UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.	**)**	**Docket No. ER16-372-007**

REQUEST FOR REHEARING

Pursuant to Section 313(a) of the Federal Power Act (the "FPA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission" or "FERC"),[2] the Electric Power Supply Association ("EPSA")[3] respectfully requests rehearing of the Commission's April 29, 2019 order[4] accepting the March 6, 2017 and July 31, 2017 compliance filings[5] of PJM Interconnection, L.L.C. ("PJM").[6] As discussed below, the April 29 Order recognized that it would be "unduly punitive"[7] for a

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1 16 U.S.C. § 825*l*(a) (2018).

2 18 C.F.R. § 385.713 (2018).

3 Launched over 20 years ago, EPSA is the national trade association representing leading independent power producers and marketers. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. Power supplied on a competitive basis collectively accounts for 40 percent of the U.S. installed generating capacity. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

4 *PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,084 (2019) (the "April 29 Order").

5 *See* Compliance Filing of PJM Interconnection, L.L.C., Docket No. ER16-372-003 (filed Mar. 6, 2017) (the "March 6 Compliance Filing"); Amended Compliance Filing of PJM Interconnection, L.L.C., Docket No. ER16-372-005 (filed July 31, 2017) (the "July 31 Amendment").

6 Capitalized terms not otherwise defined herein have the meanings set forth in PJM's Open Access Transmission Tariff (the "Tariff") or Amended and Restated Operating Agreement (the "Operating Agreement").

7 April 29 Order, 167 FERC ¶ 61,084 at P 32. This request for rehearing is timely, despite being filed 31 days after the issuance of the April 29 Order, because the Commission's offices were closed on May 29, 2019, when this request would otherwise have been due. *See* FERC,

Market Seller to be subject to penalties for failure to comply with its Fuel Cost Policy prior to being notified by PJM of such non-compliance. Nonetheless, the April 29 Order accepted, without explanation, Tariff and Operating Agreement language proposed by PJM that would appear to have exactly that result. Accordingly, rehearing of the April 29 Order is required to ensure that Market Sellers are not subjected to unjust and unreasonable retroactive penalties.[8]

I. BACKGROUND

On June 9, 2015, the Commission issued an order[9] finding PJM's Tariff to be unjust and unreasonable because it did not allow market participants to submit day-ahead offers that vary by hour or to update their offers in real-time ("hourly offers"), and instituting a proceeding under Section 206 of the FPA.[10] On November 20, 2015, PJM responded by proposing revisions to the Tariff and Operating Agreement to permit hourly offers. On June 17, 2016, the Commission rejected the proposed revisions, and directed PJM to make a compliance filing that would include, among other things, "a requirement for market participants to submit fuel cost policies that are approved by PJM prior to submission of cost-based offers," as well as "a penalty structure that will be applicable in the event that PJM or the [Independent Market Monitor for PJM (the "IMM")] determines

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Notice of Emergency Closing (May 28, 2019), https://www.ferc.gov/NOTICE_OF_EMERGENCY_CLOSING.pdf. *See also* 18 C.F.R. § 385.2007(a)(2) (2018).

[8] EPSA's decision to seek rehearing solely with respect to this issue should not be construed as acceptance of, or agreement with, all other factual findings and legal conclusions in the April 29 Order.

[9] *Duke Energy Corp. v. PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,206 (2015), *on reh'g*, 154 FERC ¶ 61,156 (2016), *aff'd sub nom. Duke Energy Corp. v. FERC*, 892 F.3d 416 (D.C. Cir. 2018).

[10] 16 U.S.C. § 824e (2018).

that a resource has submitted a cost-based offer that does not comply with Schedule 2 of the Operating Agreement or the Cost Development Guidelines in Manual 15."[11]

On August 16, 2016, PJM submitted Tariff and Operating Agreement revisions to comply with the June 2016 Order.[12] These revisions required Market Sellers to provide Fuel Cost Policies to PJM and the IMM, which detail how each seller prices fuel in different circumstances, for each fuel type used by any generation resource that the seller intends to offer into the PJM energy market. PJM's revisions also included a penalty structure that would apply in cases where a Market Seller's offer fails to comply with its Fuel Cost Policy. As the Commission explained, PJM proposed to calculate penalties as follows:

$$\frac{\sum \text{Penalty}_{dh} = \min(d, 15) \times \text{LMP}_h \times \text{MW}_h}{20}$$

where:

d is the greater of one and the number of days since PJM first notified the Market Seller of PJM's and the IMM's agreement regarding applicability of the penalty

h is the applicable hour of the day for which the offer applies

LMP_h is the real-time locational marginal price (LMP) at the applicable pricing location for the resources for the hour

MW_h is the available capacity of the resources for the hour[13]

PJM opposed the IMM's proposal that the penalty be applied to all hours when a Market Seller's offers were not compliant with its Fuel Cost Policy, including hours prior to the Market Seller's being notified of its non-compliance, explaining that the IMM's

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[11] *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,282 at P 63 (2016) (the "June 2016 Order") (citation omitted).

[12] Compliance Filing Implementing Hourly Offers and Cost-Based Offer Requirements, Docket No. ER16-372-002 (filed Aug. 16, 2016) (the "August 2016 Compliance Filing").

[13] *PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,133 at P 70 (the "February 2017 Order") (citation omitted).

approach "is unjust and unreasonable because it would apply retroactively and would not provide Market Sellers adequate notice of their infraction."[14] The Commission accepted PJM's August 2016 Compliance Filing (subject to the submission of a further compliance filing), finding the proposed penalty structure to be "appropriate because, as PJM explained, it is designed to grow in proportion with the possible impact that a Market Seller's cost-based offer may have on the market (i.e., the proposed penalty is based on the product of LMP and MW)."[15] At the same time, the Commission required PJM to make a further compliance filing to clarify, among other things, "what conditions need to be in place before it expects to terminate a penalty for a Market Seller that was found to be noncompliant . . . ."[16]

After submitting the March 6 Compliance Filing to comply with the February 2017 Order, PJM filed the July 31 Amendment proposing certain additional revisions. Among other things, PJM stated that it had "recently realized that [the penalty formula] does not precisely describe that the penalty will be applicable on a prospective basis after a Market Seller is notified, but in any event will always be applicable for a minimum of one day, as PJM proposed in the March 6 Compliance Filing."[17] In particular, PJM explained that because "the *h* variable is defined as 'the applicable hour of the day for which the offer applies,'" the proposed tariff language could be construed as meaning that "a Market Seller could submit a non-compliant cost-based offer for an extended period of time, not

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[14] Answer of PJM Interconnection, L.L.C. to Protests and Comments at 32, Docket No. ER16-372-002 (filed Oct. 7, 2016) (the "October 2016 Answer").

[15] February 2017 Order, 158 FERC ¶ 61,133 at P 78.

[16] *Id.* at P 81.

[17] July 31 Amendment at 7.

realize it, cease the offending behavior shortly after being notified by PJM, and then have the penalty calculation account for *all previous hours* that the Market Seller submitted the non-compliant cost-based offers."[18] PJM argued that "[s]uch a result would not align with PJM's intent or the February 3 Order, and could result in unduly punitive penalties for good-faith, minor errors that had no impacts on any market outcomes."[19] Accordingly, PJM therefore proposed to modify the definition of *h* in Section 5.1(a) of Schedule 2 to the Operating Agreement as follows:

> *h* is the applicable hour of the day for which the offer applies, commencing on the Operating Day that the Market Seller receives notice of its non-compliant cost-based offer. If PJM notifies the Market Seller of its non-compliant cost-based offer after the Market Seller has ceased submitting non-compliant cost-based offers, *h* is the applicable hours of the last Operating Day for which a non-compliant cost-based offer was submitted.[20]

PJM also proposed to modify the *d* variable in the penalty calculation as follows:

> *d* is the greater of one and the number of days since PJM first notified the Market Seller of PJM's and the IMM's agreement regarding applicability of the penalty. If PJM notifies the Market Seller of its non-compliant cost-based offer after the Market Seller has ceased submitting non-compliant cost-based offers, *d* shall be equal to one (1).[21]

In its April 29 Order accepting PJM's proposed Tariff and Operating Agreement revisions, the Commission rejected arguments by the IMM and others that "the non-compliance penalties should apply for each day on which an inaccurate cost-based offer has been identified," even days before the Market Seller received notice of its non-

18 *Id.*

19 *Id.*

20 *Id.* at 8.

21 *Id.*

compliance.[22] The Commission stated:

> As PJM clarifies in the July 31 Amendment, it will apply the penalty on a prospective basis after a Market Seller is notified, for a minimum of one day. Subsequent to PJM's notification, PJM's proposed penalty for a Market Seller not having an approved Fuel Cost Policy or submitting a cost-based offer that is non-compliant will not be imposed until the day after PJM determines that the Market Seller's cost-based offer complies with the approved Fuel Cost Policy of Schedule 2 of the Operating Agreement. Nothing in the July 31 Amendment changed PJM's original proposal, approved by the Commission, to have non-compliance penalties begin on the day of notification.[23]

The Commission agreed with PJM that "it [is] appropriate that the penalty be applied after a Market Seller has received notification of an infraction, since the purpose of the penalty structure is to incentivize compliance for accurate cost-based offers and Fuel Cost Policies, and not to retroactively penalize a Market Seller."[24]

Even as it rejected the imposition of retroactive penalties, however, the April 29 Order accepted proposed language that can be – and, as EPSA understands it, has been – construed as permitting, if not requiring, just such retroactive penalties. Specifically, the Commission accepted language in the definition of "*d*" that PJM interprets as requiring the imposition of penalties for a minimum of one day for Fuel Cost Policy non-compliance, even non-compliance that occurred before the Market Seller has received notification from PJM.[25]

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22 April 29 Order, 167 FERC ¶ 61,084 at P 31.

23 *Id.* (footnotes omitted).

24 *Id.* at P 32.

25 *See id.* at P 23 (describing PJM's proposal).

II. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[26] EPSA hereby identifies each issue on which it seeks rehearing of the April 29 Order, and provides representative precedent in support of its position on each of those issues:

1. In the April 29 Order, the Commission concluded that it is "appropriate that the penalty be applied after a Market Seller has received notification of an infraction," and that the purpose of the penalty structure is "not to retroactively penalize a Market Seller." April 29 Order, 167 FERC ¶ 61,084 at P 32. Nonetheless, the April 29 Order simultaneously accepted tariff language proposed by PJM that would result in a Market Seller being assessed penalties for at least one day for failing to comply with its Fuel Cost Policy, even in circumstances where PJM has not notified the seller of its non-compliance or where the seller has not had an opportunity to correct its offers. The April 29 Order therefore is arbitrary and capricious, and fails to reflect reasoned decisionmaking. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("*Allentown*"); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983) ("*BG&E*").

2. Rehearing of the April 29 Order is required, because the Commission's decision to permit PJM to assess one day of penalties in circumstances where the Market Seller is not aware of its infraction, or does not have the opportunity to correct its offers, fails to reflect reasoned decisionmaking and is not supported by substantial record evidence. *See, e.g., Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009) ("*ICC*"); *Pacific Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004) ("*PG&E*"); *Missouri Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1072-75 (D.C. Cir. 2003) ("*Missouri PSC*"); *Moraine Pipeline Co. v. FERC*, 906 F.2d 5, 9 (D.C. Cir. 1990) ("*Moraine*").

III. REQUEST FOR REHEARING

The Commission failed to engage in reasoned decisionmaking when it accepted, without explanation, proposed Tariff and Operating Agreement language that arguably

[26] 18 C.F.R. § 385.713(c)(2) (2018).

subordinates the prohibition against retroactive penalties to the requirement that penalties be imposed for a minimum of one day. Nowhere in the April 29 Order does the Commission reconcile this action with PJM's recognition that the automatic imposition penalties for pre-notification conduct is unjust and unreasonable "because it would apply retroactively and would not provide Market Sellers adequate notice of their infraction"[27] or with its own finding that it is "appropriate that the penalty be applied after a Market Seller has received notice of an infraction, since the purpose of the penalty structure is . . . not to retroactively penalize a Market Seller."[28] To be clear, it is not an acceptable answer to say that the retroactive penalties will effectively be capped at one day, because it is black-letter law that the FPA "does not say a little unlawfulness is permitted."[29]

In fairness to the Commission, the record in this proceeding was less than clear and included statements that may have obscured the inconsistency between the prohibition against retroactive penalties and application of the one-day minimum to pre-notification conduct. For example, in the July 31 Amendment, PJM characterized its debate with the IMM as a disagreement "over whether the penalty should apply (a) ***only*** after the Market Seller was notified that a penalty should be implemented (PJM's position), or (b) to all past cost-based offers submitted by the Market Seller that were not in accordance with their Fuel Cost Policy (the IMM's position)."[30] PJM further stated that it had therefore "requested that if the Commission agreed that any revisions were needed

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27 October 2016 Answer at 32.

28 April 29 Order, 167 FERC ¶ 61,084 at P 32.

29 *FPC v. Texaco Inc.*, 417 U.S. 380, 399 (1974).

30 July 31 Amendment at 5 (emphasis added).

to the definition of variable *d* to clarify that the penalty would apply ***beginning the day after a Market Seller is notified***, that the Commission direct such revisions in a future compliance filing."[31] In the same vein, in the October 2016 Answer, PJM said it would be "unduly punitive" if a Market Seller had made "a good-faith, minor error in calculating cost-based offers that it had been submitting for a long period of time" and it were then "automatically . . . penalized for this past indiscretion that it was not aware of, regardless of whether such infractions had any market impact."[32] Nonetheless, PJM went on to propose Tariff and Operating Agreement language under which a Market Seller failing to comply with its Fuel Cost Policy will be subject to a penalty "for a minimum of one day,"[33] even for non-compliance that ceased before it received notification.

Critically, the April 29 Order contains no explanation as to why the prohibition against retroactive penalties should be subordinated to the one-day minimum requirement. The prohibition against retroactive penalties reflects a principled conclusion, on the part of both PJM and the Commission, that it would be unfair, unduly punitive and, most importantly, unjust and unreasonable to impose penalties for non-compliance for conduct occurring before a Market Seller was "placed on notice of the infraction . . . ."[34] No similarly principled basis has been articulated for the one-day minimum requirement, much less for the one-day minimum requirement as applied to pre-notification non-

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31 *Id.* at 6 (emphasis added). *See also* October 2016 Answer at 33 (responding to protests and comments regarding the August 2016 Compliance Filing and stating that "the penalty should apply beginning the day after the Market Seller was put on notice by PJM or the IMM of the infraction" (footnote omitted)).

32 October 2016 Answer at 32-33.

33 July 31 Amendment at 8 (footnote omitted).

34 April 29 Order, 167 FERC ¶ 61,084 at P 32.

compliance. That being the case, it is hardly surprising that the April 29 Order offers no justification for a one-day exception to the prohibition against retroactive penalties. This lack of explanation, in and of itself, demonstrates that the Commission failed to engage in reasoned decisionmaking.[35]

To make matters worse, it is hard to imagine an explanation for retroactive penalties limited to one day that could even begin to fulfill the Commission's obligation to demonstrate the process by which it arrives at a particular "result [to] be logical and rational"[36] under these circumstances. If it is unjust and unreasonable "to retroactively penalize a Market Seller,"[37] there can be no logical and rational process that leads to a conclusion that allowing PJM to retroactively penalize a Market Seller, albeit for just one day, is just and reasonable. This is particularly true where the non-compliance was inadvertent and did not have any market impact. Under such circumstances, both PJM and the Commission have properly recognized that the automatic imposition of a penalty would be "unduly punitive."[38] To be sure, effectively capping the retroactive penalty at

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[35] *See Missouri PSC*, 337 F.3d at 1072-75 (vacating and remanding Commission orders because it found, among other things, that the Commission had failed to articulate the actual reasons for its decision, and the reasons it did cite were "speculative," unsupported by record evidence, and did not support its decision); *Moraine*, 906 F.2d at 9 (finding that the Commission failed to engage in reasoned decisionmaking where it failed to "articulate its decision based on evidence in the record"). *See also*, *e.g.*, *ICC*, 576 F.3d at 477 (explaining that a reviewing court cannot "uphold a regulatory decision that is not supported by substantial evidence on the record as a whole"); *PG&E*, 373 F.3d at 1319 (stating that the Commission's orders must be "based upon substantial evidence in the record" (quoting *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994)).

[36] *Allentown*, 522 U.S. at 374. *See also, e.g., State Farm*, 463 U.S. at 48 (stating that the Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner" (citations omitted)); *BG&E*, 462 U.S. at 105 (explaining that agency must have "considered the relevant factors and articulated a rational connection between the facts found and the choice made" (citations omitted)).

[37] April 29 Order, 167 FERC ¶ 61,084 at P 32.

[38] *Id.*

one day is ***less unduly punitive*** than the uncapped penalties advocated by the IMM. But, under the reasoning of the April 29 Order, it is still ***unduly punitive***.

IV. CONCLUSION

WHEREFORE, EPSA respectfully requests that the Commission grant rehearing of the April 29 Order as described herein.

Respectfully submitted,

ELECTRIC POWER SUPPLY ASSOCIATION

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Dated: May 30, 2019

CERTIFICATE OF SERVICE

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

Dated at Washington DC, this 30th day of May, 2019.

/s/ Stephanie S. Lim
Stephanie S. Lim