168 FERC ¶ 61,104
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C Docket No. ER18-2068-002

ORDER DENYING REHEARING

(Issued August 22, 2019)

1. On January 30, 2019, the Commission denied PJM Interconnection, L.L.C.'s (PJM) request, pursuant to section 205 of the Federal Power Act (FPA),[1] for a waiver of certain Financial Transmission Rights (FTR) liquidation rules in the PJM Open Access Transmission Tariff (Tariff), Attachment K-Appendix, Section 7.3.9, and the identical provisions of Amended and Restated Operating Agreement of PJM, Schedule 1, Section 7.3.9.[2] PJM stated that it filed the waiver request (Waiver Request) in order to ensure an orderly and efficient liquidation of the defaulted FTR portfolio of GreenHat Energy, LLC (GreenHat) in a manner that attempted to minimize distortion to the FTR markets.[3]

2. Several parties, including Old Dominion Electric Cooperative (Old Dominion) and Shell Energy North America (US), L.P. (Shell Energy), filed to intervene following issuance of the Waiver Order. On June 5, 2019, the Commission issued an order establishing paper hearing and settlement judge procedures to resolve this proceeding.[4] In that order, the Commission also denied the late interventions of those parties seeking to intervene after the Waiver Order, finding that the late intervenors had not met their higher burden to demonstrate good cause for granting such late intervention.[5]

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[1] 16 U.S.C. § 824d (2012).

[2] *PJM Interconnection, L.L.C.*, 166 FERC ¶ 61,072 (2019) (Waiver Order).

[3] PJM July 26, 2018 Waiver Request at 1.

[4] *PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,209 (2019) (June 5 Order).

[5] *Id.* P 24.

3. Old Dominion and Shell Energy filed timely requests for rehearing of the June 5 Order.[6] In this order, we deny those rehearing requests and therefore also dismiss as moot Old Dominion's request for expedited action.

I. Rehearing Requests

4. Old Dominion argues that the Commission erred in denying its motion to intervene out-of-time and erred in its application of the standard for intervention in a proceeding after a dispositive order has been issued.[7] Old Dominion asserts that it stands to be significantly and individually financially impacted by the outcome of this proceeding and as such, no other party can adequately represent Old Dominion's interests. Old Dominion also asserts that the June 5 Order did not describe what sort of prejudice or undue burden would result if Old Dominion's intervention was granted, and that at this early stage of the settlement and paper hearing procedures, there would be none.[8]

5. Old Dominion also argues that by excluding it from the settlement and paper hearing procedures, the Commission has created the potential for greater burden on PJM and those parties who have been granted intervention in this proceeding because Old Dominion's only recourse will be to seek to challenge any order which results from the procedures established by the June 5 Order.[9] Old Dominion also asserts that this proceeding could create precedent regarding how members of Regional Transmission Organizations (RTOs) might be protected in the instance of a member's default of their financial obligations, or other issues beyond the limited scope of those raised by PJM, and the Commission should not prevent parties from protecting their interests in the proceeding.[10]

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[6] Old Dominion June 19, 2019 Rehearing Request and Motion for Expedited Consideration (Old Dominion Rehearing Request); Shell Energy July 5, 2019 Rehearing Request (Shell Energy Rehearing Request).

[7] Old Dominion Rehearing Request at 3.

[8] *Id.* at 4. Old Dominion agrees to take the record as it stands to date, so that its participation will not unduly burden or prejudice any party. *Id.*

[9] *Id.* at 5.

[10] *Id.*

6. Shell Energy also argues that the Commission erred in finding that it did not demonstrate good cause to intervene out-of-time in this proceeding. Shell Energy asserts that unlike other intervenors, Shell Energy entered into three bilateral agreements with GreenHat that involved a transfer to Shell Energy and back to GreenHat of a portion of the portfolio of FTRs upon which GreenHat ultimately defaulted.[11] Shell Energy explains that, "long after the execution of those agreements," PJM claimed that Shell Energy is subject to the guarantee and indemnification provision of the PJM Tariff due to these FTR transfers.[12] Shell Energy argues that PJM did not make this claim known to Shell Energy until after the comment deadline for comments on PJM's Waiver Request.[13] Shell Energy argues that it is the only party that PJM alleges is subject to a guarantee and indemnification claim in connection with GreenHat's portfolio, and thus, no other party can adequately represent Shell Energy's interests.[14]

7. Shell Energy also argues that by denying Shell Energy and others party status in the settlement proceeding, the Commission all but ensures that any resulting settlement will impact interested parties not present during the negotiations, and thus, is unlikely to result in a settlement that is in the public interest. In addition, if Shell Energy is not granted party status, Shell Energy argues that its only recourse will be to challenge any order resulting from this settlement process, which could burden the ultimate resolution of this proceeding.[15] Finally, Shell Energy argues that granting the late intervention would not improperly burden the proceedings because no settlement conference has occurred and the Commission has identified no prejudice or burden that would arise from granting intervention.[16]

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[11] Shell Energy Rehearing Request at 4.

[12] *Id.*

[13] *Id.* at 4-5.

[14] Shell Energy argues that PJM is calculating the guarantee and indemnification claim in a manner that exposes Shell Energy to greater costs than GreenHat would have had to pay absent its default and this could not have been "reasonably foreseeable" to Shell Energy. *Id.* at 5 (citing *PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,173, at P 12 (2018)).

[15] *Id*. at 6-7.

[16] *Id.* at 3, 6-8.

II. Discussion

8. We deny Old Dominion's and Shell Energy's rehearing requests. In the June 5 Order, the Commission stated:

> In ruling on a motion to intervene out-of-time, we apply the criteria set forth in Rule 214(d) of the Commission's Rules of Practice and Procedure, and consider, *inter alia,* whether the movant had good cause for failing to file the motion within the time prescribed. Parties seeking to intervene after issuance of a Commission determination in a case bear a heavy burden. When, as here, late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. Late Intervenors have failed to demonstrate the requisite good cause. Generally, Late Intervenors do not claim they did not have notice of the proceeding. Rather, they claim they were not aware of how a denial of the Waiver Request would impact them. We do not find this explanation to be sufficient to meet the higher burden to show good cause for granting intervention following a dispositive order. Accordingly, we deny Late Intervenors' motions for leave to intervene out-of-time.[17]

9. Old Dominion and Shell Energy have not persuaded us to modify this finding. Neither party disputes that they had notice of the proceeding. Neither party disputes that the reason for late intervention was that they were not aware of how a denial of the Waiver Request would impact them. Rather, the parties claim that they are uniquely situated in this proceeding and accepting their late interventions will not unduly burden or prejudice any party given the stage of the proceeding. We do not find their reasoning persuasive.

10. We disagree that the Commission incorrectly applied its late intervention standard by failing to identify any prejudice or undue burden on the parties as a result of the intervention. Under Rule 214 of the Commission's Rules of Practice and Procedure, a timely movant must state, to the extent known, "the position taken by the movant and the basis in fact and law for that position,"[18] and demonstrate with sufficient factual detail that the movant either has a statutory or regulatory right to participate, "represents an interest which may be directly affected by the outcome of the proceeding," or that its

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[17] June 5 Order, 167 FERC ¶ 61,209 at P 24 (internal citations omitted).

[18] 18 C.F.R. § 385.214(b)(1) (2018).

participation "is in the public interest."[19] In addition to the foregoing, an untimely movant must "show good cause why the time limitation should be waived."[20]

11. Rule 214 also enumerates specific factors that the Commission "may" consider in acting upon a late motion. Specifically, the Commission "may consider whether (i) [t]he movant had good cause for failing to file the motion within the time prescribed; (ii) [a]ny disruption of the proceeding might result from permitting intervention; (iii) [t]he movant's interest is not adequately represented by other parties in the proceeding; (iv) [a]ny prejudice to, or additional burden upon, the existing parties might result from permitting the intervention;" and (v) the motion conforms to the regulation's basic procedural requirements.[21] The United States Court of Appeals for the Ninth Circuit (Ninth Circuit) has found that, "an untimely movant must, at a minimum, demonstrate good cause and, in addition, should address the further factors the Commission may consider in its discretion."[22] Moreover, the Ninth Circuit has stated:

> Rule 214's language allots broad discretion to the Commission to grant or deny an untimely motion for intervention. The rule neither conclusively defines "good cause" nor suggests that a showing of all the enumerated factors will satisfy a petitioner's burden. Indeed, the use of the permissive "may" rather than the obligatory "shall" suggests that the Commission may not only consider other, non-enumerated factors in adjudicating a motion for untimely intervention, but can affirmatively abstain from including even one or more of the enumerated factors in its decisional calculus. Additionally, because the regulation does not indicate what weight the Commission is required to place on each enumerated factor, even a failure to prove one of the factors could be sufficient to support the Commission's decision to deny intervention—notwithstanding a successful showing of good cause.[23]

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[19] *Id.* § 385.214(b)(2).

[20] *Id.* § 385.214(b)(3).

[21] *Id.* § 385.214(d)(1).

[22] *California Trout v. FERC*, 572 F.3d 1003, 1014 (9th Cir. 2009).

[23] *Id.* at 1014-1015 (citing 18 C.F.R. § 385.214(d)(1); *Power Co. of Am., L.P. v. FERC*, 245 F.3d 839, 843 (D.C. Cir. 2001) ("Failure to establish good cause is . . . a sufficient condition to deny intervention, so the Commission was not obligated to consider any other factor."); *City of Orrville v. FERC*, 147 F.3d 979, 991 (D.C. Cir. 1998) ("The text of [Rule 214] does not compel consideration of each of the factors . . . .")).

12. We affirm that Old Dominion and Shell Energy have failed to demonstrate good cause and thus should not be permitted to intervene late in this proceeding. Specifically, Shell Energy argues that it did not become aware of a guarantee and indemnification claim under its three bilateral agreements with GreenHat until after it received an invoice from PJM on August 7, 2018.[24] Shell Energy claims that following the receipt of the invoice, it "came to learn that these embedded charges were associated with PJM's guarantee and indemnification claim" [25] and "[s]ince the comment deadline, Shell Energy has been actively engaged in ongoing discussions with PJM regarding the application of the guarantee and indemnification provision to Shell Energy with regard to FTRs in the GreenHat default portfolio."[26] Shell Energy knew at the time PJM filed its Waiver Request that it had transactions with GreenHat that a Commission ruling might affect. Regardless of whether Shell Energy agreed with PJM's request for waiver, it could have intervened timely to protect its interests. Moreover, given that Shell Energy received an invoice regarding the agreements on August 7, 2018, the comment deadline for the Waiver Request was August 16, 2018, and the Waiver Order issued January 30, 2019, it appears there was ample opportunity for Shell Energy to intervene timely or at least to submit a motion to intervene out-of-time prior to issuance of the Waiver Order.

13. Old Dominion likewise does not provide a persuasive rationale to grant its late intervention. In its motion to intervene out-of-time, Old Dominion stated, "[w]hile [Old Dominion] was aware of the filing, [Old Dominion] *unfortunately did not decide in advance of the Comment Date* whether to intervene in the proceeding. It was not until the [Waiver] Order was issued that [Old Dominion] realized its oversight in not seeking to timely intervene in the proceeding."[27] In its rehearing request, Old Dominion does not further explain these statements and its admitted "oversight;" i.e., that it simply chose not to intervene timely. Rather than explain why the Commission should now effectively undo the decision Old Dominion originally made not to intervene, Old Dominion instead argues that it would be impacted by the outcome of this proceeding and that its interests should be protected in the event precedent is created regarding, for example, financial

[24] Shell Energy March 1, 2019 Request for Rehearing and Motion to Intervene Out-of-Time at 12-13.

[25] *Id.* at 13. Shell Energy does not explain when it "came to learn" this, and, we add, more than five months elapsed after the invoice before the Commission issued the Waiver Order, during which time Shell Energy could have intervened more timely than it ultimately did.

[26] *Id.*

[27] Old Dominion February 22, 2019 Motion to Intervene Out-of-Time at 4 (emphasis added).

defaults in an RTO. Old Dominion does not explain in seeking late intervention how other participants will not sufficiently represent this generalized interest, and there are, in fact, others who timely intervened on the basis they too would be impacted by the outcome of the proceeding.[28] Moreover, concern that adverse precedent may be created is not a persuasive basis for late intervention.[29] We therefore do not find these reasons to be sufficient to establish good cause to allow late intervention.

14. Finally, we do not find that failing to grant late intervenors party status will necessarily result in a settlement that is not "fair and reasonable and in the public interest."[30] Should the parties reach settlement in this proceeding, the Commission will review the terms of that settlement and determine whether such settlement meets the relevant standard.

[28] *See, e.g.*, American Electric Power Service Corporation August 3, 2018 Motion to Intervene at 1; Dominion Energy Services, Inc. August 6, 2018 Motion to Intervene at 1; Exelon Corporation July 27, 2018 Motion to Intervene at 1-2; LS Power Associates, L.P. August 1, 2018 Motion to Intervene at 1; Mercuria Energy America, Inc. August 1, 2018 Motion to Intervene at 1; PJM Industrial Coalition July 27, 2018 Motion to Intervene at 1.

[29] *See PJM Interconnection, L.L.C.*, 132 FERC ¶ 61,265, at P 19 (2010) ("[A]ny litigated proceeding before the Commission may serve as a vehicle for precedential decisions, and movants are not justified in sitting on their rights, passively anticipating a regulatory outcome favorable to their own interests.") (internal citations omitted); *see also Seminole Elec. Coop. Inc. v. Florida Power & Light Co.*, 153 FERC ¶ 61,037, at P 11 (2015) (stating that "it is Commission policy to deny late intervention at the rehearing stage, even when the petitioner claims that the decision establishes a broad policy of general application") (citing *PáTu Wind Farm LLC v. Portland General Elec. Co*., 151 FERC ¶ 61,223, at P 39 & n.5 (2015) and *Columbia Gas Transmission Co*., 113 FERC ¶ 61,066, at P 61,243 (2005)).

[30] Old Dominion Rehearing Request at 6 (citing *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 701 (D.C. Cir. 2007)).

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of the order.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.