

I. BACKGROUND

On July 26, 2018, PJM filed the Waiver Request, which asked the Commission to grant temporary waiver of certain FTR liquidation rules specified in its Tariff and Operating Agreement due to GreenHat Energy, LLC's ("GreenHat") payment default of its financial obligations. In part, PJM sought a waiver of the then-effective section 7.3.9 in order to permit it to sell in the July, August, September, and October 2018 monthly FTR auctions only the portion of GreenHat's FTR 2018/2019 Planning Period portfolio effective in the prompt month.

In its January 30 Order, the Commission denied PJM's Waiver Request, finding that it did not meet two of its four requirements for granting such a waiver. In particular, the Commission found that PJM had not shown that the proposed waiver is limited in scope, as it was seeking to change the rules governing an "already-commenced" auction, and that PJM proposed to waive four discrete elements of the Tariff in order to potentially substitute new rules that had not yet been proposed. The Commission found that "[s]uch a significant change to multiple parameters of an already-commenced auction is not a remedy that is limited in scope."³

The Commission's January 30 Order also found that PJM did not demonstrate that its requested waiver would not have undesirable consequences, noting that ". . . all parties – including PJM – were aware before the auction of the Tariff requirement to liquidate the GreenHat portfolio 'at an

³ *Id.*, P 33.

offer price designed to maximize the likelihood of liquidation.’ Under those circumstances, granting a waiver to change the rules after the auction commenced would be particularly disruptive to settled expectations.”⁴

The Commission’s January 30 Order, therefore, requires PJM to re-run the cleared July 2018 FTR auction and to replace the July 2018 results with the auction results that would have included the liquidation of a significant portion of the FTR positions from the GreenHat portfolio for September 2018 through May 2019. The order also directs PJM to unwind settlements for the period of September 2018 through January 2019.

While the Commission denied PJM’s Waiver Request, it stated that it was “cognizant of the significant impact that GreenHat’s default has had on other market participants and, ultimately, consumers.”⁵ The Commission disclosed that its Office of Enforcement has begun a non-public investigation under Part 1b of the Commission’s regulations into whether GreenHat engaged in market manipulation or other potential violations of the Commission’s orders, rules, and regulations, and that the Commission would determine what, if any, further action is needed at the conclusion of Commission Staff’s investigation.

II. MOTION TO INTERVENE AND COMMENTS

EPSA submits that its members, many of whom do not even trade FTRs, will be directly, and significantly, impacted by the Commission’s January 30 Order denying PJM’s Waiver Request. Although EPSA recognizes that it is well beyond the Commission’s notice requirement for intervention in this proceeding,

⁴ *Id.*, P 34 (citations omitted).

⁵ *Id.*, P 36.

EPSA respectfully requests that the Commission allow its out-of-time intervention and consider these comments in reviewing any requests for rehearing of its January 30 Order. As discussed below, EPSA submits that its motion satisfies the requirements of Rule 214(d) of the Commission's Rules of Practice and Procedure⁶ and is consistent with Commission precedent granting motions to intervene in similar circumstances.⁷

EPSA has previously been a party to various FTR related proceedings in PJM and credit policy proceedings more broadly, but did not intervene timely in response to the PJM Waiver Request. Unfortunately, although EPSA was aware of PJM's Waiver Request in this proceeding, it nonetheless did not fully understand the ramifications of a denial of PJM's Waiver Request until after the issuance of the January 30 Order, as PJM itself is attempting to determine the repercussions of the denial and discussing the implications with stakeholders. EPSA and other PJM stakeholders are just now learning the likely effects of the Commission's January 30 Order, including:

- The total default allocation assessments to PJM members will likely materially and unnecessarily increase by a preliminarily estimated range of \$250 - \$300 million, resulting in a revised total default reference of at least \$430 million, based on comparing (a) the revised July 2018 auction results that would result from implementing the order with (b) the sum of the actual default charges for June 2018 through December 2018 plus the most recent auction prices for the January 2019 through May 2021 positions;
- Certain PJM members will likely be in breach of their collateral requirements of PJM's credit policy, requiring them to fulfill a collateral call within two business days based on unanticipated changes in their FTR positions from changing the cleared results of the July 2018 FTR auction; and

⁶ 18 C.F.R. § 385.214(d)(2018).

⁷ See, e.g., *PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,173 at P 12 (2018); *Arkla Gathering Servs. Co.*, 68 FERC ¶ 61,096, at 61,547 (1994).

- PJM will be required to rerun and revise previously cleared FTR auction results, and to resettle affected FTR portfolios.⁸

The January 30 Order raises a number of other challenging questions and issues as well, given the complications associated with an auction that occurred over six months ago, and to rerun an auction that has been completed. One concern regards FTRs that have been resold bilaterally or in subsequent auctions: If a market participant bought an FTR in the June auction and resold it to a third party, what happens if in the replacement auction it does not obtain the same FTR? What happens to the party that it sold the FTR too? Can that party sue the seller for failure to deliver? What about the converse—a party did not win a FTR in the June auction. Now, when the auction is rerun, it indeed gets an FTR, but that may be for a time period and location that is no longer relevant. This party would be the owner of an FTR that it no longer wants or needs.

Historically, the Commission has respected market outcomes and has recognized that administrative changes to those outcomes have negative effects on markets and market participants, who have made decisions based on outcomes they believed were final. While this circumstance is marred by suboptimal actions taken by PJM, FERC's decision not to accept the auction

⁸ PJM Interconnection, L.L.C., Market Implementation Committee, *FERC Order Denying PJM's Request for Waiver re: Liquidating FTR Positions of Defaulted Member*, dated February 6, 2019, available at <https://www.pjm.com/-/media/committees-groups/committees/mic/20190206/20190206-item-01a-informational-update-ferc-order-denying-waiver-request.ashx>. See also Markets and Reliability Committee, *Update on FERC Order Denying PJM's Request for Waiver re: Liquidating FTR Positions of Defaulted Member*, dated February 21, 2019, available at <https://www.pjm.com/-/media/committees-groups/committees/mrc/20190221/20190221-informational-update-denial-of-waiver-update.ashx>.

results will *dramatically* change the market outcome and is a major departure from the practice of respecting transactional finality.

EPSA respectfully submits that these material and substantial implications, that will in all probability impact EPSA members, many of whom do not even trade FTRs, have not been fully disclosed to the Commission for its consideration prior to the issuance of its January 30 Order. Given the enormous and unanticipated impact of the Commission's decision to deny the waiver, PJM market participants may be placed in untenable financial positions, particularly because market participants were not able to take any actions to mitigate the costs resulting from the GreenHat default or the Commission's order. This, in turn, could lead to a further eroding of the PJM market. As EPSA could not predict the broad and potentially devastating impacts of the January 30 Order, there was good cause for its failure to file a timely motion to intervene.

Further, in seeking the waiver, PJM sought a temporary delay to the FTR auction to allow time to consider with stakeholders the necessary market reforms and actions to minimize impacts (and costs) of the default to other PJM Members and ultimately, consumers. With the exception of one market participant, all PJM market sectors, as well as the PJM Independent Market Monitor, were supportive of the waiver. This requested delay was reasonably intended to give PJM an opportunity to consult further with PJM Members regarding the best way to address the GreenHat default and to maintain confidence in the market. At the same time, the PJM Waiver Request seemed consistent with other situations where the Commission has granted waiver of market rules, and EPSA did not

anticipate that FERC would not apply its precedent, particularly in light of potential cost implications to other PJM Members.⁹

As has become increasingly apparent, in this instance, the liquidation is substantially more expensive than allowing the GreenHat FTRs to “roll off.” In other words, the practical effect of the Commission’s denial or “cure” is much worse than the ailment (i.e., the GreenHat default) and in fact maximizes market disruption in this case. EPSA suggests a common sense approach in responding where the Commission’s concerns regarding the importance of PJM’s Tariff do not justify exposing PJM Members to literally hundreds of millions in additional costs. Rather, when an ISO/RTO has to handle a default, minimizing market disruption and associated costs should be a key objective.

As the national trade organization representing competitive power suppliers, including numerous PJM members, EPSA is in a unique position such that its interests cannot be adequately represented by another party. Allowing EPSA to participate would further the Commission’s consideration in balancing interests. EPSA agrees to accept the current record as it stands, such that its intervention will not disrupt this proceeding or impose any burden on the existing parties. EPSA and its jurisdictional members operating in PJM, however, will clearly be directly affected by the Commission’s January 30 Order and any other determination stemming from this proceeding. Therefore, EPSA submits that

⁹ See, e.g., *Gateway Cogeneration 1, LLC*, 161 FERC ¶ 61,028 at P 18 (2017) (granting waiver after “balancing the equities”); *First Solar Development, LLC*, 161 FERC ¶ 61,256 at P 22 (2017) (same).

good cause exists for the Commission to grant its out-of-time motion to intervene in this proceeding.

III. CONCLUSION

WHEREFORE, EPSA respectfully requests that the Commission grant its out-of-time motion to intervene and designate it as a party to this proceeding with all of the rights appropriate to that status, and consider the comments provided herein.

Respectfully submitted,

/s/Nancy Bagot

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the comments via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., February 26, 2019.

/s/Nancy Bagot

Nancy Bagot, Senior VP