

128 FERC ¶ 61,051  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

Pepco Energy Services, Inc.

Docket No. EL08-58-000

v.

PJM Interconnection, L.L.C.

ORDER ON COMPLAINT

(Issued July 16, 2009)

1. In this order, the Commission grants a complaint of Pepco Energy Services, Inc. (PES), finding the market rules governing the peak-hour-period availability charge for infrequently-run generators unjust and unreasonable under section 206 of the Federal Power Act (FPA).<sup>1</sup> We establish a just and reasonable rate to be applied as of the refund effective date of April 22, 2008. However, we deny PES' request to make this rate applicable to conduct occurring prior to the refund effective date.

**I. Background**

**A. Procedural Background**

2. On April 22, 2008, PES, pursuant to sections 206 and 306 of the FPA,<sup>2</sup> and Rule 206 of the Commission's Rules of Practice and Procedure,<sup>3</sup> filed a complaint (PES Complaint) alleging that the provisions of PJM Interconnection, L.L.C.'s (PJM) open access transmission tariff (Tariff) governing the peak-hour-period availability charge for infrequently-run generators under PJM's reliability pricing model (RPM) are unjust and

---

<sup>1</sup> 16 U.S.C. § 824e (2006).

<sup>2</sup> 16 U.S.C. § 825e (2006).

<sup>3</sup> 18 C.F.R. § 385.206 (2007).

unreasonable. On July 2, 2008, the Commission issued an order holding the PES complaint in abeyance pending a report on stakeholder deliberations regarding this issue.<sup>4</sup> The Commission recognized that PJM already had started a stakeholder process to consider possible changes to the market rules governing the peak-hour-period availability metrics for infrequently-run generators and therefore determined to allow those deliberations some time to proceed. The Commission required PJM to file a report on the disposition of the stakeholder discussions, by the earlier of December 31, 2008, or thirty days from the date the stakeholder process concludes.

3. On October 31, 2008, the Commission issued an order clarifying that in deferring the complaint, the Commission had not taken any position with respect to the peak-hour-period availability charges for infrequently-run generation resources for the 2007-2008 and 2008-2009 delivery years.<sup>5</sup> The Commission stated it would rule on PES' complaint after PJM filed its report on December 31, 2008 with the results of the stakeholder process.

#### **B. Peak-Hour-Period Availability Charge**

4. In PJM's capacity market, resources that commit to provide capacity when dispatched by PJM are paid a rate determined by a capacity auction. In determining the amount of capacity for which a unit will be paid, PJM takes into consideration the forced outage rate of that unit – the historical percentage of time the unit does not run when dispatched by PJM. In order to ensure that units perform at this expected rate, PJM has two metric and penalty provisions: one for yearly availability (EFORd)<sup>6</sup> and one for peak period availability (EFORp). The yearly metric provides a means to assess whether generation resources committed as capacity actually are available at expected levels the entire year. The peak-hour period availability metric provides a means to assess whether generation resources committed as capacity actually are available at expected levels during peak periods.

5. The peak-hour-period availability charges and credits are calculated by comparing a unit's actual availability during peak-hour-periods with its expected availability. For any unit that has at least 50 service hours during peak-hour-period, a unit's actual peak-hour-period availability is determined by assessing its availability during the 500 peak

---

<sup>4</sup> *Pepco Energy Services, Inc. v. PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,008 (2008).

<sup>5</sup> *Pepco Energy Services, Inc. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,135 (2008) (October 31, 2008 Order).

<sup>6</sup> EFOR is the forced outage rate.

hours of the delivery year.<sup>7</sup> Units with EFORp above their expected availability pay a charge, while units with peak-hour-period performance that was better than their expected availability may receive a credit, funded by any charges paid by the other capacity suppliers with lower than expected performance.

6. As relevant to this complaint, a different approach to determining reliability is used for generating resources with fewer than 50 service hours during peak-hour-period (infrequently-run units). Rather than evaluate the use of the unit during peak periods, PJM instead uses the resource's yearly EFORd metric, which includes all 8760 hours in the delivery year. Both charges and credits are assessed after the end of a delivery year (June 1 through May 31).

### C. PES Complaint and Answers

7. In its complaint, PES stated that the use of the EFORd metric to calculate peak-hour-period availability charges for infrequently-run generation resources is unjust, unreasonable and unduly discriminatory.<sup>8</sup> PES contended that EFORd is an inaccurate and biased measure of peak-hour-period availability when used to calculate peak-hour-period availability charges, because a resource that is available during the approximately 500 peak hours can nonetheless be assessed a substantial penalty if it is unavailable during the approximately 8,260 hours that fall outside of the peak-hour periods in a delivery year.<sup>9</sup> As a result, PES contended that the EFORd metric has the unintended effect of subjecting PES' and potentially other sellers' infrequently-run generation resources to peak-hour-period availability charges that are unrelated to their availability during peak hours,<sup>10</sup> and not narrowly-tailored to provide incentives to make such generation resources available during peak-hour-periods.<sup>11</sup>

---

<sup>7</sup> Peak-hour-periods are defined as the hours between 1500 and 1900 on non-holiday weekdays in the summer (June through August), and the hours between 0700 and 0900, and between 1800 and 2000 on non-holiday weekdays in the winter (December through January). For a delivery year, the peak-hour-period total hours equals approximately 500 hours.

<sup>8</sup> PES Complaint at 2.

<sup>9</sup> *Id.* at 10.

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

<sup>11</sup> *Citing Mirant-Kendal, LLC, 110 FERC ¶ 61,272, at P17 (2005) (penalties should be narrowly tailored to balance the need to deter conduct that is harmful to the system with the need to limit excessive and unnecessary costs).*

8. PES requested relief in three distinct time periods. For the 2007-2008 delivery year (which was to end on May 31, 2008), PES requested that the Commission find that generation resources with fewer than 50 service hours during peak hours in a delivery year should not be subject to charges and credits assessed under the peak-hour-performance market rules. For the 2008-2009 delivery year, which was to start on June 1, 2008, PES requested that the Commission require PJM to delete the special rules applicable to infrequently-run generation resources, and adopt the same EFORp metric for all generation resources. For the 2009-2010 delivery year and beyond, PES requested the Commission to direct PJM, to explore through its stakeholder process alternative methods for assessing peak-hour-period availability charges on infrequently-run generation resources, and to make an FPA section 205 filing proposing a replacement methodology.<sup>12</sup>

9. In its Answer, PJM stated that PES has not established that using EFORd as an availability metric for peak-hour-period availability charges is unjust and unreasonable. PJM opposed PES' request to exempt generation resources with fewer than 50 total service hours from peak-hour-period availability charges or credits for the 2007-2008 delivery year and opposes the use of EFORp as an interim peak-hour-period performance metric for these units for the 2008-2009 delivery year. PJM contended that rather than imposing an inappropriate EFORp metric as a stop-gap alternative, the Commission should allow the stakeholder process to develop a more fully-considered consensus alternative to be implemented as soon as possible.<sup>13</sup>

10. No party filed comments in support of PES' Complaint for exemption from the 2007-2008 delivery year, and many parties contended that PES' requested relief for the 2007-2008 delivery year should be barred by the filed-rate doctrine. PSEG stated that the Commission should deny PES' Complaint arguing that this matter was already pending before a PJM committee. Bear Subsidiaries argued that PES could have reduced the amount of penalties by self-scheduling its units during the peak hours of the year. Constellation, Dominion, Mirant and the NRG Companies contended that PES' Complaint raised valid concerns that the use of EFORd as a performance metric for peak-hour-performance may result in rates that are unjust and unreasonable. Constellation and Dominion supported use of the EFORp as the peak-hour performance metric for the 2008-2009 delivery year. Mirant opposed use of the EFORp metric for the 2008-2009 delivery year arguing that the use of this metric was rejected by the parties to the RPM Settlement. Constellation, Dayton Companies, Dominion, ODEC, Mirant, NCEMC, PSEG, NRG Companies, and Reliant supported the stakeholder process for design and

---

<sup>12</sup> 16 U.S.C. § 824d (2006).

<sup>13</sup> PJM noted that the Reliability Pricing Model (RPM) Working Group was considering changes to the peak-hour-period availability charge methodology.

implementation of a more appropriate peak-hour-period availability metric on a going-forward basis.

11. PES filed an answer to the PJM answer and comments of the parties. PES contended that PJM fails to adequately support the continued use of an EFORd metric to assess peak-hour-performance for infrequently-run generation resources.<sup>14</sup> PES stated that the tariff provides for infrequently-run generation to be assessed peak-hour-period availability charges based on the EFORd for the entire delivery year. PES argued that, in this case, the 2007-2008 delivery year had not concluded at the time PES filed its Complaint.<sup>15</sup> Alternatively, PES requested that the Commission require PJM to assess peak-hour-period availability charges for infrequently-run generation resources based on an EFORp metric for the 2007-2008 delivery year.

**D. December 31, 2008 Report and March 26, 2009 Order**

12. On December 31, 2008, PJM submitted its report of the stakeholder process (December 31, 2008 Report). In the December 31, 2008 Report, PJM indicates that the RPM Working Group, and subsequently the Capacity Markets Evolution Committee (CMEC) had developed several proposals, and that while the PJM Markets and Reliability Committee had considered comprehensive alternatives in essentially the same form as considered by the CMEC, none of the alternatives received the supermajority support required for affirmative action by the PJM members committee. PJM stated that it intended to file the tariff changes favored by most CMEC participants. PJM also stated that it intends to apply the tariff revisions for the delivery year that starts on June 1, 2009, and does not propose to apply the changes for the current delivery year, 2008-2009.

13. As a result, in Docket No. ER09-412-000, PJM filed changes to the peak-hour-availability provisions pursuant to section 205 of the FPA. The Commission accepted these changes on March 26, 2009, with an effective date of March 27, 2009, as requested by PJM.<sup>16</sup> These changes provide that the peak-hour-availability measure of an infrequently-run resource shall be the lower of the resource's EFORd (based on the delivery year outage data) or the resource's EFORp.

**E. Responsive Pleadings**

14. PES filed an answer to the December 31, 2008 Report, and PJM and Mirant filed answers to the PES answer. PES also filed a motion to answer and an answer to the PJM

---

<sup>14</sup> PES Answer at 3.

<sup>15</sup> *Id.* at 16.

<sup>16</sup> *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275 (2009).

and Mirant answers. PES supports the tariff revisions to calculate the peak-hour-availability charges based on the lower of the resources EFORd or its EFORp, but contends that the changes should apply to the 2008-2009 delivery year, and that the Commission should exempt infrequently-run generators from the peak-hour availability charges for the 2007-2008 delivery year.

15. PJM restates that PES has not met its burden to show that the peak-hour availability charges at the time it filed its complaint were unjust and unreasonable. In addition, PJM and Mirant repeat their contention that PES' requested relief for the 2007-2008 delivery year is barred by the filed-rate doctrine. In response, PES proposes to apply the lower of the resource's EFORd or its EFORp to the 2007-2008 delivery year.

## **II. Commission Determination**

16. We will accept the answers of PJM, Mirant and PES because they have provided information that assisted us in our decision-making process.

17. We grant the complaint of PES, finding that application of PJM's tariff would unreasonably assess peak hour penalties against a unit that meets PJM's expected performance during peak periods. We further find that the tariff provisions filed by PJM and accepted by the Commission in Docket No. ER09-412-000 constitutes the just and reasonable rate to be applied from the date of this order. Further, under section 206(b) of the FPA, we find that the refund effective date is the date of the complaint and require PJM to determine refunds, if appropriate, for peak hour performance occurring from April 22, 2008 forward, for the 15 month period prescribed by section 206. As discussed below, however, no refunds will be paid with respect to peak hour conduct for the 2007-2008 delivery year, but such refunds are applicable for the 2008-2009 delivery year.

### **A. PJM's Tariff is Unjust and Unreasonable**

18. The purpose of the peak-hour metric is to ensure that a unit runs when dispatched at least its expected number of hours during the most critical periods. Whether a unit meets the 50 hour limit in the Tariff is largely outside of the operator's control; PJM determines whether the unit will be dispatched for more than the requisite 50 hours. If the unit meets its peak-hour metric, then that unit has met PJM's expectations for that unit, and no penalty should be imposed. Under the tariff, however, even if the unit meets the peak hour availability target it may be penalized if it fails to run for 50 hours. We find that application of a penalty for a unit that meets the expectations for peak hour availability is unjust, unreasonable and unduly discriminatory.

19. PJM contends that the 50 hour requirement is reasonable because the results from a unit running that little may be an unreliable indication of the resource's true peak-hour availability. But the point of the penalty is not to assess the general reliability of a generating unit, as PJM suggests. Rather, it is simply to determine whether the unit

provides, during each year, the peak period performance it contracted to provide in return for its capacity payment. If a unit meets its obligation, no justification exists for penalizing the unit for that year.

**B. Just and Reasonable Rate**

20. Pursuant to FPA section 206, when the Commission determines that an existing rate is unjust and unreasonable, the Commission is required to establish a just and reasonable alternative “to be thereafter observed and in force, and shall fix the same by order.”<sup>17</sup> We find that the just and reasonable rate we accepted in Docket No. ER09-412-000 is the just and reasonable replacement rate that should be applied from the date of this order. This Tariff provision provides that for a generator running less than 50 hours, the calculation of the peak-hour availability charges based on the lower of the peak period (EFORp) or the yearly metric (EFORd). This provision cures the problem with PJM’s prior tariff because it will not provide a peak period charge for a generating unit that meets its peak period obligation to PJM.

**C. Refund Effective Date**

21. Section 206(b) also provides that upon the filing of a complaint, the Commission must establish a refund effective date that is no earlier than the date of the complaint and no later than five (5) months subsequent to the date of the complaint. The Commission may order refunds through a date fifteen months after such refund effective date of any amounts paid, for the period subsequent to the refund effective date, in excess of those which would have been paid under the just and reasonable rate. Our general policy is to provide maximum protection to a complainant and set the refund effective date as of the date of the complaint. We will follow that course in this case and set the refund date as of the date of the complaint, April 22, 2008.

22. The parties have raised questions about how the refund effective date provision applies to two periods: 2007-2008 delivery year and 2008-2009 delivery year. With respect to the 2007-2008 delivery year, PJM, Dominion, ODEC, Mirant, NCEMC, and PSEG Power Companies have argued that PES’ requested relief is barred by the filed-rate doctrine and prohibition against retroactive ratemaking. PJM contends that the last tariff-defined peak hour period for the 2007-2008 delivery year occurred on February 29, 2008, and that the April 22, 2008 PES Complaint cannot change the binding effect of this tariff provision on generation resources with less than 50 service hours of performance during the period.

23. Because the peak period conduct preceded the filing of the complaint and the refund effective date, we find that no relief can be provided with respect to the

---

<sup>17</sup> 16 U.S.C. § 824e(a) (2006).

calculation of the 2007-2008 peak period charges. The purpose of the refund effective date in section 206(b) is to limit the utility's risk of paying refunds only to service that it provides after the refund effective date. Service provided before the refund effective date must be governed by the Tariff in effect when the service was provided.<sup>18</sup> Because PES's complaint with respect to 2007-2008 relates solely to the peak periods which occurred prior to the filing of the complaint, it is not entitled to refunds with respect to its conduct during that period.

24. PES cites to a number of cases<sup>19</sup> arguing that the Commission has the authority to waive the application of the prior tariff provision. But such a request amounts to a plea for the Commission to waive the filed-rate doctrine, which we do not have authority to waive.<sup>20</sup> As the Commission has found, we have no discretion to waive the provisions of section 206(b) and provide refunds with respect to activities occurring prior to the refund effective date.<sup>21</sup>

25. Moreover, the cases cited by PES are inapposite and do not support its contention that the Commission may waive the filed rate doctrine and provide refunds for a period prior to the refund effective date when the utility in question opposes such relief. The cases cited by PES do not deal with a request by a customer to waive the filed-rate

---

<sup>18</sup> The refund effective date under section 206 is the equivalent of the date on which a utility submits a filing under section 205. Just as the filed-rate doctrine prevents a utility from charging customers a higher rate for past service, the refund effective date provides that the utility need not pay refunds for service provided prior to the refund effective date.

<sup>19</sup> PES Answer at 17 n.65, 18 n.66, citing *Cal. Indep. Sys. Operator*, 118 FERC ¶ 61,226 (2007) (*California ISO*); *ISO New England Inc.*, 122 FERC ¶ 61,018 (2008) (*ISO-NE*); *Waterbury Generation LLC*, 120 FERC ¶ 61,007 (2007) (*Waterbury*); *Northern Natural Gas Co.*, 122 FERC ¶ 61,118, (2008) (*Northern*); *New York Indep. Sys. Operator, Inc.*, 114 FERC ¶ 61,207 (2006) (*NYISO*); *TransColorado Gas Transmission Co.*, 102 FERC ¶ 61,330 (2003) (*TransColorado*); *Midwest Indep. Transmission Sys. Operator, Inc.*, 103 FERC ¶ 61,110 (2003) (*Midwest ISO*).

<sup>20</sup> *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990) (“In sum, we have found no support for the Commission's contention that on a finding of sufficient cause, it has the authority, under section 4(d), to waive the filed rate doctrine.”).

<sup>21</sup> See *Town of Norwood v. National Grid*, 126 FERC ¶ 61,039, at P 20 (2009) (“We find that these arguments rely on a fatal premise--namely, that the Commission has discretion to disregard the statutory limits of section 206, specifically the parameters it creates as to both the prospective effective and refund effective dates.”).

doctrine.<sup>22</sup> In these cases, the utility in question either proposed to waive the tariff provision because of problems on its system or agreed to the waiver. In this case, PJM did not agree to waive penalties for service occurring prior to the date of the complaint. In addition, in many of the cases the waiver was for a future period, not with respect to prior services.<sup>23</sup> In *Midwest ISO*, the ISO did request a waiver for prior penalties, but the reason for the requested waiver was that the ISO's computer system malfunctioned and parties were assessed penalties that might not have been imposed if the system worked properly. In this case, PJM not only has not requested the waiver of the penalty, but there is no allegation that any system or other malfunction on PJM's part affected PES' behavior during the period prior to the complaint.

26. PJM argues that the Commission should exercise its discretion and not apply the revised peak-hour availability charges for the 2008-2009 delivery year (June 1, 2008 through May 31, 2009). PJM contends that applying the revision for the delivery year that begins on June 1, 2009 is more consistent with the expectations of parties in support of going-forward revisions during the stakeholder process.

27. PJM, as well as all other parties, were on notice from the date of the complaint of the possibility that refunds would be owed for 2008-2009 pursuant to the statute. In fact, we made clear in our clarification order that this was a possibility.<sup>24</sup> We do not find that the positions of some participants during the stakeholder process are sufficient to justify the denial of the refunds to which PES is eligible under the FPA.<sup>25</sup>

28. PJM is, therefore, directed to pay refunds for the 2008-2008 delivery year based on the just and reasonable tariff provision established in this proceeding.

---

<sup>22</sup> In the only case in which the filed-rate doctrine was raised, the Commission determined that the conduct in question did not violate the filed rate doctrine. *ISO-NE*, 122 FERC ¶ 61,018, at P 48 (2008).

<sup>23</sup> See *California ISO*, 118 FERC ¶ 61,226 at P 1 (involving a request to waive requirements associated with an interconnection study to occur in the future); *ISO-NE*, 122 FERC ¶ 61,018 at P 3 (regarding participation in an auction market that was to occur in the future); *Waterbury*, 120 FERC ¶ 61,007 at P 1 (regarding filing requirement for a future auction); *NYISO*, 114 FERC ¶ 61,207 at P 4 (where waiver petition filed in advance of class allocation); *TransColorado*, 102 FERC ¶ 61,330 at P 1 (where waiver petition filed in advance of proposed variance adjustments).

<sup>24</sup> October 31, 2008 Order, 125 FERC ¶ 61,135 at P 8 (2008).

<sup>25</sup> In fact, as noted earlier the stakeholder process did not come to consensus on this issue.

The Commission orders:

(A) The complaint of PES is granted.

(B) PJM is directed to apply the revised Tariff provision as of the date of this order.

(C) Within 45 days of the date of this order, PJM is directed to make refunds as discussed in the body of the order, with interest calculated in accordance with 18 C.F.R. § 35.19(a) (2008), and to file a refund report with the Commission within 15 days of the date refunds are made. If no refunds are due, PJM is directed to file a report explaining why with the Commission within 45 days of the date of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.