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OCT 15 2018

BOARD OF PUBLIC UTILITIES
TRENTON, NJ

October 12, 2018

Via Electronic & Overnight Mail

Hon. Aida Camacho-Welch
Secretary of the Board
Board of Public Utilities
44 South Clinton Avenue
3rd Floor, Suite 314
PO Box 350
Trenton, New Jersey 08625-0350

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CASE MANAGEMENT

OCT 15 2018

BOARD OF PUBLIC UTILITIES
TRENTON, NJ

**Re: In the Matter of the Provision of Basic Generation Service ("BGS")
For the Period Beginning June 1, 2019 – Docket No. ER18040356
Final Comments of Exelon Generation Company, LLC**

Dear Secretary Camacho-Welch:

Exelon Generation Company, LLC ("ExGen")¹ appreciates the opportunity to provide Final Comments on the proposed BGS-RSCP Supplier Master Agreement and the proposed BGS-CIEP Supplier Master Agreement (collectively the "SMA") in the above-captioned proceeding. As noted in our Initial Comments, based on ExGen's experiences with procurements in New Jersey and other states, ExGen recommends a change to the treatment of charges for Firm Transmission Service as set forth in section 15.9 of the SMA. The purpose of these Final Comments is to provide some additional background information on this issue as well as further details related to the ExGen request, as requested by Rate Counsel in Comments submitted during the September 28, 2018 hearing in this docket.²

As further described below, ExGen proposes that Firm Transmission Service charges be paid by the Electric Distribution Companies ("EDCs") directly. This direct pass-through, which has been adopted by other states, would improve the ability of Basic Generation Service ("BGS")

¹ ExGen, individually or through its subsidiaries, has participated in the competitive Basic Generation Service ("BGS") auction procurement processes and currently is a BGS Supplier.

² See Comments of Stephanie A. Brand, Director, New Jersey Division of Rate Counsel, at a Legislative-Type Hearing before the Board of Public Utilities, BPU Docket No. ER18040356 (September 28, 2018). Although Exelon representatives were present at that legislative-type hearing, Exelon did not present comments at that time because the company had no response to any of the Initial Comments filed.

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suppliers to offer BGS at competitive rates and help keep customers' costs reasonable. Alternatively, if the New Jersey Board of Public Utilities (the "Board") is not prepared to adopt this pass-through approach, ExGen requests the Board modify section 15.9 to streamline the cost recovery process, reducing the delay before suppliers are reimbursed for these costs and mitigating the need for suppliers to price risks associated with these charges into their BGS bids, thereby benefiting New Jersey customers. In this latter option, to be clear, ExGen is *not* requesting that BGS suppliers be reimbursed in advance of incurring these charges. Rather, ExGen is simply recommending that the timing of reimbursement for Firm Transmission Service charges align with suppliers' requirement to pay those charges.

Background

Firm Transmission Service Charge Pass-Through

Section 15.9 of the SMA details the procedure through which EDCs seek approval to reflect an increase or decrease to Firm Transmission Service charges, including any charge or surcharge imposed on customers receiving Firm Transmission Service, resulting from a Federal Energy Regulatory Commission ("FERC") order or an adjustment under a FERC-authorized formula rate. Among other things, the procedure requires Board approval before EDCs can collect such increased charges from customers and further requires that FERC issue a "Final FERC Order . . . not subject to refund" before EDCs may reimburse BGS suppliers for the increased costs.

Since Section 15.9 was implemented in 2004, the Board has approved multiple adjustments to FERC-approved transmission charges under the SMA,³ in each case directing the EDCs to collect and hold any funds collected as part of such transmission charge increase until such time

³ See, e.g., *In the Matter of the Provision of Basic Generation Service and the Compliance Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff – June 2018 AEP TEC Filing*, Docket No. ER18070758 (Aug. 29, 2018); *In the Matter of the Petition of Atlantic City Electric Company for Approval to Implement FERC-Approved Changes to ACE's Retail Transmission (Formula) Rate Pursuant to Paragraph 15.9 of the BGS-RSCP and the BGS-CIEP Supplier Master Agreements and Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff (2018)*, Docket No. ER18070711 (Aug. 29, 2018); *In the Matter of the Provision of Basic Generation Service and the Compliance Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff JCP&L, PSE&G, and Rockland June 20, 2018 Filing*, Docket No. ER18060656 (Aug. 29, 2018).

as the FERC order in question is “final and unappealable.”⁴ For example, requests to reimburse suppliers related to FERC orders issued last year are currently pending before the Board.⁵

Transmission Enhancement Project Costs

As explained below, the recently approved settlement of more than a decade of litigation in the transmission cost allocation proceedings arising from Opinion No. 494 (the “494 Proceedings”) provides a stark illustration of the significance and scope of this issue.

On May 31, 2018, FERC approved a contested settlement of the 494 Proceedings.⁶ The 494 Proceedings involved reallocation of the costs to build large-scale transmission projects (that is, transmission facilities 500 kV and above) that were approved by the PJM Interconnection L.L.C. (“PJM”) between 2007 and February 1, 2013.⁷ These projects – known as Transmission Enhancement Projects – were approved by PJM for the purpose of ensuring reliability.

PJM originally proposed to allocate the costs of these projects on a pro rata or load ratio share basis across all of PJM on the theory that they would contribute to the reliability of the PJM grid as a whole. This allocation methodology was appealed to the U.S. Court of Appeals for the Seventh Circuit, which reversed and remanded to FERC for further proceedings.⁸ On remand, FERC again proposed use of a load ratio share methodology, which resulted in a second appeal to the Seventh Circuit and a second reversal and remand to FERC for further proceedings.⁹ On the second remand in 2014, FERC set the proceeding for hearing and settlement proceedings.

Following lengthy settlement proceedings, most of the parties (including the Board) either joined or did not oppose the settlement, which was filed with FERC on June 15, 2016. On May 31, 2018, FERC approved the contested settlement and ordered PJM to make a compliance filing to

⁴ The Board has more recently noted that it has the authority to allow EDCs to begin passing through collected payments to suppliers before a final order; however, it has not yet done so. *See, In the Matter of the Provision of Basic Generation Service for the Period Beginning June 1, 2018*, Docket No. ER17040335 at 9-10 (November 21, 2017).

⁵ *See* Docket No. ER18020157. Those requests for reimbursement were precipitated by FERC orders issued in December 2017 in FERC Docket Nos. EL-17-84-000 and EL 17-90-000.

⁶ *See, e.g., PJM Interconnection, L.L.C., Order on Contested Settlement*, 163 FERC ¶ 61,168, Docket No. EL05-121-009 (May 31, 2018) (“May 2018 Order”).

⁷ *Id.*

⁸ *Illinois Commerce Commission v. FERC*, 576 F.3d 470 (7th Cir. 2009), *reh'g and reh'g en banc denied* (Oct. 20, 2009).

⁹ *Illinois Commerce Commission v. FERC*, 756 F.3d 556 (7th Cir. 2014).

implement the settlement.¹⁰ On July 30, 2018, PJM made the required compliance filing with amendments to the PJM Open Access Transmission Tariff (the “PJM Tariff”) to revise the cost allocation for the large scale transmission projects at issue (the “Covered Transmission Enhancements”) pursuant to the contested settlement.¹¹

Thus, to be clear, the 494 Proceedings involve the *resettlement* of old transmission construction costs. They do not involve new transmission costs.

Comments

Section 15.9 exists because the Board has determined that the “pass-through” of “any changes” of charges associated with the FERC-approved Open Access Transmission Tariff is appropriate.¹² When faced with a request by Rate Counsel to eliminate Section 15.9 in the past, the Board expressed concern that removal of the pass-through would ultimately increase customers’ costs because suppliers would be required to “include in their bids any expected or potential price increases for such service, as well as attempt to address the regulatory risk of expected increases.” The Board, concluding that Section 15.9 “removes the guesswork from the equation” by allowing suppliers to recover their actual FERC-approved rate changes for Firm Transmission Service, rejected Rate Counsel’s request.¹³

Unfortunately, given the magnitude of the transmission charge increases suppliers are facing as a result of the 494 Proceedings and other cost allocation proceedings, the process for passing through these charges under Section 15.9 is no longer adequate. For example, although the majority of parties settled or did not object to settlement in the 494 Proceedings, a few parties sought rehearing on issues relating to the application of the reallocation to merchant transmission projects. After resolution of the requests for rehearing, it is quite possible that some parties will seek to appeal. Therefore, it could be years before all avenues of relief have been exhausted. As a result, BGS suppliers must pay a significant amount to PJM for charges that they may not be able to recover from EDCs for years.

¹⁰ May 2018 Order at ¶¶ 38, 49.

¹¹ *PJM Interconnection, L.L.C.*, eTariff Compliance Filing for Schedule 12 and Schedule 12-Appendices, Docket No. ER18-2102 (submitted July 30, 2018).

¹² *See Re. Provision of Basic Generation Service*, Docket No. EO04040288 (Dec. 1, 2004).

¹³ *In the Matter of the Provision of Basic Generation Service for the Period Beginning June 1, 2007*, Docket No. EO06020119 (Dec. 22, 2006).

It is important to note that waiting years for a “final and unappealable order” in a FERC proceeding is not unusual. A FERC order can only be appealed on rehearing. Although the FERC is obligated to act on a request for rehearing within 30 days, they can and often do issue a tolling order, which gives them an unlimited amount of time to consider the request. It is therefore not unusual for parties to wait months or even longer before they have the right to appeal. Even after that, the appeal will need to work its way through courts, and may result in a remand, which leads to further FERC proceedings. The example of the 494 Proceedings is not an isolated one.

Given the unsustainable burden that the 494 Proceedings have placed on BGS suppliers and the prospect of future proceedings with similar timelines, if the current process under section 15.9 of the SMA remains in place, suppliers will have no choice but to price this type of regulatory risk into upcoming BGS auction offers, resulting in exactly the cost increases to customers that the Board has been working to avoid. Accordingly, as expressed in its Initial Comments in this proceeding, ExGen asks that the Board consider an amendment to the SMA that would provide for payment of Firm Transmission Service directly by the EDCs. This approach, which has been adopted in other jurisdictions such as Pennsylvania and Ohio,¹⁴ allows for the cleanest pass-through of any cost increases or decreases to customers, allowing BGS suppliers to avoid including risk premiums associated with such costs in their pricing. As other states have recognized, allowing EDCs to recover such costs on a pass-through basis “preserve[s] the goal of reducing price volatility, while additionally mitigating some of the risk borne by the winning wholesale supplier” in a default service auction.¹⁵

¹⁴ See, e.g., *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Default Service Programs*, Docket No. P-2013-2391368, et al. (Order entered July 24, 2014); *Petition of PECO Energy Company for Approval of its Default Service Program for the period from June 1, 2015 through May 31, 2017*, Docket No. P-20142409362 (Order entered Dec. 4, 2014); *Joint Default Service Plan for Citizens' Electric Company of Lewisburg, PA and Wellsboro Electric Company for the Period June 1, 2015 through May 31, 2018* *Petition of Citizens' Electric Company of Lewisburg, PA and Wellsboro Electric Company for Amendment of the Fourth Default Service Plan*, Docket Nos. P-2014-2425024 and P-2014-2425245 (Order entered Feb. 11, 2016) (“PA PUC Feb. 11, 2016 Order”); *In re Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, (July 18, 2012); *In re Duke Energy Ohio, Inc.*, Case No. 11-2641-EL-RDR, et al., (May 25, 2011); *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, No. 13-2385-EL-SSO (Feb. 25, 2015).

¹⁵ PA PUC Feb. 11, 2016 Order at *4. We understand that, at the Legislative-Type Hearing before the Board held on September 28, 2018, Rate Counsel noted that it has long been Rate Counsel’s position “that it is the BGS Suppliers that have the available resources and influences to challenge these large increases at FERC,” and “Rate Counsel believes that the pass through of transmission rate increases to BGS customers takes away any incentive for suppliers to use their resources to challenge transmission rate increases.” As the Board undoubtedly understands based on its involvement in the 494 Proceeding, the ability of suppliers to influence or challenge the reallocation of construction costs already incurred and reallocated pursuant to principles enunciated by the Seventh Circuit was

In the alternative, if the Board opts to retain the current practice of requiring BGS suppliers to pay these charges, ExGen suggests the Board remove the requirement under Section 15.9 that a FERC Order imposing increased costs be “Final” and “not subject to refund” before such costs may be recovered by the BGS suppliers. This request is similar to the request made by the EDCs in 2017.¹⁶ The Board rejected that change, concluding that EDCs already had the ability to petition the Board for “authority to begin collecting and paying such charges absent a Final FERC Order on a case by case basis.”¹⁷ However, such case-by-case approval increases regulatory uncertainty on the part of suppliers. Should parties decide to challenge such recovery, suppliers will be faced with defending their right to recover in a timely manner costs that are paid by EDCs as straight pass-throughs in other states. As noted above, given the magnitude of these costs, fewer suppliers may be willing to take such a risk, resulting in a less competitive BGS auction process and ultimately having a negative impact on customers. An amendment to section 15.9 that removes the “Final” and “not subject to refund” requirement would help alleviate suppliers’ concerns about cost recovery. We note further that removing this requirement would not place either customers or EDCs at risk for non-payment of any future refunds, as those refunds will be credited to suppliers through the PJM settlement system and then, once EDCs receive approval from the Board to make the change, will be passed through the EDCs to customers.¹⁸

virtually non-existent; to force suppliers to price in the regulatory risk associated with carrying these costs while waiting for a final FERC order can only serve to increase costs borne by customers.

¹⁶ See *In the Matter of the Provision of Basic Generation Service for the Period Beginning June 1, 2018*, Docket No. ER17040335 at 9-10 (November 21, 2017).

¹⁷ *Id.* Note that the four New Jersey EDC’s have requested that costs arising from the Opinion No. 494 Proceedings be paid to suppliers currently. See *Compliance Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff*, Docket No. ER18091061 (filed September 26, 2018). ExGen supports this request.

¹⁸ Of course, having EDCs pay such pass-through costs directly as suggested above would completely alleviate any concerns about refunds flowing from PJM to EDCs and customer through suppliers.

Conclusion

ExGen remains committed to serving customers in New Jersey through BGS supply. However, as described above, the current process of requiring BGS suppliers to pay such substantial transmission cost increases for months or even years before recovering those costs from the EDCs is placing a significant burden on suppliers that ExGen is concerned will adversely impact this and future BGS auctions.

Thank you for your consideration of the foregoing comments. Should you have any questions about the foregoing, please do not hesitate to contact me at Jeanne.dworetzky@exeloncorp.com or (202) 347-7500.

Sincerely,

/S/

Jeanne J. Dworetzky
Assistant General Counsel

Cc: Service List
John P. Slocum