

UNITED STATES OF AMERICA 107 FERC ¶ 61,069
FEDERAL ENERGY REGULATORY COMMISSION

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

FPL Energy Marcus Hook, L.P.,
Complainant

Docket No. EL04-57-000

v.

PJM Interconnection, L.L.C.
Respondent

ORDER ON COMPLAINT

(Issued April 20, 2004)

1. On January 20, 2004, FPL Energy Marcus Hook, L.P. (FPL Energy) filed a complaint against PJM Interconnection, L. L. P. (PJM) alleging that PJM failed to properly apply those portions of its tariff governing interconnections of new power plants to the PJM grid. The central issue is whether FPL Energy must continue to bear the costs of upgrades that were part of its interconnection contract when those upgrades are no longer necessary to support FPL Energy's proposed connection to the PJM grid. The Commission denies FPL Energy the relief requested in the complaint, but directs PJM to clarify how certain provisions of its tariff may operate to afford FPL Energy opportunities to recover the investment it has made.

Procedural Framework

2. This complaint was filed on January 20, 2004, and was noticed by the Commission on January 22, 2004. An intervention and comment supporting the complaint was filed by Reliant Resources, Inc. (Reliant) on February 6, 2004, subject to receiving a redacted copy of the complaint. Reliant filed its comments on February 19, 2004 after receiving a copy of the full complaint. PJM filed an answer to the complaint on February 9, 2004. On February 24, 2004, FPL Energy filed a motion for leave to answer and an answer to PJM's filing. On March 9, PJM filed a motion for leave to answer FPL Energy's February 24, 2004 answer, together with an answer. PJM stated it had no objections to that filing as long as PJM was afforded an opportunity to answer the additional arguments that were raised by FPL energy. The Commission will accept Reliant's comments, FPL Energy's answer, and PJM's replying answer as helpful in resolving the rather novel issue that is raised by this complaint.

The Complaint and the Answers

3. In its complaint FPL Energy states that it is an exempt wholesale generator that is developing the Marcus Hook Project (the Project), which is a gas-fired generating facility consisting of three gas turbines and one steam turbine. It asserts that the Project is scheduled for commercial operation in the fourth quarter of 2004 and was assigned a queue position A21 with a queue date of August 17, 1998. As is often the case, FPL Energy was required to make certain network upgrades to the facilities of the local transmission owner, PECO Energy's Conectiv subsidiary, based on a facilities study dated January 2002, and included in an Interconnection Service Agreement (ISA) dated January 22, 2002. The complaint centers on one of the improvements, the Mickleton-Monroe circuit upgrade, which has \$10,334,018 allocated to this project and \$1,148,000 allocated to another project, Project A19. This expenditure was to add a second 230KV Mickleton-Monroe transmission line to meet the needs of the projects A19 and A21.

4. The complaint further alleges that the need for the second transmission line was obviated when a higher queue project, project A13, was withdrawn.¹ FPL Energy asserts that under these circumstances sections 37.2 and 36.8.4(c) of PJM's tariff require PJM to reallocate that cost responsibility of the various parties in the queue. The complaint alleges that PJM knew of the interrelationship between project A13 and projects A19 and A21, and recognized that the upgrade was completed before project A13 withdrawal.²

5. The complaint further asserts that PJM has the obligation to re-evaluate the necessity for the circuit upgrade, reassign the cost responsibility, and execute an amended ISA. FPL Energy argues that if it is liable for any cost increases under the ISA, it should have the benefit of any costs that could be avoided when the higher queued project was withdrawn. It argues this is consistent with a Commission policy that interconnecting generators not pay any unnecessary costs of connecting the transmission grid.³ FPL Energy therefore concludes that because the second 230 KV Mickleton-Monroe transmission line is not required to flow power from project A21, that FPL Energy should have no liability for any of the past or future costs for the construction of that line.

6. Alternatively, FPL Energy asserts that the additional transmission line provides system-wide benefits and should be included in the transmission owner's asset base. It

¹ Project A13 was undertaken by an affiliate of PG&E National Energy Group (PG&NE), the Mantua Creek Generating Company, L.P. The project was terminated on December 5, 2002, after PG&NE filed for bankruptcy under Chapter 11. At that time approximately \$240 million had been expended on the project.

² See FPL Energy complaint at 9.

³ Virginia Electric and Power Co., 104 FERC ¶ 61,249 (2003) (Virginia Electric).

asserts that the double tower structure supporting the line indicates that this was contemplated in any event and therefore there would be no burden on the PJM system. FPL Energy further argues that cost responsibility should be a two-way street, asserting that if it is liable for any unforeseen costs related to its interconnection, it should be credited with any costs that could have been avoided. Reliant supports the complaint as the owner of the A19 project as it is in the same situation. Both parties request that PJM be required to refund any expenditures made for the second 230 KV Mickleton-Monroe transmission line.

7. PJM answers that FPL Energy is not entitled to have the costs recalculated under the applicable tariff provision. It asserts holding to the contrary could lead to the requirement to reallocate sunk costs under other situations where additional capacity was no longer required. For example, if project A13 had come on line, and was then retired after two years, FPL Energy's position would require that the resulting excess capacity be allocated the rest of the PJM system. PJM further asserts that there was no reason to believe that project A13 would be withdrawn given that up to the date of withdrawal some \$240 million had been committed to that project, and PJM had been regularly monitoring its progress. PJM states that it was necessary to do all the work, in Network Upgrade 28, as required by projects A13, A19 and A21, in parallel. Otherwise improvements made for project A13 would have to be removed and upgraded to accommodate those latter two projects, causing the latter parties unnecessary expense.

8. PJM further asserts that there are no system wide benefits because the additional line was never included in PJM's current five year plan for the upgrading of facilities serving the PJM grid. It argues that providing the capacity for a second line at the time transmission towers are built is standard practice because of the small incremental cost of doing so at the time the first line is constructed. PJM concludes that the risk that FPL Energy might not have had to build the second 230 KV Mickleton-Monroe transmission line is a risk FPL Energy assumed under the terms of the "but for" provisions of the PJM Tariff. It alludes to Order No. 2003, stating that if FPL Energy wished to mitigate this risk, it should have negotiated provisions to do so prior to executing its ISA or made other arrangements to do so.⁴ PJM further asserts that when the A13 project was cancelled, it reviewed whether the improvements already installed should be removed. Since this would have cost more than the completion of the Project 28 upgrades, the project was completed. PJM therefore concludes that the requested relief should be denied.

9. FPL Energy asserts in its reply that the relevant tariff language does not support PJM's interpretation that cost reallocation applies only to prospective costs. It also

⁴ Citing Standardization of Generation Interconnection Agreements and Procedures, Order No. 2003, III FERC Stats. & Regs., Regs. Preambles ¶ 31,146, at P 409 (2003).

argues that PJM may have erred in requiring the simultaneous construction of the facilities to support projects A13, A19 and A21. It asserts that a one year delay was possible before starting the construction of the second 230 KV line, and that this would have delayed that expense until after the A13 project was terminated. It argues that PJM was responsible for managing the cluster method used to allocate costs among these projects, and the PJM is responsible for the excess capacity that resulted. FPL Energy also asserts that it is incorrect that the additional mountings for the towers are modest incremental expenses. It includes an affidavit asserting that unless long run expansion was contemplated, the additional construction was imprudent. FPL Energy further requests that PMJ be required to provide credits for its use of the PJM system over 5 years as would be the case under Order No. 2003 if PJM were not an ISO.

10. PJM replies that there was no error in the scheduling of the construction. While Network Upgrade 28 was virtually completed by the fall of 2002, this was necessary to accommodate a proposed completion date for Project A13 of June 2003. It again notes that all the work for projects A13, A19, and A21 had to be done simultaneously, and that the completion of some 90 percent of the facilities by the fall of 2002 was consistent with this need. PJM asks that if FPL Energy thought the upgrades were premature, why it executed its ISA in January 2002. PJM notes that it is an independent organization and that under Order No. 2003, that its "but for" tariff provisions are acceptable. As such, FPL Energy's additional request for relief is both untimely and inconsistent with Order No. 2003 and its citation to Virginia Electric, supra is inapposite.

Discussion

11. The issue raised by this complaint is which entity bears the risk that a project that is higher in the queue may be cancelled, so there is no longer need for the construction performed by a lower project in the queue. There is no disagreement among the parties that if a project is withdrawn, the PJM tariff provides that any pending requirements for capacity should be reviewed and the costs reallocated among the members of the uncompleted projects in the queue. The issue is whether such reallocation is required here after the costs have been incurred and the work completed. The Commission concludes that it is not.

12. The issue is governed by section 36.8.4(c) of the PJM tariff,⁵ which states in part:

Withdrawal: If a Generation Interconnection Customer fails to timely execute the Interconnection Service Agreement (or request dispute resolution or that the agreement be filed unexecuted), meet the milestones

⁵ See PJM's FERC Electric Tariff, Sixth Revised Volume No. 1, Original Sheet No. 103. Other than changing the sheet caption, this provision is unchanged in PJM's proposed compliance filing to Order No. 2003 dated January 20, 2004.

(unless extended) set forth in section 36.8.5, or provide the security prescribed in this section 36.8.4, its Generation Interconnection Request shall be deemed terminated and withdrawn. In the event that a terminated and withdrawn Interconnection Request was included in a Generation Interconnection Facilities Study that evaluated more than one Interconnection Request, or in the event that an Interconnection Customer's participation in and cost responsibility for a Network Upgrade or Local Upgrade is terminated in accordance with Subpart C of Part IV of the Tariff, the Transmission Provider shall reevaluate the need for the facilities and upgrades indicated by the Generation Interconnection Facilities Study, shall redetermine the cost responsibility of each remaining Interconnection Customer for the necessary facilities and upgrades based on its assigned priority pursuant to section 36.10 and/or section 41.8, and shall enter into an amended Interconnection Service Agreement with each remaining Interconnection Customer setting forth its revised cost obligation.

13. The cited language addresses a situation where interconnection projects are included in the same Interconnection Generation Study because of engineering relationships among the Interconnection Customers involved in the study. The withdrawal of a project can change the interrelationships among the projects as the need for additional facilities and upgrades change or if the number of Interconnection Customers included in the study is reduced. The language in the tariff provides that where a project is terminated, the remaining responsibility for as yet to be constructed upgrades will be redetermined. For example, in the instant case, when project A21 entered the queue, some costs previously borne by Project A19 were reallocated to reflect their proportionate demands on the relevant portion of the PJM grid.

14. But in this case, construction had reached the point that a similar reallocation among prospective construction work involving subsequent projects could not take place. The Commission, therefore, concludes that under its tariff, PJM could not reallocate construction responsibility among the remaining project participants. As PJM argues, it makes no sense to require recalculation for the expense of construction that has already occurred unless such a recalculation is consistent with a prospective construction program. Thus, if the costs incurred by FPL Energy reflected capacity that was of value to other parties seeking capacity, or could have been avoided upon cancellation of project A13, the costs would have been reallocated or reduced accordingly. Since the costs could not be reallocated to a party needing the use of the second 230 KV line, PJM correctly used the least cost method under the circumstances, which was to complete the project.

15. FPL does not claim that conditions were such that such a reallocation was possible. Rather, it claims that since the construction of the additional 230 KV line capacity turned out to be unnecessary, it requests that those costs be allocated to PJM, the grid operator, or to Conectiv's rate base as system-wide capacity. It does not seek to

allocate those costs to another party making an incremental connection to the grid nor is it willing to assume costs that were programmed for its benefit and for project A19. This is inconsistent with PJM's tariff, which is based on the "but for" principle. This principle requires that an interconnecting generator must pay for all the costs that would not be incurred except for its project. Furthermore, as PJM explained in its compliance filing to Order No. 2003, an interconnecting generator bears all the risks associated with its project.⁶ These include the potential loss of value of the plant due to unfavorable market conditions, or as here, a change in the structure of the queue. Order No. 2003 specifically notes that generators that are concerned with this possibility should address it in their ISA or find other means of hedging this risk.⁷ If no such protection is provided in the ISA, the connecting generator is assumed to have assumed the risk that there might be changes in the structure of queue.

16. FPL Energy also argues that PJM may have erred in scheduling Network Upgrade 28 so that all the improvements for projects A13, A19, and 21 were done simultaneously. This argument suggests that PJM was negligent in its administration of the interconnection program and should therefore bear the cost of the unnecessary costs incurred for the additional 230 KV line. On the merits, this argument is unpersuasive given the project record and analysis provided by PJM, showing that it could reasonably have concluded that simultaneous construction was efficient, and that it had no way of anticipating that Project A13 would be withdrawn, particularly given the level of investment in that project. Moreover, as PJM points out, whatever problems have ultimately resulted, FPL Energy agreed to the simultaneous approach at the time it executed its ISA. Since PJM is an independent RTO with no stake in this construction or motive to discriminate in favor of its own generating capacity, and FPL Energy agreed to the construction schedule, the Commission finds that FPL Energy has failed to show any gross negligence in PJM's decisions and that there is no basis for requiring PJM, and the rest of its members, to absorb costs that FPL Energy voluntarily undertook as part of its project.

17. It is these factors that distinguish the concerns raised in Virginia Electric, supra, from the instant case. The concern addressed in that case is that a generator lower in queue might be precluded from utilizing existing capacity while waiting for another generator, whose project might be delayed, to come on-line. In that case, the Commission expressed that concern that delay in the completion of a higher ranked project might result in the lower ranked project building capacity that would turn out to be unnecessary. Even though that did not seem to be a likely prospect in reality, the Commission nonetheless suggested that if there was excess capacity that could be used

⁶ See PJM's Answer dated February 25, 2004, filed in Docket No. ER04-457 at p. 7, footnote 9.

⁷ See Footnote 3, supra.

by the lower ranked project on an interim basis until the higher ranked project was approaching completion, then the lower ranked project could be given the option to delay its construction until the higher ranked project can on on-line. But this decision is inapplicable in the instant case, because here simultaneous construction was agreed to by all to be the most efficient way of limiting total costs, and FPL Energy's construction had already been completed when the higher project was withdrawn. Thus, the procedure adopted in Virginia Electric would be of no value to FPL Energy.

18. Finally, given that the addition of the extra line was not included in PJM's applicable five year investment plans, the Commission will reject FPL Energy's assertions that the additional 230 KV line has system-wide benefits. If this project had been included in PJM's Regional Transmission Plan, because it had system-wide benefits, there would be no need to require FPL Energy to build that line.⁸ Since the second 230 KV line was not part of the PJM Regional Transmission Plan, the "but for" provisions of PJM's tariff are controlling.⁹ Finally, as PJM is an RTO, there is not merit to FPL Energy's request that PJM be treated as if were not one in this case.

19. For the reasons discussed, the Commission concludes that none of the relief FPL Energy has requested here can be granted. However, the Commission directs PJM to clarify how, if at all, certain other provisions of its tariff and commercial practices are applicable to the present case. First, it would appear that at the present time there would be little value to any incremental Auction Revenue Rights (ARRs) that might be associated with the additional 230 KV line because that line is not needed now for transmission purposes. The Commission directs PJM to explain how revenue (from ARRs or otherwise) might accrue to FPL Energy if transmission congestion does occur

⁸ In this regard, see PJM's FERC Electric Tariff, Sixth Revised Volume No. 1, Original Sheet No. 105, section 37.2 (unchanged in PJM's compliance filing to Order No. 2003 dated January 20, 2004), which provides:

A Generation Interconnection Customer shall be obligated to pay for 100 the costs of the minimum amount of Local Upgrades and Network Upgrades necessary to accommodate its Generation Interconnection Request and that would not have been incurred under the Regional Transmission Expansion Plan but for the Generation Interconnection Request, net of benefits resulting from the construction of the upgrades, such costs not to be less than zero....(emphasis added).

⁹ FPL Energy cites no compelling basis for challenging PJM's determination that the "but for" provisions of its tariff applied, and, in any event, such a challenge should have been made before FPL Energy agreed to those conditions, not after the project has already been completed.

and power begins to flow over the second line. Since the line is not included in the transmission owner's rate base,¹⁰ it seems inequitable for any revenues that result from the use of the line to accrue to the transmission owner. PJM must clarify how ARRs might be allocated in this situation and the prospect that this might provide some relief.

20. Second, section 37.7 of Sixth Revised Volume No. 1, Original Sheet No. 107, appears to require that if another generator attaches to the system in a manner that would create need for the second 230 KV line funded by projects A19 and A21, these projects would receive some reimbursement because a proportionate share of the sunk costs would be reallocated to the new Interconnection Customer. Such a contribution would help defray the costs FPL Energy has incurred. PJM needs to confirm whether this interpretation is correct.

21. PJM must provide the clarifications required here within 30 days after this order issues.

The Commission orders:

(A) The Commission denies the relief requested by FPL Energy in the case.

(B) PJM shall provide the clarifications required by P 19 and P 20 within 30 days after this order issues.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Acting Secretary.

¹⁰ See PJM's February 25, 2004 Answer in Docket No. ER04-457 at 4.