



indemnification under section 10.3 of the PJM Open Access Transmission Tariff (“OATT”), but Duke’s lack of a legal basis for this claim has been fully addressed in the Market Monitor’s and others’ prior pleadings.<sup>2</sup> Duke does not press its claim for indemnification in its June 11<sup>th</sup> answer. However, Duke, with support from PJM, does continue to argue for a waiver, emphasizing that a shift of the cost of gas procurement is justified in the particular emergency conditions present on January 28, 2014. Duke and PJM agree that unless a waiver is granted, PJM cannot expect cooperation from the owners of Generation Capacity Resources to provide energy during emergencies if it does not permit resources to recover losses on gas purchases from PJM customers, and that this will compromise PJM’s ability to ensure reliability operations in PJM. PJM and Duke’s argument that PJM will not get the cooperation it needs for reliability is not grounds for a waiver. If PJM cannot rely on cooperation from capacity resources to meet their obligations and maintain reliability, then it is time to evaluate whether the rules provide, as they are intended to do, adequate incentives for resources to meet their obligations. Accordingly, the request for waiver should be denied.

## **I. ANSWER**

PJM strongly opposes Duke’s request for indemnification under section 10.3, and PJM contradicts a number of facts and representations on which Duke relies on for support of its request for a waiver. Nevertheless, PJM does not oppose Duke’s request for waiver, stating (at 48):

... PJM needs to be able to rely on the owners and operators of generation resources in the PJM Region to comply with PJM’s dispatch instructions. PJM fears that if generation owners and operators incur an extraordinary loss, such as that which Duke experienced in this case, which are in large part due to the existing

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<sup>2</sup> See, e.g., PJM May 27<sup>th</sup> Answer at 11–45; PJM June 26<sup>th</sup> Answer at 2–8; Protest of the PJM Industrial Customer Coalition, Docket No. EL14-45-000 (May 27, 2014).

conditions of the gas market, they may hesitate to comply with PJM's dispatch instructions despite the Tariff requirement that they do so. PJM cannot sustain long term reliable operations if generation owners and operators are forced to make a business decision to violate the Tariff and not comply with a dispatch instruction because they fear they will incur costs they cannot recover under the Tariff."

PJM's position is not consistent with its market design. If customers pay for capacity they have the right to expect performance. If the incentives for such performance are not strong enough for PJM to rely on, they should be strengthened until PJM can rely on capacity resources to meet their obligations.

PJM's assertion that PJM fears that generation owners will not comply with the Tariff if they are not provided special payments for which they do not qualify under the Tariff is extraordinary. It is a statement that the current incentives are not adequate. The Market Monitor agrees. But the solution is to strengthen the performance incentives and not to make special after the fact payments for the purpose of assuring participants that they may receive such payments in the future. There is no incentive based reason to pay participants for actions that they have already taken. PJM could meet the same objectives by changing the rules to provide for such payments in the future or by fixing the performance incentives.

The Market Monitor has previously identified the issue of inadequate performance incentives for capacity resources.<sup>3</sup> By supporting this waiver, PJM effectively agrees that incentives are not strong enough. PJM should take immediate action to fix its flawed performance incentives. PJM should have performance incentives that are transparent, consistent with its overall market design and applied on a non-discriminatory basis to all participants. PJM should not support one-off requests for retroactive subsidies. This approach does not fix PJM's flawed rules. Granting this waiver request opens the

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<sup>3</sup> See, e.g., 2013 State of the Market Report for PJM, Vol. 2 (March 13, 2013) at 161.

floodgates to future requests for waivers, but it does not provide certainty to any participant that its costs will be reimbursed. Accordingly, waiver are not a means for PJM to achieve its purported objectives.

The term “emergency” has been used carelessly in this proceeding. An “emergency” as PJM defines it is not extraordinary or unexpected. PJM has issued 10 Maximum Emergency Generation Alerts and 49 Hot or Cold Weather Alerts since January 1, 2013.<sup>4</sup> Peak days are not normal or average days, but such days are explicitly contemplated in the process for determining how much capacity that PJM needs to procure. An obligation to perform at all times, including peak times, is an essential feature of the capacity product.

Duke argues (at 3–4) that it is “incorrect” that it “was already required to buy the gas because Lee is a Capacity Resource,” explaining that, “but for PJM’s directive, Duke never would have been required to purchase gas for January 28th, notwithstanding Lee’s status as a Capacity Resource.” Duke does not show that it was not required to buy gas because it is a capacity resource. Duke shows, at most, that it was prepared to risk not meeting its obligation to provide energy when it was needed. In fact, Duke did risk not being available, because it delayed its decision to buy gas after PJM issued a Maximum Emergency Generation Alert and it did not buy the gas needed to operate all of the Lee units after PJM indicated that all of the Lee units might be needed. Duke concedes that it did not follow PJM’s instructions (at 15), but it asserts that it “bought as much gas as it could find.” Duke has not supported its claim that it could not procure the gas that PJM thought would be needed. Duke’s assertion does not account for its delay in deciding to purchase gas. Had Duke determined not to buy gas and had then been called by PJM, its decision not to buy gas would have been investigated and if the Tariff had been violated, PJM, the Market Monitor and the Commission would all have acted.

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<sup>4</sup> See *Id.* at 112–114; 2014 Quarterly State of the Market Report for PJM: January through March (May 15, 2014) at 120.

Duke claims (at 7) that the Market Monitor “essentially assert[s] that Duke should have defied PJM’s Master Dispatcher and refused to buy the gas.” The Market Monitor makes no such assertion. The Market Monitor asserts that Duke should be ready to provide energy from the Lee units whenever it is needed because it is a capacity resource. Issuance of a Maximum Emergency Generation Alert and statements from PJM anticipating that the Lee units would be needed in no way relieves the Lee units of their obligations as capacity resources, rather it emphasizes and reinforces those obligations.

Duke’s obligations as a capacity resource do not turn on whether it has communications with PJM or the content of any such communications. Duke cannot transfer its fuel procurement risk to PJM customers by calling to ask PJM’s opinion on whether it will be called the next day. PJM dispatchers cannot excuse Duke of its capacity obligations if they indicate that they do not expect to need capacity on the following day. The Commission should not grant a waiver based on whether communications occurred and the content of those communications with particular participants. Similarly, participants should not be penalized for not calling PJM to discuss the likelihood of being dispatched or to receive advice on fuel procurement decisions.

Duke argues (at 8–9, 13–14), “PJM’s command required Duke to abandon its preferred approach to managing commercial risk, and instead embark on a directly contrary path.” On the contrary, Duke was not required to abandon its approach, and Duke did not, in fact, follow PJM’s approach. Duke’s own behavior during the events belies this claim. PJM did not and could not prevent Duke from recourse to any of the alternatives to being ready to run that Duke asserts were available to it (at 9–10), including buying replacement capacity or submitting higher day-ahead offers.

Contrary to Duke’s argument (at 36), Duke’s timing for gas purchases was not determined by PJM. Thus, Duke’s costs to run the Lee units are best calculated effective at the time that a Maximum Emergency Generation Alert issued and not a later time.

Duke claims (at 11–12) that the provisions cited by the Market Monitor (OATT Attachment DD § 8.1; OA Schedule 1 § 1.10.1A(d)) that obligate Duke to provide energy when

needed do not “suggest[] that it is impermissible to wait to purchase gas after receiving dispatch notification.” The Market Monitor does not suggest that the cited rules mean that Duke cannot wait to purchase gas. Duke has the responsibility to manage its own fuel procurement in the short and long term. Duke can purchase gas at what it believes is the optimum time, but it must meet its obligation to provide energy when it is needed.

Duke complains (at 13) that the Market Monitor provides no citations (presumably, Duke means other than to the PJM tariff) showing that capacity resources have an obligation to provide energy when it is needed. The Commission recently has explained in *New England Power Generators Association, Inc. v. ISO New England, Inc.* that capacity resources have an obligation to provide energy when it is needed and that they cannot fail to meet that obligation for economic reasons.<sup>5</sup> Capacity resources have the same obligation under the PJM market rules, and PJM explained those obligations to Duke in their communications.<sup>6</sup> Because Duke has an existing obligation to provide energy when needed, Duke cannot properly shift the costs incurred to meet this obligation to PJM customers.

Duke concedes (at 17), as the Market Monitor argues, that “Duke has simply identified for waiver the provisions that permit Duke to be compensated.” Accordingly, Duke’s claim that its request “is narrowly tailored to plugging the Tariff gap, for Duke alone, under specifically described and substantiated extraordinary circumstances” is incorrect. Duke proposes to radically alter the defined assignment under the market rules of fuel procurement risks to suppliers and not to customers. Capacity resource status means

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<sup>5</sup> See 144 FERC ¶ 61,157 at PP 47–59 (2013) (“The Commission agrees with ISO-NE that the Tariff imposes a strict performance obligation on capacity resources and that capacity resources may not take economic outages, including outages based on economic decisions not to procure fuel or transportation. However, ... we find that a demonstrated inability to procure fuel or transportation, as opposed to an economic determination not to procure fuel or transportation, may legitimately affect whether a capacity resource is physically available under the Tariff, and therefore may excuse nonperformance.”), *order on reh’g*, 145 FERC ¶ 61,206 (2013); Duke June 11<sup>th</sup> Filing at 5.

<sup>6</sup> See PJM May 27<sup>th</sup> Answer at 4 & n.9, 8, 27–28,

providing energy when it is needed, including on peak days, which typically include the hottest and/or coldest days of the year. That is why capacity resources are paid through the capacity market. Granting the relief that Duke requests would either constitute impermissible discrimination relieving only Duke of its capacity-related responsibilities or would radically change the assignment of risk between all suppliers and all customers. Other waivers concerning similar circumstances are pending.<sup>7</sup> Waivers of the tariff rules should not be used to discriminate in favor of particular suppliers or to effectively and unilaterally change the market design.

Duke claims (at 20) that “the IMM [does not] dispute that the term ‘start-up costs’ is undefined.” On the contrary, the Market Monitor cites to the formula included in the Cost Development Guidelines (PJM manual 15 § 2.4.1 at 12) that plainly provides for the calculation of start up costs based on the fuel actually burned to start the unit. In addition, the term “start up cost” is self explanatory and well understood in the industry.

Duke indicates (at 22–23), in response to PJM’s argument that Duke should have pursued waiver under a theory that it should receive “cancellation fees” and not “start up costs,” that it “does not object to treating the costs instead as a ‘cancellation fee.’” Duke is indifferent to the particular theory of recovery and how it would impact risk assignment in PJM markets going forward, so long as it is permitted to shift the losses that it incurred to PJM customers.

Duke is not entitled to cancellation fees under the rules, and waiver of rules that are operating as intended in order to create a different result should not be permitted. Contrary to PJM’s argument that it made a “selection” of the units that entitles the units to a waiver, “selection” has no meaning apart from scheduled under the PJM market rules.<sup>8</sup> There is no

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<sup>7</sup> See FERC Dockets Nos. ER14-2075 and ER14-2242.

<sup>8</sup> PJM May 27<sup>th</sup> Answer at 50.

defined selection process based on dispatcher communications. Paying cancellation fees to Duke for the cancellation of units that were deemed to be selected would effectively create a new term and a new right under the PJM market rules. PJM does not assert that every unit scheduled day ahead should receive a waiver if not run in the operating day.

Finally, the Market Monitor does not agree with Duke (at 36) that rapid action on this complaint and request for waiver is needed to “promote market finality.” The market rules are currently clear and final. The fact that Duke would like to change the applicability of the market rules is not required for market finality. There are numerous matters currently before the Commission that, if resolved, would do more to promote market stability than this claim, which involves radical change to current and long established rules assigning fuel procurement risks. The Commission should take whatever time it needs to render an appropriate decision and, if it decides to grant any relief contrary to the Market Monitor’s position, it is necessary to carefully review and determine the basis for any costs that Duke is permitted to recover.<sup>9</sup>

## II. MOTION FOR LEAVE TO ANSWER

The Commission’s Rules of Practice and Procedure, 18 CFR § 385.213(a)(2), do not permit answers to answers or protests unless otherwise ordered by the decisional authority. The Commission has made exceptions, however, where an answer clarifies the issues or

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<sup>9</sup> Although supportive of Duke’s waiver claim, we note that PJM specifically disclaims (at 45) support for recovery by Duke at any particular level. If the Commission allows waiver of any PJM market rules as they would otherwise apply to Duke, no value should be determined without additional detailed review of Duke’s costs, including the specific reasons why any cost was incurred and whether reasonable opportunity to avoid incurring costs existed. Costs that are not documented and verified, costs incurred without good reason and costs that could have been avoided should be denied even if a waiver is granted, and even if the actual level of recovery is *de minimis*.



assists in creating a complete record.<sup>10</sup> In this answer, the Market Monitor provides the Commission with information useful to the Commission's decision-making process and which provides a more complete record. Accordingly, the Market Monitor respectfully requests that this answer be permitted.

### III. CONCLUSION

The Market Monitor respectfully requests that the Commission afford due consideration to this pleading as the Commission resolves the issues raised in this proceeding.

Respectfully submitted,



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Jeffrey W. Mayes

Joseph E. Bowring  
Independent Market Monitor for PJM  
President  
Monitoring Analytics, LLC  
2621 Van Buren Avenue, Suite 160  
Valley Forge Corporate Center  
Eagleville, Pennsylvania 19403  
(610) 271-8051  
*joseph.bowring@monitoringanalytics.com*

General Counsel  
Monitoring Analytics, LLC  
2621 Van Buren Avenue, Suite 160  
Valley Forge Corporate Center  
Eagleville, Pennsylvania 19403  
(610) 271-8053  
*jeffrey.mayes@monitoringanalytics.com*

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<sup>10</sup> See, e.g., *PJM Interconnection, L.L.C.*, 119 FERC ¶61,318 at P 36 (2007) (accepted answer to answer that "provided information that assisted ... decision-making process"); *California Independent System Operator Corporation*, 110 FERC ¶ 61,007 (2005) (answer to answer permitted to assist Commission in decision-making process); *New Power Company v. PJM Interconnection, L.L.C.*, 98 FERC ¶ 61,208 (2002) (answer accepted to provide new factual and legal material to assist the Commission in decision-making process); *N.Y. Indep. Sys. Operator, Inc.*, 121 FERC ¶61,112 at P 4 (2007) (answer to protest accepted because it provided information that assisted the Commission in its decision-making process).

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Eagleville, Pennsylvania,  
this 10<sup>th</sup> day of July, 2014.



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Jeffrey W. Mayes

General Counsel

Monitoring Analytics, LLC

2621 Van Buren Avenue, Suite 160

Valley Forge Corporate Center

Eagleville, Pennsylvania 19403

(610) 271-8053

*jeffrey.mayes@monitoringanalytics.com*