

166 FERC ¶ 61,036
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

York Haven Power Company, LLC

Docket No. ER17-2577-001

ORDER ON REFUND REPORT

(Issued January 17, 2019)

1. In this order, the Commission accepts a refund report filed by York Haven Power Company, LLC (York Haven), as discussed below.

I. Background

2. On February 26, 2018, the Commission issued an order accepting York Haven's market-based rate tariff, effective November 29, 2017. The Commission required time-value refund obligations for the unauthorized wholesale sales of electric power that York Haven made from November 19, 2015 through September 12, 2017, and directed York Haven to submit a refund report regarding the basis for and calculations of the refunds paid.¹

3. The Commission stated that, where a utility has made sales without authorization, the Commission will require the utility to refund to its customers the time-value of the gross revenues collected for the entire period that the rate was collected without Commission authorization. In addition, when dealing with market-based rate sales that are not timely filed, the utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and the cost-justified rate.² The Commission stated that, for a qualifying facility (QF) like York Haven, the difference between the market-based rate and the cost-justified rate would be the difference between

¹ *York Haven Power Company, LLC*, 162 FERC ¶ 61,164 (2018) (February 26 Order).

² *Id.* P 14 (citing *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (1993)).

the market-based rate and its avoided cost rate (or, if it has no such avoided cost rate, a reasonable proxy for such rate).³

4. On April 12, 2018, York Haven filed a refund report in response to the February 26 Order. With respect to time-value refunds, York Haven states that it has tendered a wire transfer in the amount of \$401,339 to PJM Interconnection, L.L.C. (PJM) and a check in the amount of \$473 to American PowerNet Management, LP (PowerNet).⁴ As discussed in greater detail below, York Haven argues that it should not be required to make payment of these refunds because doing so would result in York Haven operating at a loss and asserts that it tendered these refunds to PJM and PowerNet as a precautionary measure in order to avoid additional interest in the event the Commission rejects York Haven's refund report. York Haven states that it will deem the Commission's acceptance of its refund report as affirmation of York Haven's position that no refund payments are necessary; thus, upon acceptance of this refund report, York Haven will seek from PJM return of the \$401,339 refund. York Haven states that it waives its right to recover the \$473 paid to PowerNet due to it being a *de minimis* amount. In addition, York Haven, at the request of PJM, asks that the Commission: (i) direct PJM to distribute the refunds paid by York Haven to market participants notwithstanding that the refunds relate in part to amounts collected by York Haven more than two years ago (beyond the PJM billing adjustment period) and (ii) provide guidance to PJM as to how it should process and distribute the refunds.

5. York Haven states that it has determined that the difference between the market-based rate and its avoided cost rate (or, a reasonable proxy for such rate) is zero. York Haven states that it is a small power production QF and makes all sales of capacity and energy into the PJM markets or to purchasers in the PJM region and thus does not sell its output directly to any electric utility purchaser at avoided cost rates. York Haven states that under these circumstances, a reasonable proxy for such avoided cost rates is: (i) in the case of sales to PJM, the market prices in the PJM organized markets at which York Haven sold capacity, energy, and ancillary services to PJM during the refund period, and (ii) in the case of sales to PowerNet from September 1, 2017 to September 12, 2017, the negotiated rate of \$28/MWh at which it sold energy to PowerNet.

6. York Haven states that there is no difference between the market-based rate and a reasonable proxy for York Haven's avoided cost rate for the sales into the PJM markets and, therefore, there is no additional refund resulting from the difference between the market-based rate and its avoided cost rate (in addition to time-value refunds). York Haven states that negotiated rates between a QF and a buyer are a reasonable

³ *Id.* P 15.

⁴ As part of the filing, York Haven provided the monthly revenues and interest calculations supporting these refund amounts.

proxy for avoided costs rates and, as such, there is no difference between the market-based rate and a reasonable proxy for York Haven's avoided cost rate for the sales to PowerNet and, therefore, there is no additional refund resulting from the difference between the market-based rate and its avoided cost rate (in addition to time-value refunds).

7. Although York Haven already paid the time-value refund obligations to PJM and PowerNet, York Haven argues that it should not be required to pay these refunds for its sales during the refund period because doing so would result in it operating at a loss. York Haven recognizes that the Commission has historically applied different methodologies in addressing unauthorized sales by generators and unauthorized service by transmission providers. York Haven states that, for generators, the Commission has historically set the cost-based refund floor for determining whether the seller would be operating at a loss based on variable costs alone; in contrast, the Commission has set the cost-based refund floor for determining whether a transmission provider would be operating at a loss to include all costs of the seller, including both fixed and variable costs.⁵ York Haven states that the Commission has explained that this difference in treatment derives from the fact that total costs for generators are typically driven primarily by variable costs alone, that is, generators typically incur substantial fuel and other operation and maintenance (O&M) costs that vary with the amount of energy produced or transmitted, while total costs for transmission providers are not driven primarily by variable costs, and considering only variable costs would not reasonably reflect costs for a transmission provider in determining whether or not time-value refunds would result in the seller operating at a loss.

8. York Haven states that, while it may be reasonable to assume for fossil-fueled generators that total costs are primarily driven by variable costs alone, that assumption is not at all the case for a run-of-river renewable hydroelectric plant such as the York Haven Facility. Rather, as a run-of-river renewable hydro facility, York Haven states that the York Haven Facility has no variable cost of fuel and York Haven's variable O&M costs are similarly limited. Thus, York Haven asserts that it has a cost structure that is less like a fossil-fired generator and more like that of a transmission provider in which most costs are fixed. York Haven asserts that in this regard, it would be appropriate for the Commission to set the refund floor for York Haven based on its total costs, including its fixed and variable costs, not just its variable costs alone.⁶

⁵ April 12 Filing at 8 (citing *Carolina Power & Light Co.*, 84 FERC ¶ 61,103 (1998), *order on reh'g*, 87 FERC ¶ 61,083, at 61,357 (1999); *Int'l Transmission Co.*, 152 FERC ¶ 61,043, at PP 29-34 (2015)).

⁶ *Id.* at 9 (citing *SunE M5B Holdings, LLC*, 157 FERC ¶ 61,045 (2016) (Commissioner Honorable, C., concurring) (writing separately with respect to how time-value refunds are calculated for generation resources); *Bright Light Capital, LLC*,

9. York Haven also states that taking into account only variable costs would not be reasonable or appropriate where the seller's refunds are based on revenues for capacity, which is inherently based on the fixed costs for the facility. York Haven states that the sale to PJM of capacity from a facility, by its very nature, is based on fixed costs and does not incur variable costs; rather, such capacity is supplied by fixed assets and fixed costs. York Haven states that in this particular case, a substantial part of York Haven's revenues, and the calculation of time-value refunds, is from sales of capacity into the PJM capacity market, the costs of which were borne fully from York Haven's fixed, not variable, costs.

II. Notice

10. Notice of York Haven's April 12, 2018 filing was published in the *Federal Register*,⁷ with interventions and protests due on or before May 3, 2018. On April 25, 2018, PJM submitted a motion to intervene.

III. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), PJM's timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. Substantive Matters

12. We accept York Haven's refund report. However, our acceptance of York Haven's refund report does not signify that we agree with York Haven's position that no time value refund payments are necessary. York Haven states that it should not be required to pay these refunds because doing so would result in it operating at a loss. The Commission's standard, as articulated in *Carolina Power & Light*,⁸ is to limit the application of the time value formula to an amount that permits a public utility to recover its variable costs, which normally will include fuel and O&M expenses. In *Carolina Power & Light* the Commission stated that this policy "is equitable in that no public utility will face the prospect of losing money on a sale under late-filed rates that

157 FERC ¶ 61,046 (2016) (Commissioner Honorable, C., concurring) (writing separately with respect to how time-value refunds are calculated for generation resources)).

⁷ 83 Fed. Reg. 17,167 (2018).

⁸ *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,357 (1999).

otherwise are accepted for filing.”⁹ However, York Haven has not demonstrated that if it pays time value refunds using a variable-cost cap, York Haven would lose money on the sales that it made without market-based rate authority.

13. Further, while there may be differences in the cost structures of renewable/non-thermal and traditional thermal generating resources, we do not agree with York Haven’s argument that its cost structure should be treated similarly to that of a transmission provider as opposed to a generator. The Commission’s long-standing precedent establishes that for generators that have made unauthorized power sales, the appropriate time value refund methodology is the variable cost floor. The transmission cases York Haven cites are distinguishable from this case involving unauthorized sales of energy and capacity. In *ITC* and *Consumers Energy*, the unauthorized service was provided pursuant to agreements that involved cost allocations of joint facilities,¹⁰ or the construction, operation and maintenance of transmission facilities to serve the requirements of a single customer under a single agreement.¹¹ In these cases, had ITC and Consumers each not entered into a facilities agreement to construct and operate the facility in question for the particular owner, they would not have incurred the fixed or variable costs associated with the agreement. Here, York Haven has not alleged that it built the generator in order to serve a particular customer and has not demonstrated that it would lose money on these transactions using the traditional variable-cost refund cap. It appears that, with or without these sales, York Haven would have still incurred the same fixed costs. This is not true of the *ITC* and *Consumers Energy* transmission cases. In addition, the York Haven Facility’s operations and cost recovery are not the same as those of a transmission provider that recovers its cost pursuant to a cost-of-service rate.

14. While York Haven argues that “taking into account only variable costs would not be reasonable or appropriate where the seller’s refunds are based on revenues for capacity which is inherently based on the fixed costs for the facility,”¹² we note that capacity has historically been treated as a power sale and included as a sales revenue in refund reports.¹³ Distinguishing capacity and energy sales for the purposes of calculating

⁹ *Id.*

¹⁰ See *International Transmission Co.* 152 FERC ¶ 61,043 (2015) (*ITC*).

¹¹ See *Consumers Energy Co.*, 153 FERC ¶ 61,185 (2015) (*Consumers Energy*).

¹² York Haven April 12, 2018 Refund Report at 9. York Haven notes that “a substantial part of York Haven’s revenues, and the calculation of time-value refunds, is from sales of capacity into the PJM capacity market -- the costs of which were borne fully from York Haven’s fixed, not variable, costs.” *Id.*

¹³ See, e.g., *Covanta Haverhill Associates, LP*, Docket No. ER14-221-000 (Jan. 8, 2014) (delegated order) (rejecting request for waiver of prior notice requirement

refunds would entail allocating all costs into either a cost of providing capacity or a cost of providing energy, when in reality, these costs go to both types of sales and would be difficult to allocate. Additionally, if sellers are permitted to count fixed costs for capacity sales when calculating the refund floor, sellers would have an incentive to attribute fixed costs to capacity sales and variable costs to energy sales. For these reasons, we reject York Haven's argument that it is not reasonable to take into account only variable costs when establishing a refund floor for capacity.

15. The two-year billing adjustment period in PJM's tariff¹⁴ does not limit the Commission's ability to direct PJM to distribute the refunds associated with York Haven's unauthorized sales. We clarify that PJM should distribute the refunds paid by York Haven on a pro-rata basis to market participants that were active in PJM between November 2015 and September 2017.

The Commission orders:

York Haven's refund report is hereby accepted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

and requiring refunds); *Covanta Haverhill Associates, LP*, Refund Report, Docket No. ER14-221-000 (filed Feb. 26, 2014, as supplemented Apr. 30, 2014) (including revenues from energy and capacity in the refund report).

¹⁴ PJM Motion to Intervene at 2 n.3 (citing PJM, Intra-PJM Tariffs, OATT, § 10.4 and PJM, Intra-PJM Tariffs, OA, § 15.6).