone.<sup>23</sup> PJM also opposes Reliant's proposal to add a new section 4.11, allowing for either party to the PJM/Reliant Capacity Payments Agreement to seek contract revisions, subject to the Commission's just and reasonable standard. PJM asserts that this allowance would inappropriately limit the standard of review that may otherwise be applicable regarding contract reviews that cannot be known or even anticipated at this time.

44. Finally, PJM responds to DII's proposal to clarify how the revenues generated from incremental auction sales, or third party sales, will be used to offset an LSE's capacity costs. PJM argues that the Capacity Payments Agreements are not the source of an LSE's opportunity to participate in the incremental auctions. PJM states that, instead, its existing tariff provides this opportunity on terms applicable to all LSEs. PJM also responds to DII's request that tariff provisions be adopted for allocating the costs of remarketed capacity to the loads that originally pay for this capacity. PJM asserts that because there are no special rules on resale of portable capacity, there need be no special rules on allocation of the revenues from any such sale.

---

including the incremental auctions, as demand resources. *See* PJM OATT at attachment DD, section 5.5.

<sup>23</sup> PJM answer at 12, *citing* September 3 Order, 124 FERC ¶ 61,219 at P 201-13.

## II. Discussion

### A. Procedural Matters

45. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>24</sup> the timely, unopposed motions to intervene and notices of intervention submitted by the entities noted above serve to make them parties to this proceeding. In addition, given their interests, the early stage of this proceeding, and the absence of undue prejudice or delay, we will grant the unopposed late-filed interventions submitted by Constellation and Dominion.

46. Rule 213(a) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest unless otherwise permitted by the decisional authority. We will accept the answer submitted by PJM because it has provided information that assisted us in our decision-making process.

47. FirstEnergy, DII and PSEG request that the Commission consolidate the filings addressed in this order. However, we are not persuaded that administrative efficiency warrants, or otherwise requires, such action here.<sup>25</sup>

### B. Analysis

48. For the reasons discussed below, we accept, subject to conditions and the submission of a compliance filing, the Portability Agreement and the Capacity Payments Agreements, to become effective on the date that Duquesne withdraws from PJM and joins the Midwest ISO. We also grant, as may be necessary, waiver of the Commission's prior notice requirement.<sup>26</sup>

#### 1. The Portability Agreement

49. For the reasons discussed below, we find that the Portability Agreement, subject to conditions, adequately addresses the January 17 Order's requirement that capacity acquired by Duquesne be made portable. The Portability Agreement requires PJM to assume responsibility for the reliability of the Duquesne zone for the years for which PJM acquired capacity through the PJM auction on behalf of the Duquesne zone LSEs. As such, the Portability Agreement provides a means for the Duquesne zone LSEs to

---

<sup>24</sup>18 C.F.R. § 385.214 (2008).

<sup>25</sup> See *National Fuel Gas Supply Co.*, 57 FERC ¶ 61,049, at p. 61,119 (1991).

<sup>26</sup> 18 C.F.R. § 35.3 (2008).

satisfy their Midwest ISO capacity requirements as applicable to this period. To clarify this point, we require PJM to revise paragraph 2 to state expressly that the Portability Agreement satisfies the reliability obligations of Module E through May 31, 2011.

50. With respect to must-offer requirements, we note that the Portability Agreement is silent on whether resources committed to the PJM capacity markets are subject to must-offer requirements, whether imposed under the PJM OATT or the Midwest ISO TEMT. We agree with intervenors that it is not reasonable, or likely possible, for the same capacity to comply, simultaneously, with two must-offer requirements. Therefore, we condition our acceptance of the Portability Agreement on the submission of clarifying language explaining how these must-offer requirements will apply.<sup>27</sup>

51. PJM, in its answer, notes that the Midwest ISO and PJM are currently considering clarifications to the Portability Agreement to address intervenor concerns related to, among other things, capacity qualifications under the Midwest ISO TEMT.<sup>28</sup> PJM, in its compliance filing, should also address this issue.

52. With respect to the intervenors' arguments that scheduling energy during emergencies should be an RTO responsibility, not the responsibility of a Duquesne zone LSE, we agree that the Portability Agreement should be revised to include this clarification. PJM, in its answer, agrees, stating that during emergencies, PJM will deliver energy to the Midwest ISO, as required, as an RTO to RTO transaction.<sup>29</sup> PJM further clarifies that while it will deliver energy to the Midwest ISO in these circumstances, it will be the Midwest ISO, not PJM, that will be the transmission operator and balancing authority for the Duquesne zone, following Duquesne's migration to the Midwest ISO.<sup>30</sup> PJM also notes that it is working with the Midwest ISO to consider the appropriate implementation of these clarifications. Accordingly, we condition our acceptance of the Portability Agreement on the submission of these clarifying revisions.

---

<sup>27</sup> In this submission, PJM and the Midwest ISO should also address Reliant's request that the Midwest ISO verify monthly capacity resources in the Midwest ISO's TEMT (a request that appears to relate to the assignment of must-offer rights under the Portability Agreement).

<sup>28</sup> PJM answer at 8.

<sup>29</sup> *Id.* at 9.

<sup>30</sup> *Id.* at 10.

53. We also agree with Exelon that paragraph 9 of the Portability Agreement requires clarification regarding the authority granted to PJM and the Midwest ISO to revise the agreement on an annual basis. We agree that any such change must be submitted to the Commission in the form of an FPA section 205 filing. Accordingly, we require PJM to include this clarification in its compliance filing.

54. We reject FirstEnergy's argument that Duquesne should be required to hold Duquesne zone LSEs harmless with respect to any new costs that may be imposed on these LSEs under the Portability Agreement.<sup>31</sup> In fact, the potential costs to which FirstEnergy refers are based on asserted obligations that will not arise under the Portability Agreement, as revised herein. As discussed above, PJM will file revisions to the Portability Agreement to clarify the provisions on scheduling of energy and operations during emergencies and the applicability of must-offer requirements. Moreover, even assuming that the Duquesne Zone LSEs would be subject to costs with respect to these functions, we are not convinced that these costs are of a sort that would warrant the imposition of a hold harmless obligation on Duquesne. In the January 17 Order, the Commission found that because RTO withdrawal is expressly permitted under the RTO agreements to which Duquesne is subject, parties were on notice that withdrawal was a possibility and that, in the event of withdrawal, costs of this sort may be incurred.<sup>32</sup>

55. With respect to Reliant's argument that Duquesne's integration into the Midwest ISO should be deferred until June 1, 2009, we note that the Commission has already addressed this issue in the September 3 Order.<sup>33</sup> Specifically, the Commission, in the September 3 Order, conditioned its acceptance of the Duquesne/Midwest ISO integration plan on the submission of additional filings by Duquesne and/or the Midwest ISO, as well as a firm commitment, on the part of Duquesne, to withdraw from PJM. The Commission required Duquesne to give at least 60 days notice of its firm commitment to withdraw.

56. We reject intervenors' argument that tariff changes to the PJM OATT or Midwest ISO TEMT are necessary in order to implement the parties' portability commitments.

---

<sup>31</sup> FirstEnergy identifies potential costs attributable to any dual must-offer obligations that may apply as between PJM and the Midwest ISO and costs associated with any Duquesne zone LSE emergency scheduling obligations.

<sup>32</sup> January 17 Order, 122 FERC ¶61,039 at P 134; September 3 Order, 124 FERC ¶ 61,219 at P 45.

<sup>33</sup> September 3 Order, 124 FERC ¶ 61,219 at P 73.

The Portability Agreement, as a Commission-approved agreement, adequately addresses the parties' obligations. Finally, we disagree with FirstEnergy that the Portability Agreement should be rejected because it was negotiated without adequate stakeholder input. We find that the parties to this proceeding have been provided an adequate opportunity to address all issues presented by PJM's filing.

## 2. Mitigation

57. As noted above, the Commission, in the January 17 Order, directed PJM to consider means of allowing LSEs in the Duquesne zone to mitigate their capacity costs.<sup>34</sup> The Portability Agreement addresses this requirement by providing a means by which LSEs in the Duquesne zone can offset their capacity charge through the 2011-12 delivery year. This opportunity is the same opportunity that is granted to all other RPM participants.<sup>35</sup>

58. Duquesne requests clarification that it will be permitted to transfer any capacity that may not be required under the Midwest ISO's resource adequacy rules to third parties.<sup>36</sup> We reject Duquesne's request. We find that PJM's proposed mitigation is sufficient and provides Duquesne with the same ability to mitigate capacity payments as other members of PJM. Neither the PJM OATT, nor the settlement agreement establishing PJM's RPM protocols, permit or otherwise contemplate any additional rights in this regard.

---

<sup>34</sup> January 17 Order, 122 FERC ¶ 61,039 at P 96.

<sup>35</sup> The PJM OATT at attachment DD, section 5.1 states as follows:

An LSE may offset the Locational Reliability charge for a Delivery Year, in whole or in part, by: (a) Self-Supply of Capacity Resources in the Base Residual Auction; (b) offering and clearing Capacity Resources in the Base Residual Auction or, if one is conducted, a Second Incremental Auction (but only to the extent of the additional resources allocated through such Second Incremental Auction to such Zone); (c) obtaining certification of load reduction capability as ILR three months prior to the start of the Delivery Year; (d) receiving payments from Capacity Transfer Rights; or (e) offering and clearing Qualifying Transmission Upgrades in the Base Residual Auction.

<sup>36</sup> In the September 3 Order, the Commission deferred ruling on Duquesne's request, holding that this issue should be considered in the instant proceeding. *See* September 3 Order, 124 FERC ¶ 61,219 at P 123.

59. Section 2.1.3 of the Capacity Payments Agreements states that LSEs may offer capacity resources for sale in any incremental auction for any affected delivery year. In addition, the Capacity Payments Agreements state that entities with the ability to reduce demand in the Duquesne zone in a way that qualifies as a demand resource under PJM's rules may offer that reduction capability into an incremental auction, or may obtain certification as interruptible load for reliability. Duquesne has not demonstrated why this opportunity to mitigate RPM cost obligations is not sufficient, and why a further tradable right (i.e., a right that is not available to any other load in PJM that pays RPM charges) is necessary. Under the Portability Agreement, PJM is providing reliability for the Duquesne zone based on the capacity acquired by Duquesne zone LSEs in the RPM auctions. Because all of this capacity is being used to provide for the reliability of the Duquesne zone, there will be no excess capacity that can or should be sold to third parties.

### **3. The Capacity Payments Agreements**

60. We accept the Capacity Payments Agreements, effective on the date that Duquesne withdraws from PJM and integrates into the Midwest ISO, subject to the following conditions.

61. With respect to Reliant's and Pepco's proposed revisions to their individual Capacity Payments Agreement, we note that PJM, in its answer, states that it is amenable to the revisions proposed by Pepco, and to most of the revisions proposed by Reliant. We find these revisions to be appropriate. Accordingly, our acceptance of these agreements is conditioned on PJM submitting these revisions in its compliance filing.

62. We also agree that PSEG's proposed revisions to section 2.1 of the PJM/Duquesne Capacity Payments Agreement is reasonable and should be adopted. Specifically, PSEG proposes and we agree that the PJM/Duquesne Capacity Payments Agreement should be revised to clarify that Duquesne will retain the other Duquesne Zone LSE capacity obligations until PJM can properly verify the transfer of any underlying load obligation to a new LSE and establish that LSE's capacity obligation. This clarification is appropriate in order to eliminate the possibility of any unassigned capacity obligations for the Duquesne zone. Accordingly, our acceptance of the PJM/Duquesne Capacity Payments Agreement is conditioned on PJM revising this provision in its compliance filing.

63. We also agree that the obligation of a new Duquesne zone LSE to sign a Capacity Payments Agreement must be appropriately memorialized by the Midwest ISO. While we are not persuaded that a revision to the Midwest ISO TEMT is necessary, in this regard, we agree with PJM that the Midwest ISO can satisfy this requirement by posting the appropriate notice on its website. PJM should provide an update on the status of this matter in its compliance filing.

64. Reliant asserts that any future proposed revisions to the PJM/Reliant Capacity Payments Agreements should be considered by the Commission under the FPA just and reasonable standard of review (a right addressed in Reliant's proposed new section 4.11). We agree. Accordingly, we direct PJM to make this revision in its compliance filing, i.e., to modify this aspect of the PJM/Reliant Capacity Payments Agreement.

65. We reject as unnecessary DII's request to revise the Capacity Payments Agreements to address how the revenues generated from incremental auction sales will be used to offset capacity costs paid by load in the Duquesne zone. As noted above, PJM is offering the same opportunity for Duquesne zone LSEs to mitigate their RPM auction costs that is offered to all other RPM participants. Accordingly, a Duquesne zone LSE that successfully offers a capacity resource into the RPM auctions will receive the revenues for that resource, just as it would today while the Duquesne zone is in PJM.

66. We also reject as unnecessary Reliant's proposal to condition the Capacity Payments Agreements on the January 17 Order and any other relevant Commission orders. The Capacity Payments Agreements, at section 3.2, appropriately address contingencies of this sort.<sup>37</sup> We also reject as unnecessary PSEG's proposal to add the Midwest ISO as a party to the Capacity Payments Agreements. The obligation, under these agreements, to ensure payments for capacity procured by PJM on behalf of Duquesne is a PJM obligation, not a Midwest ISO obligation. We also reject as unnecessary PSEG's proposal to revise the Capacity Payments Agreements to state that Duquesne shall provide all required data and information that PJM needs. Under the agreements, Duquesne or the Midwest ISO will provide these details. As such, it is up to Duquesne and the Midwest ISO to determine how this will be accomplished. The details of this arrangement need not be considered here.

67. Finally, we reject as moot Pepco's request that each Capacity Payments Agreement be uniform in all material respects. In fact, the Capacity Payments Agreements appear to satisfy this standard.

---

<sup>37</sup> Section 3.2 provides as follows:

In the event that FERC or any court on rehearing and/or judicial review of the January 17 Order modifies the January 17 Order to eliminate or reduce [the party's] obligations to be financially responsible for [the party's] allocated portion of the just and reasonable costs for capacity acquired on behalf of the Duquesne Zone, then this Agreement shall be terminated and of no further effect, and the Parties agree to engage in good faith negotiations to negotiate a replacement agreement to reflect the requirements of any such FERC order or court decision.

The Commission orders:

(A) We hereby accept the Portability Agreement and the Capacity Payments Agreements, subject to the conditions discussed in the body to this order, to become effective on the date that Duquesne withdraws from PJM and joins the Midwest ISO.

(B) We hereby direct PJM to make a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

## **Appendix**

### **List of Intervenors** **Docket No. ER08-1339-000**

Allegheny Energy Companies  
Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.  
Duke Energy Corporation  
Duquesne Industrial Intervenors  
Duquesne Light Company  
Exelon Corporation  
FirstEnergy Service Company  
North Carolina Electric Membership Corporation  
Old Dominion Electric Cooperative  
Pennsylvania Office of Consumer Advocate  
Pepco Holdings, Inc.  
Public Service Commission of Maryland  
PSEG Companies  
Reliant Energy, Inc.

### **List of Intervenors** **Docket No. ER08-1345-000**

Allegheny Energy Companies  
Ameren Services Company  
American Electric Power Service Corporation  
Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.  
Consumers Energy Company  
Direct Energy  
Dominion Retail, Inc.  
Duke Energy Corporation  
Duquesne Industrial Intervenors  
Duquesne Light Company  
Edison Mission Energy and Edison Mission Marketing & Trading, Inc.  
Exelon Corporation  
FirstEnergy Service Company  
Illinois Commerce Commission  
Midwest Independent Transmission System Operator, Inc.  
Mirant Parties  
North Carolina Electric Membership Corporation  
Old Dominion Electric Cooperative

Pennsylvania Office of Consumer Advocate  
Pepco Holdings, Inc. (Pepco)  
PSEG Companies  
Public Service Commission of Maryland  
Reliant Energy, Inc.