

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C.

Docket No. ER04-608-002
ER04-608-003
ER04-608-004
EL05-127-000

ORDER INSTITUTING INVESTIGATION, AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued July 6, 2005)

1. In this order, the Commission is instituting an investigation, and establishing hearing and settlement judge procedures, to examine the justness and reasonableness of PJM's tariff provisions governing its behind-the meter (BTM) program under section 206 of the Federal Power Act (FPA).¹ The proceeding is to examine whether PJM should expand the BTM generation netting program to include BTM generation connected to electric distribution systems. The order benefits customers by ensuring that similarly situated entities are treated similarly, in compliance with the FPA.

I. Background

2. PJM operates an integrated transmission system and charges its members for energy, capacity, transmission service, ancillary services, and PJM administrative fees, as appropriate, based on those members' use of the transmission system. On March 1, 2004, under section 205 of the FPA, PJM filed proposed tariff revisions to allow market participants operating BTM generation to net that generation against load at the same electrical location for the purposes of calculating the applicable PJM charges. Such

¹ 16 U.S.C. 824(e) (2000).

netting would reduce the load attributed to qualifying entities, thereby reducing their allocation of cost responsibility for the interstate transmission system.

3. Under PJM's current definition, BTM generation consists of "units that are located with load at a single electrical location such that no transmission or distribution facilities are used to deliver energy from the generating unit to the load."² PJM asserted that this netting program was appropriate, in that it would encourage demand response, and also because it would "reduce[] the cost to those market participants that rely to a lesser degree on the PJM integrated transmission system," and that, as a result of the netting program, entities serving load with BTM generation would be "allocated a fairer share of the costs associated with the operation of the PJM integrated transmission system."³

4. Several parties protested, as unduly discriminatory, PJM's elimination of municipal generators from the category of market participants that could net BTM generation against load. PJM responded that its BTM netting program rules did not discriminate against municipal generation, because BTM netting was not available to *any* generation that was connected with a distribution system, not just to municipal generation. PJM contended that municipal systems often are configured in such a manner that behind the meter generation actually makes use of the transmission system.⁴ PJM further stated that extension of the BTM netting program to such generation "could result in municipal systems, and other similar distribution systems, being allotted less than their fair share of charges associated with use of the transmission system and ancillary services."⁵

5. PJM further noted that, given the amount of municipal generation in PJM, the potential for including that generation in the BTM netting program could result in far more generation being designated as BTM generation than had been anticipated, and that classifying such high volumes of generation as BTM generation could potentially cause reliability problems. PJM stated, however, that despite these potential difficulties, its stakeholders recognized that some generation associated with distribution systems, might appropriately come within the BTM netting program, and it asked the Commission to

² *PJM Interconnection, Inc.*, 107 FERC ¶ 61,113 at P 4 (2004) (May 6 Order).

³ PJM's March 1, 2004 transmittal letter at 7.

⁴ PJM's April 6, 2004 answer to protests at 3-4, emphasis added.

⁵ *Id.* at 4.

allow its stakeholder process to go forward, rather than ruling on the issues raised by the municipal protestors.

6. In an order issued May 6, 2004, the Commission approved PJM's proposal as just and reasonable. It found that the municipal protestors had not sufficiently demonstrated that municipal generation was sufficiently similarly-situated to directly connected load that it should also be allowed to participate in PJM's netting program, and that "unlike industrial generators, the municipal generators have failed to show that their generation does not make use of the transmission system, such that they should be relieved of paying the applicable charges."⁶ The Commission, however, directed PJM to file, by January 1, 2005, a status report informing the Commission of the results of its stakeholder process examining whether municipal generators should be accommodated by the program. In an order denying rehearing,⁷ the Commission again noted that PJM would be continuing to consider this issue through its stakeholder process, and reiterated its requirement that PJM file a status report with the Commission on the results of this stakeholder process.⁸ The Commission further stated that in this status report, PJM must justify any continued exclusion of municipal generation from the "total netting" treatment, especially if the generators can demonstrate that some of their generation does not use PJM's integrated transmission system, so that the Commission could determine whether a further proceeding is necessary to review behind the meter generation program issues.⁹

7. PJM filed three status reports. On January 3, 2005, PJM stated that the BTM stakeholder process was not yet complete, but that a working group was addressing the issue. PJM reiterated that it was concerned about possible reliability problems if it expanded the BTM netting program, but it also expressed its concern that the working group's proposal "assure all customers that netting of BTM will not unfairly shift costs to other users of the PJM transmission system."¹⁰ On February 28, 2005, PJM filed a second status report stating that another proposal would be submitted to stakeholders in its March 17, 2005 Members Committee meeting and that it "will permit participation in the behind the meter program by all eligible customers on the same terms and conditions,

⁶ May 6 Order at P 30.

⁷ *PJM Interconnection, Inc.*, 108 FERC ¶ 61,302 (2004) (September 22 Order).

⁸ *Id.* at P 17.

⁹ *Id.*

¹⁰ *Id.*

including municipals and electric cooperatives. It will provide the ability to have [BTM] generation netted from capacity and network transmission service obligations.”¹¹

8. On March 18, 2005, PJM filed a third status report. It stated that on March 17, 2005, it had presented the proposal to its members, and the proposal had not passed by the requisite two-thirds majority. PJM further stated that, while previously PJM had been concerned that including some municipal generation in the BTM program might cause reliability problems, its March 17 proposal would resolve those concerns. Under the proposal, municipal and cooperative generation that delivers energy to load without using the transmission system, but which uses distribution facilities (with the consent of the owner of those facilities), can qualify as behind the meter generation. To address the reliability concerns that would arise from the higher volume of generation that would result from permitting greater participation in the BTM netting program, PJM proposed a revised mechanism for netting BTM generation from an entity's transmission and capacity obligations, which would apply to all entities with behind the meter generation (current participants as well as municipals and electric cooperatives). PJM stated that in light of its members' rejection of the March 17 proposal, PJM would not seek to expand the current BTM netting program as approved by the Commission on May 6, 2004, since, without the changes in PJM's current proposal, PJM's reliability concerns would be left unaddressed.¹²

9. PJM additionally noted that, when it filed its initial application for the BTM generation program, it was concerned that some generation attached to municipal distribution systems might make use of the transmission system, in that generation might flow onto the transmission system at one location and reenter the municipal system at another location. In that circumstance, allowing that generation to participate in the BTM netting program might result in the municipal system in question being allotted less than its fair share of charges associated with the use of the transmission system. However, PJM stated, in its March 17 proposal, “[t]his issue is addressed . . . by retaining the requirement that no transmission facilities may be used to deliver behind the meter generation to load.”¹³

¹¹ February 3, 2005 status report at 2.

¹² *Id.* at 5.

¹³ *Id.* at 2 n. 1.

Protests of PJM's Status Reports

10. Notice of PJM's January 3, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 3,012 (2005), with comments, protests, and interventions due on or before January 24, 2005. North Carolina Electric Membership Corporation and Public Power Systems, Inc. (PPS) filed timely motions to intervene. Notice of PJM's February 28, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 12,863 (2005), with comments, protests, and interventions due on or before March 21, 2005. Notice of PJM's March 18, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 17,081 (2005), with comments, protests, and interventions due on or before March 31, 2005.

11. In response to the January 3, 2005 filing, American Municipal Power-Ohio, Inc. (AMP-Ohio) and PPS filed protests arguing that PJM's report fell short of the Commission's directives by not stating whether PJM could expand the netting program, and failing to justify continued exclusion of municipal BTM generation from PJM's netting program.

12. AMP-Ohio, PPS and the City of Geneva, Ohio protested the March 18 status report. AMP-Ohio and PPS argue that PJM has failed to justify continued exclusion of municipal generation from the netting program. They stress that, under the revised language contained in PJM's March 17 proposal, participation in the BTM netting program would be allowed only for municipal and electric cooperative BTM generation that delivers energy to load without using the transmission system.¹⁴

13. In an Answer to PPS's Protest of PJM's March 18, 2005 report, PJM Industrial Customer Coalition (PJMICC) stated that PJM's status reports meet the obligation placed on PJM to justify continued exclusion of municipal and cooperative generation from the BTM generation netting program. PJMICC argues that municipal generation is not

¹⁴ See PPS protest at 15-16, *citing* redlined version of section 1.5B of the Operating Agreement, posted at www.pjm.com under the Members Committee presentation materials for the March 17, 2005 meeting:

Behind The Meter Generation refers to a generating unit . . . that delivers energy to load without using the Transmission System, or any distribution facilities (unless the entity that owns or leases the distribution facilities has consented to such use of the distribution facilities and such consent has been demonstrated to the satisfaction of the Office of the Interconnection)[.]

similarly situated to generation owned by industrial customers, and PJM is therefore not engaging in undue discrimination by excluding that generation from the BTM netting program.

II. Discussion

A. Procedural Issues

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions of North Carolina Electric Membership Corporation and PPS to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a) (2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2) (2003), prohibits an answer to a protest unless otherwise permitted by the decisional authority. We are not persuaded to accept PJM's answer and will, therefore, reject it. PJM has fulfilled its obligation to file the required status report, and the Commission therefore accepts PJM's three status reports.

B. Investigation under Section 206

15. The PJM stakeholder process has failed to answer the question of whether it is unduly discriminatory for PJM, after development of the March 17 proposal, to continue to exclude generation connected to a distribution system from the BTM netting program. We therefore are establishing a hearing under section 206 of the FPA in Docket No. EL05-127-000 to examine this issue and are establishing settlement and hearing judge procedures.

16. PJM initially proposed to apply its netting approach only to generators at a single electrical location, to ensure that the netting program only included generation that does not use the transmission system. The Commission accepted the filing as just and reasonable. However, the municipal protestors claimed that PJM's tariff was unjust and unreasonable and unreasonably discriminatory, because it did not include other parties whose generation, while not located together with load, also did not use the transmission system. As the Commission explained in the September 22, 2004 Order, such a change to an existing just and reasonable tariff falls under section 206 of the FPA.¹⁵ However, because PJM had indicated that there may be situations in which municipal generators do

¹⁵ The protestors had not provided sufficient evidence at that time to warrant the Commission instituting a section 206 proceeding to change PJM's tariff.

not make significant use of the transmission grid, and was continuing to study this issue, the Commission required PJM to file additional updates on its consideration of the issue.¹⁶

17. Based on its filings, PJM has not satisfactorily shown that BTM generation that is connected to load through a distribution system should be excluded from the netting program. The representations in its March 18 status report suggest that these generators may, in some circumstances, qualify for the program. In its March 18 status report, PJM stated that the March 17 proposal prepared by its staff would enable certain municipal and cooperative generation to participate in the BTM netting program, in that the proposal limited participation to “generation that delivers energy to load without using the transmission system, but which uses distribution facilities.”¹⁷ PJM further stated that this proposal included a revised mechanism for netting BTM generation from an entity's transmission and capacity obligations that would address PJM's reliability concerns.¹⁸ The PJM stakeholders, however, did not approve this proposal. Without additional information in the record as to PJM's proposal, or as to the extent to which the municipal distribution-connected generation is similarly situated to the directly-connected industrial generation, we cannot make a finding as to whether PJM's BTM netting program is currently just and reasonable.

18. The Commission therefore finds, pursuant to its authority under section 206, that PJM's current tariff that excludes from the BTM program all generation that is connected to load through a distribution system may not be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. We therefore set PJM's tariff provisions covering its BTM netting program for settlement judge proceedings and hearing.

19. At the hearing, the parties need to consider whether generation that is not located together with its load should categorically not be permitted to participate in the BTM generation netting program, or else why certain generation not located together with its load (whether it is connected to load by a single radial line, or serves load through the use of distribution facilities, or otherwise) should be permitted to participate in the BTM generation netting program. If parties assert that generation not located together with its

¹⁶ September 22 Order at P 17.

¹⁷ March 18 status report at 3.

¹⁸ *Id.*

load should qualify under some circumstances, they should also address the standards for determining when such generation should qualify.

20. Finally, assuming *arguendo* that the scope of netting should be expanded to include municipal generators, PJM previously asserted that it may be appropriate for PJM to treat municipal generators differently from generators located together with industrial customers, because allowing such municipal generators to participate in BTM netting will cause reliability problems for PJM by reducing the capacity obligations of municipalities.¹⁹ The parties at the hearing need to explore whether the reliability concerns raised by PJM are relevant to the question of netting to determine responsibility for the costs of the transmission system or whether such concerns can be addressed in other ways.

21. Pursuant to section 206(b) of the FPA, the Commission must establish a refund effective date that is no earlier than 60 days after the publication of notice of the Commission's intent to institute a proceeding, and no later than five months subsequent to the expiration of the 60-day period. The Commission will establish a refund effective date of 60 days from publication of notice of the Commission's initiation of a hearing. The Commission is also required by section 206 to indicate when it expects to issue a final order. The Commission expects to issue a final order in this section 206 investigation within 180 days of the date this order issues.

The Commission orders:

(A) The Commission accepts PJM's January 3, February 28 and March 18 status reports.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), an investigation is hereby instituted, in Docket No. EL05-127-000, concerning the continued justness and reasonableness of PJM's previously-accepted rate filing with respect to the BTM generation netting program, as discussed in the body of this order.

¹⁹ See PJM's April 6, 2004 answer at 4-5.

(C) The Secretary shall promptly publish in the Federal Register a notice of the Commission's initiation of the proceeding ordered in Docket No. EL05-127-000 in Ordering Paragraph (B) above.

(D) The refund effective date in Docket No. EL05-127-000, established pursuant to section 206(b) of the Federal Power Act, shall be sixty (60) days following publication in the Federal Register of the notice ordered in Ordering Paragraph (C) above.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in the proceeding ordered in Ordering Paragraph (B) above within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge.

(F) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussion, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every thirty (30) days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(G) If the settlement judge procedures fail, and a formal hearing is to be held, a presiding judge to be designated by the Chief Judge shall convene a conference in this proceeding to be held within approximately fifteen (15) days of the date the Chief Judge designates the presiding judge, at a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20427. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

Linda Mitry,
Deputy Secretary.