

166 FERC ¶ 61,071  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C.  
PJM Settlement, Inc.

Docket No. ER18-1972-000

ORDER DENYING WAIVER

(Issued January 30, 2019)

1. On July 6, 2018, PJM Interconnection, L.L.C. and PJM Settlement, Inc. (collectively, PJM) filed a request for a one-time waiver of Attachment Q, section III of the PJM Open Access Transmission Tariff (Tariff), concerning PJM's authorization to retain the collateral of Orange Avenue FTRs, LLC (Orange) for a "commercially reasonable time."<sup>1</sup> PJM seeks to retain the collateral in question for a period of up to one year, while it determines: (i) whether legal action is appropriate against Orange's affiliate, GreenHat Energy, LLC (GreenHat); and (ii) whether PJM will seek to apply Orange's collateral to the debt incurred by GreenHat. For the reasons discussed below, we deny PJM's waiver request.

**I. Background**

2. PJM states that on February 22, 2018, Orange submitted the minimum collateral amount required by PJM's credit requirements (\$550,000), for the purpose of participating in PJM's Financial Transmission Rights (FTR) auctions.<sup>2</sup> PJM states that,

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<sup>1</sup> PJM initially submitted its requests in both a public and non-public version to preserve the confidentiality of Orange. *See* 18 C.F.R. § 388.112 (2018). In its protest, however, as summarized more fully below, Orange openly addresses the issues in dispute. Accordingly, PJM submitted a filing, on August 3, 2018 (Revised Waiver Request), in which it agreed to withdraw its request for confidential treatment, except as otherwise noted below.

<sup>2</sup> Revised Waiver Request at 1-2.

subsequently, on June 4, 2018, Orange submitted a request to withdraw from PJM and asked that its collateral be returned.<sup>3</sup>

3. PJM asserts that under its Tariff, at Attachment Q, section III, a “commercially reasonable time” is prescribed for PJM to determine whether a collateral payment is no longer required.<sup>4</sup> PJM states that it is currently undertaking this assessment, noting that a withdrawal of membership does not relieve the withdrawing member of: (i) its obligations to pay for its share of fees and charges incurred or assessed by PJM prior to the date of its withdrawal; or (ii) any obligation to provide indemnification for the consequences of acts, omissions or events occurring prior to such withdrawal.<sup>5</sup>

4. With respect to the underlying obligations at issue, PJM states that GreenHat’s managing member is also the managing and sole member of Orange, and that Orange is an affiliate of GreenHat.<sup>6</sup> PJM adds that GreenHat, after acquiring an FTR portfolio in 2015 covering three planning years (2018-21), subsequently incurred a payment default of \$12 million.<sup>7</sup> PJM states, that in 2017, it sought assurances from GreenHat, regarding the likelihood that GreenHat would incur significant losses on its portfolio; in response, GreenHat assured PJM that it expected to receive revenues of approximately \$62 million from its bilateral FTR contracts with a third party (FTR Party).<sup>8</sup> To this end, PJM contends that on June 23, 2017, GreenHat and PJM executed a Partial Assignment and Pledge Agreement (Pledge Agreement), committing GreenHat to pledge these claimed revenues as collateral, which GreenHat represented were due June 2018.<sup>9</sup> PJM states,

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<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.* at 3-4. Specifically, Attachment Q, section III provides: “In order to satisfy their PJM credit requirements Participants may provide Collateral in a PJM Settlement-approved form and amount pursuant to the guidelines herein. Collateral which is no longer required to be maintained under provisions of the Agreements shall be returned at the request of a Participant no later than two Business Days following determination by PJM Settlement within a commercially reasonable period of time that such Collateral is not required.”

<sup>5</sup> *Id.* at 3 (citing PJM Operating Agreement at Schedule I, section 1.4.6(c)).

<sup>6</sup> *Id.* at 2 (citing Orange’s affiliate disclosure form).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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

however, that to date, no payments have been made under the Pledge Agreement, and that it has been informed by the FTR Party that it has no further payment obligations to GreenHat under its bilateral FTR contracts.<sup>10</sup>

5. PJM states that it is currently reviewing whether the representations made by GreenHat, when negotiating the Pledge Agreement, were accurate, and is obtaining additional information from the FTR Party to determine if legal action is appropriate against GreenHat and/or its managing member.<sup>11</sup>

## II. Revised Waiver Request

6. PJM claims that its review of Orange's obligations generally fall within the commercially reasonable time, as contemplated by Attachment Q, section III.<sup>12</sup> PJM states, however, that to avoid any uncertainty on this issue, it is seeking waiver of Attachment Q, section III for a period of one year.<sup>13</sup>

7. PJM states that good cause exists to grant its waiver request. First, PJM asserts that its waiver request is of limited scope, given that it will apply to a single PJM member and only to the collateral that this member has posted, and because the waiver allowance will be in effect for a limited period only – up to one year.<sup>14</sup> Second, PJM submits that its requested waiver is necessary to remedy a concrete problem, namely, the need to retain the relevant funds for up to one year, in order to allow PJM to gather the information it will need regarding GreenHat's representations.<sup>15</sup> Finally, PJM asserts that its requested waiver, if granted, will not result in any undesirable consequences because it will not have an adverse impact on third parties, while potentially benefitting PJM's membership, which is financially responsible for the socialized default charges of GreenHat.<sup>16</sup>

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<sup>10</sup> *Id.* at 2-3.

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

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

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

<sup>14</sup> *Id.* at 6.

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

<sup>16</sup> *Id.* at 7. Although PJM requests a waiver of the Tariff, it also states that the PJM Tariff “expressly recognizes that a period of time needs to be set aside for PJM and

### III. Notice of Filing and Responsive Pleadings

8. Notice of PJM's filing was published in the *Federal Register*, 83 Fed. Reg. 32,660 (2018), with interventions and protests due on or before July 27, 2018. Motions to intervene were timely filed by Orange, Monitoring Analytics, LLC, acting as PJM's independent market monitor, the Delaware Division of Public Advocate, Dominion Energy Services, Inc., and American Municipal Power, Inc. In addition, motions to intervene out-of-time were filed, on August 16, 2018, by EDP Renewables North America LLC (EDP) and on August 22, 2018, by the Financial Marketers Coalition. A protest was filed by Orange on July 27, 2018. Answers were filed by PJM, on August 8, 2018 and August 31, 2018, and by Orange, on August 23, 2018.

#### A. Orange's Protest

9. Orange asserts that nothing in PJM's Tariff authorizes PJM to take Orange's collateral to cover GreenHat's losses.<sup>17</sup> Orange argues that, as such, its collateral must be returned because it informed PJM of its withdrawal, requested that its collateral be returned, participated in no FTR auction, and engaged in no FTR transactions.<sup>18</sup> Orange further asserts that GreenHat, over the relevant period, was in compliance with PJM's credit requirements.<sup>19</sup> Orange argues that while PJM demanded additional credit in 2017, it did so based on a standard not stated in PJM's Tariff, using a proprietary model that it has refused to disclose to GreenHat.<sup>20</sup> Orange states that, at the time, the Commission lacked a quorum, thus preventing GreenHat from challenging PJM's demand for additional credit.<sup>21</sup> Orange adds that, as such, GreenHat was forced to execute the Pledge

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PJM Settlement to determine '*that such Collateral is not required*' prior to the triggering of the two day requirement for return of a Member's Collateral." *Id.* at 5 (quoting PJM Tariff, Attachment Q, section III).

<sup>17</sup> Orange Protest at 10.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.*

Agreement, but that in doing so, it made no representations or warranties about the value of its 2018-20 receivables.<sup>22</sup>

10. On the issue of transparency, Orange cites to the Commission's policy statement on credit requirements, holding that the lack of clear credit requirements can "serve to undermine certainty in the markets and [represent] barriers to legitimate market activity."<sup>23</sup> Orange adds that the Commission, on several occasions, has rejected attempts by utilities to rely on credit requirements that were not transparent and clearly stated in the Tariff.<sup>24</sup> Orange also relies on the Commission's ruling in a 2008 PJM case holding that "PJM should only be allowed to keep collateral for as long as the positions exist and the customer has not paid."<sup>25</sup> Orange adds that nothing in PJM's Tariff authorizes PJM to take a market participant's collateral to cover an affiliate's losses.<sup>26</sup>

## **B. Answers**

11. PJM asserts that the determination of whether Orange's and GreenHat's managing member fraudulently induced PJM to enter into the Pledge Agreement is not an issue raised by its waiver request.<sup>27</sup> PJM argues that it had the authority to request that GreenHat enter the Pledge Agreement.<sup>28</sup> PJM adds that it is only asking the Commission to authorize PJM's right to continue to hold Orange's collateral, not to take Orange's collateral to offset its affiliate's losses.<sup>29</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 10 (citing *Policy Statement on Elec. Creditworthiness*, 109 FERC ¶ 61,186, at P 11 (2004) (Credit Policy Statement)).

<sup>24</sup> *Id.* (citing *Xcel Energy Operating Cos.*, 123 FERC ¶ 61,053, at P 19 (2008); *South Carolina Elec. & Gas Co.*, 122 FERC ¶ 61,070, at P 12 (2008)).

<sup>25</sup> *Id.* at 10-11 (citing *PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,279, at P 41 (2008) (*PJM FTR Credit Order*)).

<sup>26</sup> *Id.* at 11 (citing *PJM FTR Credit Order*, 122 FERC ¶ 61,279 at PP 57-58).

<sup>27</sup> PJM August 8, 2018 Answer at 5-7.

<sup>28</sup> *Id.* at 7-9.

<sup>29</sup> *Id.* at 9-10.

12. In response, Orange argues that GreenHat's losses in the FTR market occurred because PJM's forecasts of future congestion, upon which GreenHat's own forecasts were based, failed to predict PJM's actual June and July 2018 congestion results.<sup>30</sup> Orange further asserts that GreenHat made no misrepresentations in connection with the Pledge Agreement, and that PJM demanded the additional collateral from GreenHat, without authorization to do so.<sup>31</sup> Orange adds that GreenHat signed the Pledge Agreement to avoid the unauthorized seizure of its books at a time when it could not seek redress from the Commission due to the Commission's then-absence of a quorum.<sup>32</sup>

13. PJM argues, in response, that Orange's allegations concerning the circumstances surrounding the Pledge Agreement, which PJM disputes, have no bearing on the waiver it seeks or the Commission's standards governing waivers.<sup>33</sup> PJM adds that it is not seeking authorization to convert the collateral at issue, or use it to off-set GreenHat's losses; those remedies, PJM claims, would be pursued, if at all, through a yet-to-be determined legal process.<sup>34</sup> PJM argues that the waiver is of limited scope and maintains the status quo, and that the Commission has routinely granted waiver requests involving tariff deadlines or scheduling requirements.<sup>35</sup>

#### **IV. Procedural Matters**

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>36</sup> 18 C.F.R. § 385.214 (2018), the notices of intervention and timely, unopposed motions to

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<sup>30</sup> Orange Answer at 1.

<sup>31</sup> *Id.* at 1-2.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> PJM August 31, 2018 Answer at 1-3.

<sup>34</sup> *Id.* at 2-3.

<sup>35</sup> *Id.* at 3-5 (citing, among others, *Midcontinent Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,023 (2018); *Dunkirk Power LLC*, 147 FERC ¶ 61,146 (2014); *N.Y. Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,012 (2013)).

<sup>36</sup> 18 C.F.R. § 385.214 (2018).

intervene serve to make the entities that filed them parties to this proceeding. In addition, we grant the unopposed late-filed interventions submitted by EDP and the Financial Marketers Coalition, given their interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>37</sup> prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We accept the answers filed by Orange and PJM because they have assisted us in our decision-making process.

## V. Discussion

16. For the reasons discussed below, we deny PJM's request for waiver of the PJM Tariff, at Attachment Q, section III. The Commission has granted waiver of tariff provisions where: (i) the applicant acted in good faith; (ii) the waiver is of limited scope; (iii) the waiver addresses a concrete problem; and (iv) the waiver does not have undesirable consequences, such as harming third parties.<sup>38</sup> We find that PJM has not satisfied the fourth prong of these waiver criteria.

17. First, Attachment Q, section III requires PJM, upon its receipt of a PJM member's notice of withdrawal from PJM, to return that entity's collateral within a commercially reasonable time. We find that Orange would be unreasonably harmed by granting PJM a waiver request that has the effect of limiting, if not defeating, the return of collateral as set forth in Attachment Q of PJM's tariff.

18. Second, while PJM states that it intends to investigate potential fraud with respect to the execution of the Pledge Agreement by the managing member of GreenHat, PJM fails to make any claim that Orange may have participated in any fraud, pointing out only that GreenHat and Orange have the same managing director. On the evidence submitted by PJM, therefore, we find that Orange would be unreasonably harmed by granting PJM a waiver request.

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<sup>37</sup> *Id.* at § 385.213 (a)(2).

<sup>38</sup> *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

The Commission orders:

PJM's request for a one-time waiver of the PJM Tariff is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner McNamee is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.