155 FERC ¶ 61,060
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Viridity Energy, Inc. Docket No. EL12-54-000

v.

PJM Interconnection, L.L.C.

ORDER DENYING COMPLAINT

(Issued April 21, 2016)

1. On March 29, 2012, Viridity Energy, Inc. (Viridity) filed a complaint, pursuant to section 206 of the Federal Power Act (FPA),[1] against PJM Interconnection, L.L.C. (PJM) alleging that PJM's Open Access Transmission Tariff (OATT) and the paraellel provisions of the PJM Operating Agreement are unduly discriminatory, as applicable to the differing classifications and treatment of end-use customers eligible to participate in PJM's Emergency Load Response Program. Specifically, Viridity raised concerns regarding treatment of: (i) an end-use customer that registers with a Curtailment Service Provider (CSP) for capacity market purposes and uses that same CSP for energy and ancillary services purposes; versus (ii) an end-use customer that registers with one CSP for capacity market purposes and a second CSP for energy and ancillary services purposes. Viridity asserts that, under either scenario, the payment made for load reductions should be equal, because the end-use customers at issue are similarly-situated. For the reasons discussed below, we deny the complaint.

I. Background

2. PJM's Emergency Load Response Program provides two options by which an end-use customer can earn compensation for undertaking a mandatory obligation to

[1] 16 U.S.C. § 824e (2012).

reduce its load in response to PJM's request during an emergency.[2] Under the Full Program Option, an end-use customer that registers with one CSP in PJM's capacity program and uses that same CSP for energy and ancillary services will receive both full compensation for the capacity service it provides and a guaranteed energy payment for load reductions during an emergency event equal to the higher of its floor price or the Locational Marginal Price for its load curtailments. Full Program Option customers set the floor price for their energy payment during an emergency event, without the need to make and clear an offer in the energy market.

3. Alternatively, an end-use customer may register as a Capacity Only resource, in which case it will work with one CSP for capacity and may choose to work with a second CSP to provide energy and ancillary services.[3] A CSP that registers a Capacity Only resource receives a capacity payment only. A second CSP that registers this same resource for energy and ancillary services purposes receives an energy payment *only if* that CSP makes and clears an offer in the energy market. CSPs representing end-use customers for energy and ancillary services only may not set a floor price for their bids in the energy market.[4]

II. **Complaint**

4. Viridity asserts that PJM's compensation provisions, as applicable to a Capacity Only resource, are unduly discriminatory because an end-use customer that registers with one CSP for capacity and a second CSP for energy does not receive a guaranteed energy payment when called to reduce load in response to an emergency. As a result, Viridity argues that Capacity Only participants, will not earn the same compensation as the Full Program Option participant, even though, according to Viridity, these entities are similarly situated.

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[2] PJM OATT at Attachment K-Appendix, section 8. The currently effective provisions of section 8 also provide for a Pre-Emergency Load Response Program. *See PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,103 (2014). PJM also allows customers an Energy Only Option, under section 8, permitting an end-use customer to reduce load voluntarily in response to PJM's request; this energy option, however, is not at issue here.

[3] PJM OATT at Attachment K-Appendix, section 8.9 ("Capacity Only resources are Full Program Option resources that do not receive an energy payment for load reductions during a[n] . . . emergency event.").

[4] For the remainder of this order, all references to 'Capacity Only resources' will relate exclusively to end-use customers who work with one CSP for capacity services and also choose to participate in PJM's energy and anciallay services market through a second CSP.

5. Specifically, Viridity states that both are: (i) obligated to curtail load in response to PJM's request during an emergency; (ii) entitled to no more than two hours prior notice; (iii) required to submit their load reduction meter data to PJM within 60 days after the emergency event; (iv) required to forego payment for their participation if they fail to do so; and (v) pay the same penalty charges if they are unable perform. Viridity adds that, in an analogous context, the Commission has rejected proposals to compensate new generators differently than existing capacity suppliers.[5] Viridity argues that, if an end-use customer desires to work with one CSP that specializes in capacity and a second CSP that specializes in energy and ancillary services, it should be permitted to do so without being penalized with respect to the compensation it receives.[6]

6. To address these concerns, Viridity requests that the Commission require PJM to revise its OATT and Operating Agreement to provide that an end-use customer is permitted to register with one CSP for capacity and a second CSP for energy and ancillary services, without forfeiting its rights to receive emergency energy payments, as applicable to the Full Program Option. Specifically, Viridity proposes to add the following language to PJM's OATT at Attachment K-Appendix, section 8.9, addressing PJM's Emergency Load Response Program:

> Regardless of whether the Load Management resource is registered as Emergency Load Response Full Program Option or as a Capacity Only resource, the energy payment for load reductions during an emergency event shall be paid to the [CSP] who has registered the resource in the Emergency Load Response Program. The Load Management Resource shall receive only one energy payment for that load reduction, and will not receive an energy payment for any offer for the same hours in the Economic Load Response Program**.**

In addition, Viridity proposes to add the following new registration clarification, to be included at section 1.5A.3 of PJM's OATT:

> For any end-use customer of an electric distribution company, if a Curtailment Service Provider other than the Economic Load Response Participant has registered the end-use customer in the Emergency Load

[5] Complaint at 9-10 (citing *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 149 (2009) (*Capacity Market Revisions Order*)).

[6] Viridity notes that, for the 2011-12 delivery year, 64 percent of all CSP-registered MW, under the Full Program Option, established a floor price of either $999 or $1,000 per MWh, i.e., at a level that would not have permitted any Capacity Only resource to clear in PJM's energy market and thus receive an energy payment.

> Response Program as a Full Program Option participant eligible to receive an energy payment for load reductions during an emergency event, the Office of the Interconnection shall (i) confirm that an entity has met all of the qualifications to be an Economic Load Response Participant, (ii) notify the Curtailment Service Provider for the customer's Emergency Load Response Program registration that the Economic Load Response Participant has submitted a registration for the same customer, and (iii) request verification that the Curtailment Service Provider for the customer's Emergency Load Response Program registration has no objection to the Economic Load Response Participant's registration. If the Curtailment Service Provider for the customer's Emergency Load Response Program registration verifies that it has no objection to the Economic Load Response Participant's registration, then the Office of the Interconnection shall accept the registration, provided it meets the requirements of this section 1.5A.

III. Notice of Complaint and Responsive Pleadings

7. Notice of Viridity's complaint was published in the *Federal Register*, with answers, interventions and protests due on or before April 18, 2012. PJM submitted a timely answer. Motions to intervene were filed by the entities noted in the appendix to this order. Protests and/or comments were filed by PSEG Companes (PSEG), ENBALA Power Networks (USA), Inc. (ENBALA), Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM (Market Monitor). In addition, a motion to intervene out-of-time was submitted on April 20, 2012 by Dominion Resources Services, Inc. (Dominion). Answers to protests and/or answers to answers were filed by Viridity, on May 2, 2012 and May 22, 2012, and by PJM, on May 4, 2012 and May 17, 2012.

A. PJM's Answer

8. PJM asserts that its existing rules were created at the request of CSPs seeking the flexibility to register end-use customers in PJM's ancillary service market, where these end-use customers had already agreed to be registered by their utilities, acting as their own CSPs, in the capacity market.

9. PJM argues that while its Full Program Option and Capacity Only resource rules differ, as summarized above, the options themselves are voluntary and thus may not be characterized as unduly discriminatory.[7] PJM adds that the distinction between these

[7] PJM April 18, 2012 answer at 9 (citing *Transcontinental Gas Pipe Line Corp.*, 46 FERC ¶ 61,364 at 62,141 (1989) (finding that there was no undue discrimation with respect to certain proposed rate structures where the customers had a choice between the proposed rate structures and the existing sales rate schedules)).

two options is justified, given the measurement and verification needs presented. Specifically, PJM notes that, for reliability purposes, it is required to ensure that the CSP that commits a capacity resource and receives a capacity payment is the same CSP that is responsible for the appropriate curtailment in time of emergency. PJM asserts that, accordingly, its rules are designed to prevent demand resources represented by two different CSPs from submitting duplicate offers for the same megawatts, for the same time period, into any PJM market. PJM states that duplicate offers could indicate to PJM's operators that they will be getting twice the demand reduction than is actually available (which may cause reliability issues), while market participants could end up paying twice for the same reduction.

10. PJM asserts that Viridity's requested remedy lacks the measurement and verification protections necessary to ensure successful integration into operations and settlement. Specifically, PJM argues that Viridity's proposed remedy fails to address how PJM would settle with an Economic Load Response Program CSP when that entity clears in the day-ahead market, but, upon declaration of an emergency, receives an emergency energy payment. PJM adds that Viridity has also failed to address how PJM would settle with the Economic Load Response CSP if its resource is dispatched in real-time, and is then subsequently dispatched for an emergency event.

11. Finally, PJM asserts that Viridity's proposal would also require the formulation and adoption of revised aggregation rules, given that CSPs are currently permitted to benefit from registration aggregation and dispatch portfolio aggregation.[8] PJM argues that, currently, resources dispatched by PJM may represent many different customers, with PJM unable to know on a real time basis which CSP represents which customer.

B. Protests and Comments

12. PSEG agrees with PJM that any differences in the treatment of CSPs under PJM's Emergency Load Response Program appropriately reflect the type of services that participants elect to provide. PSEG notes that Capacity Only resources receive payments for capacity from the capacity market, while demand response resources that participate as Energy Only resources are paid the appropriate compensation for participating in those markets. PSEG asserts that both Full Program Option and Capacity Only resources can receive an energy payment during an emergency event, and that the only difference is that Capacity Only resources must also offer into the energy market and therefore have

[8] PJM explains that registration aggregation allows several locations, representing either individual end-use customers or premises, to be aggregated together on a registration such that small locations can participate in PJM's markets. Dispatch portfolio aggregation, allows multiple registrations to be aggregated together into one dispatch portfolio to allow a CSP more aggregation flexibility to manage their resources.

incentives to make bids based on market conditions. PSEG argues that this is similar to the current market construct for generators, which requires generation capacity resources that are dispatched for emergency conditions to submit energy market bids. PSEG asserts that Viridity seeks, in effect, an unwarranted preferential treatment by obtaining payments for energy without having to offer the energy into the market.

13. The Market Monitor argues that, in addition to the issues raised by Viridity's complaint, the complaint raises a broader concern regarding above-market emergency energy payments made to Full Program Option resources at levels significantly above market prices.[9]

C. Additional Answers

14. Viridity responds to PJM's argument that participation in the Full Program Option or the Capacity Only option is voluntary – a choice to be exercised by any customer seeking to provide these demand response services. Viridity argues that, in fact, there is no realistic or practical choice, following the elimination of PJM's Interruptible Load for Reliability Program, as of the 2011-12 delivery year.[10] Viridity explains that this program enabled a customer working with any CSP to obtain compensation closely tied to the clearing price in the base residual auction and did not require registration until only months in advance of the relevant delivery year. Viridity asserts that, as such, the customer seeking to participate in the energy and ancillary services markets could choose a CSP based solely on that CSP's ability to represent its interests in those markets, without regard to the customer's capacity market interests.

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[9] The Market Monitor asserts that this overpayment results in strong incentives to seek overcompensation through emergency energy payments equal to the greater of the Locational Marginal Price or a submitted minimum dispatch price, which, in most cases is set at $1,000 per MWh. The Market Monitor argues that the appropriate energy payment for a load reduction during an emergency event is the hourly Locational Marginal Price.

[10] Under PJM's prior capacity market rules, a portion of PJM's reliability requirement was procured by PJM as Interuptible Load for Reliability capacity, permitting qualifying resources, under this program, to offer their capacity as late as three months prior to the relevant delivery year. Under that set-aside, PJM adjusted its demand curve to take into account a projected aggregated level of Interruptible Load for Reliability capacity. In a March 2009 order, the Commission conditionally accepted PJM's proposal to replace this set-aside with a short-term resource procurement target, to be acquired by PJM in its incremental auctions. *See PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 83 (2009) (2009 Capacity Revisions Order).

15. Viridity notes that, currently, a demand response resource can receive full compensation for the capacity it provides to PJM only if the demand resource chooses a CSP three years is advance of the relevant delivery year. Viridity adds that an end-use customer that registers with a new CSP for energy services will sacrifice a substantial portion of its capacity compensation because that new CSP would not have participated in the relevant (prior year) base residual auction and thus will not be allowed to offer auction-based compensation, as available to Full Program Option participants.

16. Viridity also addresses PJM's concern regarding Viridity's proposed treatment of a day-ahead offer that clears followed by the declaration of an emergency event covering those same hours.[11] Viridity states that it is willing to withdraw its proposed language as may be necessary to leave in place PJM's existing energy payment methodology. Viridity argues that the aggregation issues raised by PJM in its answer, i.e., the inability for PJM to know in real time which CSP represents which customer, is a complication that could arise with either one CSP or two.

17. PJM characterizes Viridity's argument regarding the Interruptible Load for Reliability Program as beyond the scope of this proceeding. PJM adds that, regardless, there is no relevant distinction between this Program and demand resource participation in the Emergency Load Response Program regarding the timeframe in which individual demand resources make their CSP choice and determine whether they will register as a Capacity Only resource or choose the Full Program Option. PJM asserts that Viridity's characterization of the CSP registration alternatives as unattractive does not make the existing rules unduly discriminatory.

18. PJM adds that, under Viridity's proposal, if a day-ahead bid is cleared and PJM also declares an emergency for the same hours, the Emergency Load Response CSP would receive the energy payment and the Economic Load Response CSP would receive no energy payment. PJM states this is contrary to PJM's existing Operating Agreement rules because PJM pays compensation based on the day-ahead commitment and not Emergency Load Response Program rules.

19. PJM also states that Viridity's proposal would penalize the Economic Load Response CSP for a commitment made in the day-ahead market by requiring the CSP to meet its day-ahead commitment through the purchase of energy in real-time, which may

[11] Viridity, in its complaint, proposes that, for both Full Program Option and Capacity Only resources, the energy payment for load reductions during an emergency event be paid to the CSP that has registered the resource in the Emergency Load Response Program, with the Load Management Resource receiving only one energy payment for that load reduction.

result in a loss to the CSP, in addition to the assessment of balancing operating reserve charges for not delivering the committed load reductions. Finally, PJM responds to Viridity's assertion that PJM's measurement and verification concerns arise under PJM's current rules because there is only one CSP in effect with respect to energy payments. PJM argues that, under its current rules, it is never in the position of having to decide which CSP receives an energy payment.

IV. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. In addition, given its interest in the proceedings, the early stage of the proceedings, and the absence of undue prejudice or delay, we grant the unopposed, late-filed intervention submitted by Dominion. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest and/or answer unless otherwise ordered by decisional authority. We will accept the answers submitted by Viridity and PJM because they have provided information that assisted us in our decision-making process.

V. Discussion

21. For the reasons discussed below, we deny Viridity's complaint. Viridity has not shown that PJM's existing OATT is unduly discriminatory in its clasification and treatment of Full Program Option resources and Capacity Only resources.

22. As the Commission has held, a finding of undue discrimination may be supported by a showing that there is a difference in rates or services among similarly situated entities that is not justified by some legitimate factor.[12] Here, however, as PJM notes, the distinctions in compensation accorded to a Full Program Option resource and a Capacity Only resource under the relevant provisions of PJM's Emergency Load Response Program are justified by the need to avoid errors in measurement and verification by preventing end-use customers represented by two different CSPs from inadvertently (or intentionally) submitting duplicate offers for the same MWs covering the same time period. Duplicate offers, as PJM notes, could create reliability problems by erroneously indicating to PJM's operators that they will be getting twice the demand reduction that is

[12] *Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,148, at P 34 (2010).

actually available during an emergency condition.[13] As PJM further notes, market participants, in this circumstance, could be required to pay twice for the same reduction.[14]

23. To be clear, under PJM's current dispatch protocols, PJM does not know in real time which CSP represents which customer and thus must be able to rely on a rule that, absent a Capacity Only arrangement, allows that there will be only be a single CSP. In this way, PJM's existing rules protect against gaming and thereby promote successful integration of demand response resources into PJM's operations and settlement protocols. Accordingly, we find that a legitimate basis exists, in this context, for treating a resource with one CSP differently from a resource choosing to use two CSPs.

24. Viridity challenges the measurement and verification rationale on which PJM relies on the grounds that PJM's apparent underlying concern (i.e., its lack of knowledge on a real time basis regarding which CSP represents which customer) is a concern that would apply whether there is only one CSP is involved, or two CSPs. We disagree. The concern raised by PJM regarding the submission of duplicate offers, as PJM points out, is not present under the Full Program Option where there is only one CSP involved

25. Moreover, Viridity has failed to demonstrate that the existing tariff unduly discriminates between two different classes of customers. Under PJM's tariff, the end user can choose to use one CSP (and receive both capacity and automatic energy payments, with the possibility of being limited to the floor price), or use two CSPs (and receive only the capacity payment) and then seek an energy payment through an offer in the energy market. Viridity argues, in effect, that a customer given these options is being unduly discriminated against because the options, as their name implies, have qualitative differences. As the Commission has held, however, there is not necessarily undue discrimination simply because a customer is permitted to choose.[15]

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[13] *See* PJM April 18, 2012 answer at 5.

[14] *Id.*

[15] *Transcontinental Gas Pipe Line Corp.*, 46 FERC ¶ 61,364 at 62,141 (no undue discrimination where the customer has a choice between the proposed rate structure and an existing rate schedule). *Accord PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,172, at P 21 (2012) (*Regulation Market Order*). In the *Regulation Market Order*, the Commission accepted PJM's proposed establishment of a Regulation Only registration allowance, permitting an end-use customer to utilize an additional CSP covering other services, subject to restrictions. Specifically, the Commission noted that, when an end-use customer registers as Regulation Only, a second CSP, as used to provide Economic Load Response, would be precluded from providing other ancillary services because it could lead to an overlap of the same MW from the same end-use customer in two

(continued…)

26. Viridity argues that PJM's 2009 elimination of the Interruptible Load for Reliability Program (and its set-aside structure, allowing for late registration close to the delivery year, as summarized above) effectively rescinded any realistic choice between the two programs at issue here (the Full Program Option and the Capacity Only), further contending that under PJM's currently effective rules, a demand resource can receive full compensation for the capacity it provides only if it chooses a CSP three years in advance of the relevant delivery year. We disagree, however, that the justness and reasonableness of the CSP requirements at issue here turns solely, or necessarily, on the issue of whether Viridity has participation options that are closer in time to the relevant delivery year. PJM's elimination of its set-aside does not prohibit a participant from choosing whether to use either one or two CSPs, and either of those choices have potential advantages and drawbacks, as discussed above.

27. Nor are we persuaded that Viridity's complaint must be granted, simply because the Commission rejected PJM's proposal to compensate new generators under a methodology that differs from that applicable to existing capacity suppliers.[16] In that case, the Commission determined that PJM's proposed compensation methodology was not just and reasonable; here, by contrast, we have found that the differential treatment as between Full Program Option participants and Capacity Only resources is justified for the reasons discussed above, as well as on reliability grounds -- by PJM's need to ensure that it can rely on the load reductions it has requested.

28. Finally, we dismiss as beyond the scope of this proceeding, the Market Monitor's concern that Full Program Option participants may be over-compensated by receiving the floor price, as opposed to a mechanism that relies on hourly prices.

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different markets. Viridity, in that proceeding, opposed a prohibition on the participation of Regulation Only registrants in other ancillary service markets, arguing that such an approach would cause disparate treatment of customers that choose to work with multiple CSPs. The Commission, however, accepted PJM's proposal, finding that an end user can choose the CSP it prefers, while CSPs can compete with respect to the type and scope of services they choose to provide. *Id.*

[16] *See* 2009 Capacity Revisions Order, 126 FERC ¶ 61,275 at P 149.

The Commission orders:

The complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix

Intervenors

American Electric Power Service Corporation
American Municipal Power, Inc.
Comverge, Inc.
Dominion Resources Services, Inc. *
Duke Energy Corporation
ENBALA Power Networks (USA), Inc.
Exelon Corporation
Monitoring Analytics, LLC, acting as the
Independent Market Monitor for PJM
New Jersey Board of Public Utilities
North America Power Partners, LLC.
Old Dominion Electric Cooperative
PJM Interconnection, L.L.C.
PJM Power Providers Group
PSEG Companies

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* late intervention