

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

Before Commissioners: Neil Chatterjee, Chairman;  
Cheryl A. LaFleur, Richard Glick,  
and Bernard L. McNamee.

Calpine Corporation, Dynegy Inc., Eastern  
Generation, LLC, Homer City Generation, L.P.,  
NRG Power Marketing LLC, GenOn Energy  
Management, LLC, Carroll County Energy LLC,  
C.P. Crane LLC, Essential Power, LLC, Essential  
Power OPP, LLC, Essential Power Rock Springs,  
LLC, Lakewood Cogeneration, L.P., GDF SUEZ  
Energy Marketing NA, Inc., Oregon Clean Energy,  
LLC and Panda Power Generation Infrastructure  
Fund, LLC

Docket Nos. EL16-49-000

v.

PJM Interconnection, L.L.C.

PJM Interconnection, L.L.C.

EL18-178-000  
(Consolidated)

ORDER ON MOTION FOR SUPPLEMENTAL CLARIFICATION

(Issued July 25, 2019)

1. On April 10, 2019, PJM Interconnection, L.L.C. (PJM) filed a motion, pursuant to Rule 212 of the Commission's Rules of Practice and Procedure,<sup>1</sup> seeking clarification of the Commission's order issued in this proceeding on June 29, 2018 (Motion).<sup>2</sup> In its Motion, PJM states that it intends to run its Base Residual Auction (BRA) in August 2019

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<sup>1</sup> 18 C.F.R. § 385.212 (2019).

<sup>2</sup> *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (June 2018 Order), *reh'g pending*.

(August 2019 BRA) for the 2022-2023 delivery year under its existing tariff.<sup>3</sup> PJM seeks confirmation that, to the extent the Commission has not established a replacement rate prior to the August 2019 BRA, any replacement rate later established would be applied prospectively and would not require PJM to rerun the August 2019 BRA.<sup>4</sup> PJM also requests that, should the Commission not wish PJM to run the August 2019 BRA under its existing rules, the Commission affirmatively so state in ruling on the Motion.<sup>5</sup>

2. For the reasons discussed below, we deny PJM's Motion and direct PJM not to run the BRA in August 2019.

### **I. Background and Motion**

3. In the June 2018 Order, the Commission found PJM's Tariff unjust and unreasonable and unduly discriminatory because it fails to protect the capacity market from the price-suppressive impacts of out-of-market support to new and existing resources.<sup>6</sup> The Commission also instituted a paper hearing, under section 206 of the Federal Power Act (FPA),<sup>7</sup> to determine the just and reasonable replacement rate. Initial and reply testimony were submitted on October 2, 2018, and November 6, 2018, respectively. Commission action on the paper hearing remains pending.

4. Subsequently, in the Waiver Order, the Commission granted PJM's request to waive the auction timing requirements of its Tariff to allow for a delay of the 2019 BRA for the 2022-2023 delivery year from May 2019, to August 14-28, 2019.<sup>8</sup> PJM sought to

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<sup>3</sup> Motion at 3 (citing *PJM Interconnection L.L.C.*, 164 FERC ¶ 61,153 (2018) (approving PJM's waiver request to move the 2019 BRA to August 14-28, 2019) (Waiver Order)).

<sup>4</sup> Motion at 2.

<sup>5</sup> *Id.* at 6, n.16.

<sup>6</sup> June 28 Order, 163 FERC ¶ 61,236, at P 5.

<sup>7</sup> 16 U.S.C. § 825e (2012).

<sup>8</sup> Waiver Order, 164 FERC ¶ 61,153, at P 1. Specifically, PJM was granted waiver of Attachment DD, at: (i) section 5.4(a) (requiring that the BRA be conducted in May three years prior to the relevant delivery year); (ii) section 5.10(a)(vi)(B) and 5.10(d) (requiring PJM to post by February 1 before the BRA the Variable Resource

move the BRA, in part, to ensure that it had sufficient time to conduct the auction based on the just and reasonable replacement rate established in this proceeding.<sup>9</sup>

5. In its Motion, PJM states that, because the Commission has not yet issued a replacement rate, PJM intends to conduct the August 2019 BRA under its existing rules, notwithstanding the Commission's determination in the June 2018 Order that those existing rules are unjust and unreasonable. PJM asserts that, without a replacement rate or an alternative directive from the Commission, PJM is required to operate under its existing Tariff, i.e., the filed rate.<sup>10</sup>

6. PJM states that confidence in the auction results is critical for all participants, especially potential new entrants.<sup>11</sup> In order to ensure certainty in the outcome of the August 2019 BRA, PJM requests that the Commission clarify that any replacement rate ultimately adopted in this proceeding operate prospectively and that the results of the August 2019 BRA not be made subject to refund. On the issue of refunds, PJM notes the Commission is not required to order refunds in all cases.<sup>12</sup> PJM asserts that, here, refunds would not be warranted because the basis of the underlying complaint is that the relevant rates are too low, not too high, which is a required finding for refunds under section 206 of the FPA.<sup>13</sup>

## II. Responsive Pleadings

7. Comments generally supportive of the Motion were submitted by American Municipal Power, Inc., Dominion Energy Services, Inc., Exelon Corporation, EDP Renewables North American LLC, FirstEnergy Utility Companies, and Talen PJM

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Requirement curves to be used in the BRA and the Preliminary PJM Region Peak Load Forecast for the delivery year; and (iii) requiring any seller seeking an exception to the BRA must-offer requirement on the basis of the deactivation of its resource to submit a preliminary written request by the September 1 preceding the BRA, and provide confirmation by December 1).

<sup>9</sup> *Id.* P 13.

<sup>10</sup> Motion at 3, 6 (citing *Elec. Dist. No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985)).

<sup>11</sup> *Id.* at 4-5.

<sup>12</sup> *Id.* at 5-7.

<sup>13</sup> *Id.* at 7-8 (citing *City of Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009) and 16 U.S.C. § 824e(b)).

Companies (PJM Entities); the Electric Power Supply Association (EPSA); Direct Energy Business Marketing, LLC and Direct Energy Business, LLC (Direct Energy); and the American Wind Energy Association and the Solar Council (Clean Energy Entities). The Illinois Attorney General's Office (Illinois AG) submitted comments regarding existing flaws in the capacity market.

8. PJM Entities agree with PJM's Motion, but assert that the auction should be delayed if the Commission does not grant PJM's clarification. PJM Entities argue that running the auction without granting PJM's clarification would undermine the very certainty the BRAs are designed to provide.<sup>14</sup>

9. EPSA supports PJM's Motion. EPSA largely reiterates PJM's arguments and adds that delaying the August 2019 BRA beyond August 2019 could have "serious market impacts," especially if the auction is delayed to May 2020, taking nearly a full year off the three year forward period.<sup>15</sup>

10. Direct Energy agrees that the auction should be run in August 2019. It asserts that the forward capacity auction was designed to provide market participants with important price signals that are necessary for resource investment and retirement decisions and for load serving entities that procure capacity on behalf of customers. Direct Energy states that further delaying the August 2019 BRA would negatively impact the market by providing no indication of the capacity price for the relevant delivery year, thus requiring retail suppliers to forecast prices without a cleared market, and also could impact the 2020 BRA, eroding market confidence. Direct Energy states that, while further delaying the auction may be beneficial to some entities impacted by the replacement rate, such as PJM Entities, that is not the case for all resources in PJM.<sup>16</sup> Direct Energy explains that load serving entities that do not own generation and are serving customers outside of state sponsored wholesale procurements rely on the forward capacity auction price signals to index electricity offers to customers. According to Direct Energy, other mechanisms are not available to protect default service customers from capacity market outcomes, given

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<sup>14</sup> PJM Entities' Answer at 3. PJM Entities' Answer included a cross-motion to move the August 2019 BRA to April 2020. This order does not address PJM Entities' cross-motion or EPSA's May 9, 2019 answer to the cross-motion.

<sup>15</sup> EPSA Answer at 3.

<sup>16</sup> Direct Energy Comments at 3-4 (referencing PJM Entities' request to delay the auction if the Commission does not grant PJM's Motion).

that the Commission has not yet set a replacement rate. Direct Energy states that running the August 2019 BRA under the current rules will have little impact on clearing prices.<sup>17</sup>

11. Clean Energy Entities support PJM's Motion, adding that further delays would postpone the necessary forward price signals that market participants rely on and could risk interfering with the May 2020 BRA.<sup>18</sup>

12. The Illinois AG requests that, if the Commission grants PJM's Motion, the Commission address flaws in the existing capacity market rules that facilitate market power abuse by requiring PJM to release generator bidding data and to replace the algorithm that PJM uses to increase clearing prices above the highest bid.<sup>19</sup>

### **III. Discussion**

13. For the reasons discussed below, we deny PJM's Motion and provide additional guidance. First, we deny PJM's request to clarify that any replacement rate ultimately adopted in this proceeding operate prospectively and would not require PJM to rerun the August 2019 BRA. We will not rule prematurely on the issue of any appropriate remedy prior to rendering a determination on the merits of a replacement rate.<sup>20</sup>

14. Second, we direct PJM not to conduct the 2019 BRA in August. In rendering this determination, we take into account considerations such as the magnitude of the tariff process at issue—the BRA, a major feature of the PJM market—and the corresponding interest of market participants who make resource investment and retirement decisions based on price signals. We recognize the importance of sending price signals sufficiently in advance of delivery to allow for resource investment decisions. However, we believe that in the circumstances presented here, on balance, delaying the auction until the Commission establishes a replacement rate will provide greater certainty to the market than conducting the auction under the existing rules.

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<sup>17</sup> *Id.* at 4-6.

<sup>18</sup> Clean Energy Entities Comments 3-4.

<sup>19</sup> Illinois AG Answer at 3.

<sup>20</sup> See *PJM Interconnection, L.L.C.*, 149 FERC ¶ 61,252, at P 9 (2014) (rejecting, as premature, a request that the Commission rule on refunds in advance of a technical conference and prior to the Commission's order on the merits).

The Commission orders:

(A) PJM's Motion is hereby denied, as discussed in the body of this order.

(B) PJM is hereby directed to not hold the 2019 BRA scheduled for August 14-28, 2019.

By the Commission. Commissioners LaFleur, Glick, and McNamee are concurring with separate statements attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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LaFLEUR, Commissioner, *concurring*:

1. Today's order provides PJM Interconnection, L.L.C. (PJM) guidance regarding whether to run its August 2019 Base Residual Auction (BRA). While we deny PJM's Motion, we affirmatively provide PJM with its requested guidance. I am voting for today's order to give PJM clarity on its proposal to run the August 2019 BRA and to avoid their running an auction that the Commission may ultimately find unjust and unreasonable.

2. I write separately, however, to underscore my dissent on the June 2018 Order that declared PJM's Tariff unjust, unreasonable, and unduly discriminatory and proposed a replacement rate structure of the Commission's design.<sup>1</sup>

3. As noted in my dissent, I objected not just to the substance of the order but also to its process and timeline. In the June 2018 Order, the Commission proposed a hastily designed and thinly sketched proposal conjured without any engagement with PJM stakeholders. The Commission – in my view, incorrectly – believed that a 90 day paper hearing would be sufficient to build a record, receive feedback from the states and other

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<sup>1</sup> *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (June 2018 Order) (LaFleur, Comm'r, dissenting), *reh'g pending*.

stakeholders, and set the just and reasonable replacement design for the market. Now, more than a year after the Commission upended the PJM capacity market with no clear path to repairing it, we have still not acted to resolve the foreseeable and avoidable uncertainty created by our own actions. At the time, I called the June 2018 Order an act of regulatory hubris; however, given the passage of time, the uncertainty created by the Commission might better be labeled an act of regulatory malpractice. The Commission, whatever concerns it has with the PJM capacity market, should not have put PJM, the states and customers served by its markets, and its stakeholders in this position.

4. I believe it is essential that PJM have an opportunity to engage with its stakeholders on a redesign of this magnitude. In particular, I think that PJM would be well-served by engaging with the states that regulate its member companies to ascertain their long-term commitment to the mandatory capacity market for resource adequacy, as opposed to state selection of preferred resources to meet state initiatives. As I said in my earlier dissent, I believe that an ill-considered replacement market design that imposes choices on the states without adequately accounting for their input could ultimately lead to the unplanned demise of the capacity market.<sup>2</sup>

5. The concerns raised in my earlier dissent have only been reinforced by what has transpired during the past year. The PJM capacity market is unable to move forward until it receives guidance from the Commission. I hope the Commission is able to give PJM some clarity of direction soon. In the meantime, I am reluctantly voting to suspend the August 2019 BRA.

For these reasons, I respectfully concur.

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Cheryl A. LaFleur  
Commissioner

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<sup>2</sup> *Id.* (LaFleur, Comm’r, *dissenting* at 5).



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GLICK, Commissioner, *concurring*:

1. The position in which the Commission finds itself today is the predictable consequence of the profound lack of reasoned decisionmaking in the June 2018 Order.<sup>1</sup> As I explained in my dissent, it was readily apparent at the time that the Commission had neither a coherent, well-supported theory of why the PJM Interconnection, L.L.C. (PJM) tariff was unjust and unreasonable nor a clear, well-articulated vision for how to remedy the perceived deficiencies.<sup>2</sup> One year later, Commissioner LaFleur's description of the June 2018 Order as "regulatory hubris"<sup>3</sup> seems more apt than ever after the Commission

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<sup>1</sup> *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018), *reh'g pending*.

<sup>2</sup> *Id.* (Glick, Comm'r, dissenting at 2-13).

<sup>3</sup> *Id.* (LaFleur, Comm'r, dissenting at 5) ("The majority is proceeding to overhaul the PJM capacity market based on a thinly sketched concept, a troubling act of regulatory hubris that could ultimately hasten, rather than halt, the re-regulation of the PJM market.").

has shown an absence of leadership that has caused us to drift rudderless into the position in which we find ourselves today.

2. Even so, the Commission still has not demonstrated that it appreciates the extent of the uncertainty that was created by the June 2018 Order, which has only been compounded by the Commission's continuing failure to implement a remedy on a timeline even remotely close to what it promised.<sup>4</sup> PJM, its market participants, and the 65 million customers in the region deserve treatment far better than what they have received from the Commission over the past fifteen months. At a time when leadership and decisiveness are necessary, indecision and inaction are all they have received.

3. But we are where we are. Although I continue to believe that the existing tariff is just and reasonable,<sup>5</sup> I agree with my colleagues that PJM should further postpone the 2019 Base Residual Auction. The short-term palliative effect of running the auction next month would be outweighed by the long-term uncertainty created by running an auction—and allocating capacity commitments—under tariff provisions that the Commission has found unjust and unreasonable. Doing so would raise serious questions about the legality of the auction and the resulting capacity commitments, further adding to the list of issues that will be litigated for years to come.

4. I hope that today's order proves to be the nadir in this saga and we can soon begin repairing the damage created by the June 2018 Order. If ever the Pottery Barn Rule<sup>6</sup> applied to a regulatory proceeding, it is this one. Commissioner McNamee misunderstands this point. It was the Commission—not PJM—that made the finding<sup>7</sup> that has prevented PJM from running its capacity auction. And it has been the Commission—not any party to this proceeding—that has failed to act, even though we are now more than six months past the date promised in the June 2018 Order. Meanwhile, neither the facts nor the law have changed and the time for deliberation has long passed. The Commission is now fully responsible for the damage done to date and whatever comes next.

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<sup>4</sup> *Id.* P 172 (stating that the Commission plans to issue a subsequent order by January 4, 2019).

<sup>5</sup> *Id.* (Glick, Comm'r, dissenting at 9-12).

<sup>6</sup> See Bob Woodward, *Plan of Attack* 150 (2004) (describing the "Pottery Barn Rule: You break it, you own it").

<sup>7</sup> Specifically, it was the Commission's action under section 206 of the Federal Power Act, not PJM's section 205 filing, that deemed PJM's tariff unjust and unreasonable.

For these reasons, I respectfully concur.

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Richard Glick  
Commissioner

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McNAMEE, Commissioner, *concurring*:

1. I approve today's order because it is important that the regulated community be afforded certainty that PJM's capacity auction cannot be run under rules the Commission deemed unjust and unreasonable. Although I was not a member of the Commission when it issued the June 2018 Order,<sup>1</sup> and am therefore the only current member who was unable to engage in deliberations leading to that order, I am sympathetic to the large degree of uncertainty this proceeding has brought to the PJM community. However, I write separately today because I disagree with certain characterizations put forth in my colleagues' concurrences.

2. In particular, one of the concurrences invokes the "Pottery Barn Rule," stating "[t]he Commission is now fully responsible for the damage done to date and whatever comes next." Though it may be rhetorically satisfying, this statement is misleading. To suggest the Commission is the source of the problems presently facing PJM is to ignore nearly a decade of proceedings attempting to address the interaction between competitive markets and out-of-market subsidies. More importantly, such a statement only makes sense if one ignores the impetus behind PJM's original filing in Docket No. ER18-1314-

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<sup>1</sup> *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (June 2018 Order).

000, which was PJM’s desire to address issues arising from state out-of-market support for generation resources in its footprint.

3. At that time—April 2018—PJM argued “[t]he time has come . . . to fill this gap in the PJM Tariff” and “[d]oing nothing . . . is not an option.”<sup>2</sup> In addition, PJM’s April 2018 filing stated:

Some may argue that no action is needed at this time because capacity commitments in PJM are well above the installed reserve margin, and because the PJM Region continues to see new entry. This argument ignores the current drivers of new entry in PJM . . . ; and falsely suggests that there are times during the business cycle when it is appropriate to distort markets.<sup>3</sup>

4. As discussed in the June 2018 Order, the Commission engaged in a thorough analysis and considered the pleadings of dozens of participants and ultimately determined that PJM’s tariff was unjust and unreasonable because the current MOPR “fails to mitigate price distortions caused by out-of-market support granted to [non-natural gas-fired] new entrants or to existing capacity resources of any type.”<sup>4</sup> As a Commission, we must fulfill our statutory duties, letting our decisions be led by the law and the facts in each case before us.

5. With every proceeding, the Commission strives to ensure rates that are just, reasonable, and not unduly discriminatory. In that respect, this proceeding is no different. I commit to continuing to work diligently to address this matter—and all matters—pending before the Commission.

For these reasons, I respectfully concur.

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Bernard L. McNamee  
Commissioner

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<sup>2</sup> PJM April 9, 2018 Filing, Docket No. ER18-1314-000, at 17.

<sup>3</sup> *Id.* at 36-37 (footnote omitted).

<sup>4</sup> June 2018 Order, 163 FERC ¶ 61,236 at P 5. The finding in the June 2018 Order was based not only on PJM’s filing but also a complaint from 2016 in Docket No. EL16-49-000, which was consolidated with Docket No. ER18-1314-000 by the June 2018 Order. *Id.* P 6.