UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.	**)**	**Docket No. ER15-696-000**

JOINT COMMENTS AND LIMITED PROTEST OF THE ELECTRIC POWER SUPPLY ASSOCIATION AND THE PJM POWER PROVIDERS GROUP

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"),[1] the Electric Power Supply Association ("EPSA")[2] and the PJM Power Providers Group ("P3")[3] jointly submit comments on, and a limited protest to, PJM's December 22, 2014 filing[4] in

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[1] 18 C.F.R. § 385.211 (2014).

[2] EPSA is the national trade association representing leading competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. These comments represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

[3] P3 is a nonprofit corporation dedicated to promoting policies that will allow the PJM Interconnection, L.L.C. ("PJM") region to fulfill the promise of its competitive wholesale electricity markets. P3 strongly believes that properly designed and well-functioning competitive markets are the most effective means of ensuring a reliable supply of power to the PJM region, facilitating investments in alternative energy and demand response technology, and promoting prices that will allow consumers to enjoy the benefits of competitive electricity markets. Combined, P3 members own over 87,000 MW of generation assets, own over 51,000 miles of transmission lines, serve nearly 12.2 million customers, and employ over 55,000 people in the PJM region – encompassing 13 states and the District of Columbia. For more information on P3, visit www.p3powergroup.com. The comments contained in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

[4] Compliance Filing Regarding Reactive Power Capability, Docket No. ER15-696-000 (filed Dec. 22, 2014) (the "December 22 Filing").

the above-captioned proceeding[5] in response to a November 20, 2014 order[6] relating to continued payments to reactive power suppliers after units are deactivated or transferred. As discussed below, EPSA and P3 generally support the process set forth in the December 22 Filing as an acceptable means of addressing the concerns expressed by the Federal Energy Regulatory Commission (the "Commission") in the November 20 Order about "the lack of clarity concerning termination [of] or . . . change in payments for Reactive Service when generation units are no longer capable of providing reactive power or have been transferred out of a fleet, respectively."[7] While generally supportive of the December 22 Filing, EPSA and P3 urge the Commission to require certain discrete modifications to PJM's proposal in order to provide clarity regarding the treatment of generation units that were (or are) deactivated prior to the adoption of PJM's proposal and to distinguish between unit deactivations and transfers.

I. BACKGROUND

A. The November 20 Order

In the November 20 Order, the Commission, acting under Section 206 of the Federal Power Act (the "FPA"),[8] ordered PJM to make a filing within 30 days that would either (1) revise the PJM Open Access Transmission Tariff (the

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5 EPSA and P3 separately filed timely motions to intervene in this proceeding. *See* (doc-less) Motion to Intervene of the Electric Power Supply Association, Docket No. ER15-696-000 (filed Jan. 5, 2015); (doc-less) Motion to Intervene of the PJM Power Providers Group, Docket No. ER15-696-000 (filed Jan. 8, 2015).

6 *PJM Interconnection, L.L.C.*, 149 FERC ¶ 61,132 (2014) (the "November 20 Order").

7 *Id.* at P 8.

8 16 U.S.C. § 824e (2012).

"Tariff")[9] to provide that a "resource owner will no longer receive reactive power capability payments after it has deactivated its unit and to clarify the treatment of reactive power capability payments for units transferred out of a fleet"; or (2) "show cause why it should not be required to do so."[10] The Commission stated that it was taking this action in light of PJM's comments in another proceeding suggesting that it "continues to pay generation and non-generation resources for Reactive Service after units have deactivated."[11]

The Commission acknowledged that the Tariff says nothing about whether "reactive power payments will cease when a. . . resource owner has deactivated a unit such that the unit is no longer capable of providing the service" or reactive power payments must be adjusted "when a unit is transferred from a fleet."[12] The Commission stated its concern that this "lack of clarity" rendered the Tariff unjust and unreasonable and further asserted that "[p]aying for a service required under the Tariff where . . . the generation or non-generation resource owner is no longer capable of providing that service is unjust and unreasonable."[13] Notwithstanding its acknowledgement that the Tariff is silent on these questions, the Commission also indicated that it was making a referral to its Office of Enforcement "[g]iven that some generation and non-generation resource owners

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9 Capitalized terms used and not otherwise defined herein have the meaning given to them in the Tariff.

10 November 20 Order, 149 FERC ¶ 61,132 at P 1.

11 *Id.* at P 7.

12 *Id.*

13 *Id.* at P 8 (internal citations omitted).

apparently continued to receive payments for Reactive Service after their units were no longer capable of providing that service . . . ."[14]

B. The December 22 Filing

In the December 22 Filing, PJM emphasizes that it "plays a very limited role in the determination of rates for reactive power" and that it "simply facilitates the collection in each zone of charges from loads and credits to Reactive Power Suppliers in accordance with . . . Commission-approved rate schedules."[15] PJM further explains that most of the reactive power revenue requirements were established by the region's transmission owners prior to divestiture of their generation and have "remained largely unchanged since the incorporation of Schedule 2 into the Tariff in 1997."[16] Such revenue requirements "did not specify which of the transmission owner's generators were actually supplying the reactive power."[17]

In response to the November 20 Order, PJM proposes to revise the Tariff to require that 90 days before deactivating or transferring a unit, a resource owner with a reactive power revenue requirement either "(1) submit a filing to either terminate or adjust its cost-based rate schedule to account for the deactivated or transferred unit; or (2) submit an informational filing explaining the basis for [its] decision . . . not to terminate or revise its cost-based rate

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14 *Id.* at P 10.

15 December 22 Filing, Transmittal Letter at 1.

16 *Id.* at 2.

17 *Id.*

schedule."[18] While acknowledging that this proposal will not definitively "ensure that Reactive Power Suppliers no longer receive reactive power capability payments after a unit has deactivated,"[19] PJM explains that it lacks "the necessary information regarding the fleet-based rates or authority under section 205 of the FPA to revise the Tariff to simply stop paying a Reactive Power Supplier in accordance with the Commission-approved rate schedule or to force a Reactive Power Supplier to terminate or revise its Commission-approved rate schedule."[20]

II. COMMENTS

EPSA and P3 generally support the process set forth in the December 22 Filing as an acceptable means of addressing the concerns expressed in the November 20 Order about "the lack of clarity concerning termination [of] or . . . change in payments for Reactive Service" when generation units are deactivated in the future.[21] The comments below highlight certain issues that are important for the Commission to bear in mind as it considers PJM's proposal.

A. PJM's Proposal Must Be Considered In The Context Of The Historical Treatment Of Reactive Power Compensation In PJM

The historical background provided in the December 22 Filing is essential to a proper understanding of PJM's response to the November 20 Order and reactive power compensation in PJM. As PJM explains, the revenue

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18 *Id.* at 5-6.

19 *Id.* at 7.

20 *Id.* at 6.

21 November 20 Order, 149 FERC ¶ 61,132 at P 8.

requirements established by the transmission providers and incorporated into Schedule 2 to the Tariff in 1997 were fleet-wide revenue requirements not tied to any specific units.[22] In this regard, it is important to distinguish between revenue requirements specifically tied to individual units and fleet-wide revenue requirements. In the latter case, unless and until the entire fleet has been deactivated or transferred, PJM cannot, by any stretch of the imagination, be said to be "[p]aying for a service required under the Tariff where . . . the ***generation or non-generation resource owner*** is no longer capable of providing that service . . . ."[23] As a result, precedent cited in the November 20 Order for the proposition that continued payments under such circumstances are "unjust and unreasonable"[24] is inapposite.

Where fleet-wide reactive power revenue requirements are involved, one cannot assume that deactivation of one or more units necessarily results in the supplier over-recovering its cost of providing reactive power service. To the contrary, as PSEG Power LLC and PSEG Energy Resources & Trade LLC observed in their protest to the November 20 Order, such an assumption ignores the fact "there are ongoing plant additions and enhancements that occur regularly, long after the cost-based rate [i]s established."[25] In this respect, a resource owner providing reactive power service from a fleet of units is no different from a transmission owner, pipeline or other utility providing service at

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22 December 22 Filing, Transmittal Letter at 2.

23 November 20 Order, 149 FERC ¶ 61,132 at P 8 (emphasis added).

24 *Id.* at P 8 & n.18.

25 Motion to Intervene and Protest of the PSEG Companies at 4, Docket No. EL15-15-000 (filed Dec. 11, 2014).

rates set on a cost-of-service basis: It continues to provide service at previously-accepted rates, even if subsequent changes, including changes in the composition of its "system," mean that its actual cost of service deviates from the projected cost of service upon which those rates are based.[26]

Moreover, even making the dubious assumption that there had been no additional investments in the fleet since the reactive power revenue requirements went into effect, one could still not assume that deactivation or transfer of one or more units would translate into any over-recovery. Many of the currently-effective reactive power revenue requirements, particularly the "legacy" revenue requirements initially established by the PJM transmission owners, are the product of "black-box" settlements, and without undertaking a fleet-specific cost analysis, there is no way of knowing if and to what extent those revenue requirements may actually understate the cost of providing reactive power service. And there are good reasons why legacy revenue requirements may very

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[26] *See, e.g.*, *Board of Public Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 32 (1926) (rejecting the proposition that future rates should be adjusted to account for past over-recovery on the grounds that "[c]ustomers pay for service, not the property used to render it"); *Central Ill. Pub. Serv. Co. v. FERC*, 941 F.2d 622, 628 (7th Cir.1991) ("Rarely will an actual, rate-effective period of the utility's cost-of-service duplicate the corresponding test year value. These variations – which may have a positive or negative effect on earnings – are a manifestation of the risks for which the stockholder has been compensated in the return component of the test year cost-of-service."); *American Pub. Gas Ass'n v. FPC*, 567 F.2d 1016, 1057 (D.C. Cir. 1977) ("The common law of public utility regulation pragmatically accepts the futility of embroiling current and future rate regulation with a function of making correctives for excess or insufficiencies of rates charged in the past."). This is true even when deviations become apparent while a rate case is ongoing, unless it is shown that cost projections "are 'substantially in error' and would yield 'unreasonable results.'" *Boroughs of Ellwood City v. FERC*, 731 F.2d 959, 966 (D.C. Cir. 1984) (quoting *Southern Cal. Edison Co.*, 8 FERC ¶ 61,099 at 61,375 (1979)). *See also, e.g.*, *Southwestern Public Service Co. v. FERC*, 952 F.2d 555, 562 (D.C. Cir. 1992); *Cities of Batavia v. FERC*, 672 F.2d 64, 74 (D.C. Cir. 1982); *Villages of Chatham v. FERC*, 662 F.2d 23, 29-30 (D.C. Cir. 1981).

well understate the actual cost of service. At the time when these legacy revenue requirements were established, many of the transmission owners would have had little or no incentive to ensure that the reactive power revenue requirements fully captured the cost of providing reactive service, because they were still vertically-integrated utilities that could recover those costs through retail rates in any event. Moreover, as PJM observes, most of the reactive power revenue requirements were established in 1997,[27] prior to the development of the Commission's "*AEP* methodology."[28] As a result, these revenue requirements would not have accounted for any number of costs recoverable under that methodology.

That the existing revenue requirements may, in fact, be understating the actual cost of service is illustrated by the one example of a supplier that replaced its legacy reactive power revenue requirement with a new revenue requirement that was cost justified using the *AEP* methodology and taking plant additions into account. In that case, the supplier was able to cost justify a revenue requirement that was a multiple of its legacy revenue requirement.[29]

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[27] *See* December 22 Order, Transmittal Letter at 2.

[28] This methodology takes its name from the Commission's order in *American Elec. Power Serv. Corp.*, Opinion No. 440, 88 FERC ¶ 61,141 (1999), *on reh'g*, 92 FERC ¶ 61,001 (2000).

[29] *See* Filing of Rate Schedule No. 3, Docket No. ER08-951-000 (filed May 13, 2008), *accepted*, *PSEG Energy Res. & Trade, LLC*, Docket Nos. ER08-951-000, *et al.* (Nov. 13, 2008) (unreported).

B. PJM Appropriately Acknowledges That It May Not Usurp Reactive Power Suppliers' FPA Section 205 Rights

In the December 22 Filing, PJM states that its proposal to include the option for a supplier to file an informational filing, rather than making an FPA Section 205 filing, when it is going to deactivate or transfer a unit is intended "to ensure that PJM not usurp the [Section] 205 rights of the Reactive Power Suppliers (or the [Section] 206 obligations of the Commission)."[30] PJM should be commended for recognizing the statutory limits on its ability to address the concerns expressed in the November 20 Order, and it is essential that the Commission do likewise in its order on the December 22 Filing.

Explaining why it was unable to propose Tariff revisions that would guarantee that a reactive power supplier "no longer receive[s] reactive power capability payments after a unit has been deactivated," as the November 20 Order appeared to contemplate, PJM states:

> PJM does not have the authority to compel a Reactive Power Supplier to submit a filing under section 205 of the FPA to modify or cancel its existing reactive power tariff or its reactive power revenue requirement when a unit is deactivated. Similarly, PJM does not have the authority under section 205 of the FPA to stop paying Reactive Power Suppliers in accordance with their fleet-based rate absent Commission direction as such action would be tantamount to PJM unilaterally revising the Reactive Power Supplier's Commission-approved rate schedule and stepping into a ratemaking role that appropriately lies with the Commission.[31]

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30 December 22 Filing, Transmittal Letter at 6.

31 *Id.* at 7.

While EPSA and P3 generally agree with this statement and with the discussion of the statutory framework that follows, two clarifications are in order. First, as PJM discusses later in the December 22 Filing, not only PJM but the Commission itself lacks the authority to compel a reactive power supplier to submit a filing under Section 205 of the FPA.[32] The Courts have repeatedly and consistently held that the Commission cannot compel public utilities to make rate filings under Section 205 of the FPA, and that the Commission may only unilaterally set rates under Section 206 of the FPA after finding the existing rates unjust and unreasonable.[33]

Second, ceasing to pay reactive power suppliers in accordance with their existing revenue requirements would have PJM "stepping into a ratemaking role that appropriately lies" not "with the Commission," as PJM suggests, but with the ***suppliers***.[34] Under Sections 205 and 206 of the FPA, rates are "established initially by the [public utilities]" and "are subject to being modified by the Commission upon a finding that they are unlawful."[35] The Commission's power

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[32] *See id.* at 8-9 & n.17 (citing *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) ("*Atlantic City*")).

[33] *See, e.g.*, *Atlantic City Elec. Co. v. FERC*, 329 F.3d 856, 858-59 (D.C. Cir. 2003); *Atlantic City*, 295 F.3d at 10-11; *Consumers Energy Co. v. FERC*, 226 F.3d 777, 780 (6th Cir. 2000); *Western Res., Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993); *Public Serv. Comm'n of New York v. FERC*, 866 F.2d 487, 488-89 (D.C. Cir. 1989); *Massachusetts Dep't of Pub. Utils. v. United States*, 729 F.2d 886, 887-88 (1st Cir. 1984).

[34] December 22 Filing, Transmittal Letter at 7.

[35] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341 (1956) ("*Mobile*"). The quoted passages from *Mobile* interpret provisions of the Natural Gas Act that are "substantively identical" to Sections 205 and 206 of the FPA, *FPC v. Sierra Pac. Power Co. v. FPC*, 350 U.S. 348, 350 (1956), and the relevant provisions of the two statutes may be cited "interchangeably," *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

to modify those rates under Section 206 "is neither a 'rate-making' nor a 'rate-changing' procedure," but is instead "simply the power to review rates . . . made in the first instance by [public utilities] and, if they are determined to be unlawful, to remedy them."[36] Under the statutory scheme of the FPA, it is the public utility that plays the "ratemaking role,"[37] while the Commission plays an "essentially passive and reactive role" under Section 205 and "a more active," but still reactive, role under Section 206.[38]

These clarifications are not meant to diminish the importance of the Commission's role in ensuring that rates remain just and reasonable but only to emphasize the importance of ensuring that it performs that role in a manner that comports with the statute. The approach proposed in the December 22 Filing represents a good faith attempt on PJM's part to devise a means of putting the Commission in a position to identify reactive power revenue requirements that may have become unjust and unreasonable and to modify those revenue requirements upon a finding that they are, in fact, unjust and unreasonable.[39] Importantly, the informational filings contemplated by the December 22 Filing

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[36] *Mobile*, 350 U.S. at 341

[37] December 22 Filing, Transmittal Letter at 7.

[38] *City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984).

[39] If anything, PJM may have gone too far in its effort to reduce the probability that Reactive Power Suppliers "no longer receive reactive power capability payments after a unit has been deactivated." December 22 Filing, Transmittal Letter at 7. To the extent that PJM is suggesting that continued reactive power payments are contingent upon compliance with the proposed procedures, it could be seen as doing precisely what it has recognized that it lacks the power to do: namely, acting under FPA Section 205 "to stop paying Reactive Power Suppliers in accordance with their fleet-based rate[s] . . . ." *Id.* The Commission should make clear that PJM does not have the authority to take such action for non-compliance with the proposed procedures.

would provide 90-day advance notice that a reactive power supplier was deactivating a unit not just to the Commission but to load-serving entities and others that would then have the option to file a complaint under Section 206 of the FPA.

III. LIMITED PROTEST

A. PJM Should Be Directed To Address the Treatment Of Units Deactivated Or Transferred Prior To The Effectiveness Of The Proposed Tariff Revisions

As discussed above, EPSA and P3 support the Tariff revisions proposed in the December 22 Filing as a reasonable means of ensuring that reactive power revenue requirements are adjusted, if and as appropriate, when units are deactivated in the future. The December 22 Filing does not expressly address the issue of how to account for deactivations occurring prior to the effectiveness of the proposed Tariff revisions. As the Commission recognized in the November 20 Order, the Tariff does not currently require any adjustments to reactive power revenue requirements for unit deactivations or transfers.[40]

As the Commission appeared to be concerned that PJM may be paying for reactive power after units have been deactivated or transferred,[41] EPSA and P3 suggest that the Tariff mechanism proposed in the December 22 Filing be modified so that it will expressly cover not only future deactivations but also past deactivations and transfers. Naturally, this would necessitate a different deadline tied to the timing of the Commission's order and the effectiveness of the

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[40] *See* November 20 Order, 149 FERC ¶ 61,132 at P 7.

[41] *See id.* at P 10.

proposed Tariff revisions for previously deactivated or transferred units. Specifically, the Tariff should provide that an owner of a unit deactivated or transferred prior to the effective date of the Tariff revisions that continues to receive reactive power revenues under Schedule 2 to the Tariff must make an FPA Section 205 filing or an informational filing, like those required for future deactivations, no more than 180 days after the later of (1) the date of the Commission's order accepting the December 22 Filing, or (2) the effective date of the proposed Tariff revisions.[42] A 180-day period is reasonable in light of the challenges associated with attempting to identify all relevant changes – including not only deactivations and transfers of units but also additional expenditures on units that remain in the fleet – that may have occurred since these revenue requirements were established. This is particularly true in the case of fleet-wide revenue requirements that are the product of black-box settlements and that were not, therefore, based on the actual costs of individual units in the first instance.

B. The 90-Day Advance Notice Requirement Should Not Apply To Future Transfers

The November 20 Order directed PJM "to clarify the treatment of reactive power capability payments for units transferred out of a fleet . . . ."[43] EPSA and P3 are concerned that by lumping transfers together with deactivations, PJM's

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[42] The Commission might also want to consider language to address the possibility that a unit might be deactivated or transferred less than 90 days after the effectiveness of the proposed tariff revisions.

[43] November 20 Order, 149 FERC ¶ 61,132 at P 1.

December 22 Filing may do just the opposite and may also create unnecessary obstacles to transfers of units.

PJM's Tariff already provides that revenue requirements may be reallocated as agreed by the parties in connection with sales of Generation Capacity Resources, and PJM has appropriately proposed clarifying language to ensure that this provision applies more broadly to transfers of other resources.[44] The acquiror of a unit eligible for reactive power compensation has every incentive to ensure that it either obtains a reasonable allocation of the pre-existing revenue requirement or that such revenue requirement is cancelled or reduced appropriately so that it can propose its own reactive power revenue requirement.[45] As a result, unit transfer does not present the same concerns about over-recovery that may be present in the case of unit deactivation, and it is unclear what useful purpose is served by requiring the transferor to make a Section 205 filing or an informational filing 90 days in advance of the disposition date. Moreover, such a requirement could delay transfers that might otherwise be consummated in less than 90 days.[46]

At a minimum, there should be no requirement to make any filing prior to the disposition date when the transfer itself will not result in a net increase in

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[44] *See* December 22 Filing, Attachment A, Revisions to the PJM Open Access Transmission Tariff (Marked/Redline Format), Schedule 2.

[45] Where the acquiror intends to propose a new reactive power revenue requirement for the acquired unit, the continued effectiveness of a revenue requirement for that unit or potential claims that the unit was included in a fleet-wide revenue requirement that remained in effect would be a significant obstacle to the acquiror's effort to demonstrate that its proposed revenue requirement is just and reasonable.

[46] The Commission routinely processes applications for approval of generating asset sales under Section 203 of the FPA, 16 U.S.C. § 824b (2012), in substantially less than 90 days.

reactive power compensation or decrease in reactive power capability. For example, if the entire reactive revenue requirement is transferring with the unit or the transferor and the acquiror have agreed to an allocation of the revenue requirement, no filing 90 days prior to the disposition date should be required. Similarly, if the transferor has agreed to cancel the existing revenue requirement, no filing should be required. This should be the case even if the acquiror intends to propose a new revenue requirement for the unit, as it will need to demonstrate that the proposed revenue requirement is just and reasonable under Section 205 of the FPA.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA and P3 respectfully request that the Commission take these comments into account in formulating an order on the December 22 Filing and condition its acceptance of that filing as set forth herein.

Respectfully submitted,

ELECTRIC POWER SUPPLY ASSOCIATION

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January 12, 2015

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C. this 12th day of January 2014.

/s/
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