UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Indiana Municipal Power Agency and City of Lawrenceburg, Indiana,	)	
Complainants,	)	
v.	)	**Docket No. EL20-30-000**
PJM Interconnection, L.L.C., American Electric Power Service Corp., and Lawrenceburg Power, LLC,	)	
Respondents	)	

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

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or the "Commission"),[1] the PJM Power Providers Group ("P3")[2] and the Electric Power Supply Association ("EPSA")[3] protest the complaint and petition[4]

[1] 18 C.F.R. § 385.211 (2019).

[2] P3 is a non-profit organization that supports the development of properly designed and well-functioning markets in the PJM region. Combined, P3 members own approximately 67,000 megawatts of generation assets, produce enough power to supply over 50 million homes in the PJM region covering 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. P3 has separately moved to intervene in this proceeding. *See* (doc-less) Motion to Intervene of the PJM Power Providers Group, Docket No. EL20-30-000 (filed Mar. 16, 2020).

[3] EPSA is the national trade association representing competitive power suppliers in the U.S. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. 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. EPSA has separately moved to intervene in this proceeding. *See* Motion to Intervene of the Electric Power Supply Association, Docket No. EL20-30-000 (filed Mar. 19, 2020).

[4] Complaint and Petition for Declaratory Relief of the Indiana Municipal Power Agency and the City of Lawrenceburg, Indiana, Docket No. EL20-30-000 (filed Mar. 6, 2020) (the "Complaint").

filed by the Indiana Municipal Power Agency ("IMPA") and the City of Lawrenceburg, Indiana (the "City" and, together with IMPA, "Complainants") in the above-captioned proceeding. As discussed below, the Commission should deny the Complaint and assert exclusive jurisdiction over station power netting pursuant to the PJM Interconnection, L.L.C. ("PJM") Open Access Transmission Tariff (the "PJM Tariff"). In the alternative, even if the Commission is unwilling to assert exclusive jurisdiction in this area, Complainants have failed to justify their extraordinary request that the station power provisions of the PJM Tariff be declared to be "null and void and unenforceable."[5] At most, they have made a case for clarifying that those provisions have no preemptive effect where a State authority has established a netting interval for the retail provision of station power that is different from the monthly netting interval prescribed by the PJM Tariff. Finally, the Commission should also make clear that any relief granted in this proceeding will be prospective.

I.

BACKGROUND

Relying chiefly on Commission orders and judicial decisions relating to the station power provisions of the California Independent System Operator Corporation's Fifth Replacement FERC Electric Tariff (the "CAISO Tariff"),[6] Complainants argue that "the Commission lacks jurisdiction over the supply of station power," and that "it necessarily follows that the PJM Tariff provisions purporting to afford merchant sellers the ability to self-supply station power by means

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5 *Id.* at 6. *See also id.* at 30 (same).

6 *See Duke Energy Moss Landing LLC v. California Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,183 (2010) ("*Duke Energy I*"), *on reh'g*, 134 FERC ¶ 61,151 (2011) ("*Duke Energy II*" and, together with *Duke Energy I*, "*Duke Energy*"), *aff'd sub nom. Calpine Corp. v. FERC*, 702 F.3d 41 (D.C. Cir. 2012) ("*Calpine*"). *Duke Energy I* was an order on remand from a decision of the U.S. Court of Appeals for the District of Columbia (the "D.C. Circuit") in *Southern Cal. Edison Co. v. FERC*, 603 F.3d 996 (D.C. Cir. 2010) ("*Edison*").

of monthly netting are a nullity."[7] Accordingly, Complainants urge the Commission to declare that, as of February 12, 2013 (if not earlier),[8] those provisions are "null and void and unenforceable" and that respondent Lawrenceburg Power, LLC ("Lawrenceburg Power") "must take station power service under the retail rates, terms, and conditions of service under state and local law . . . ."[9] Complainants further ask that the Commission direct respondent American Electric Power Service Corporation "to record IMPA's delivery of electricity to the City at [Lawrenceburg Power's generation facility] in IMPA's PJM Load Service Entity ('LSE') account,"[10] and respondent PJM "to provide IMPA wholesale electric and network transmission service for the supply and transmission of power to its designated network load at the Lawrenceburg Plant delivery point . . . ."[11] Complainants claim that the requested relief is "narrow and what is necessary to enforce their rights."[12]

II.

PROTEST

As an initial matter, P3 and EPSA agree with arguments advanced by Lawrenceburg Power in related litigation discussed in the Complaint[13] concerning the relevance and continuing

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7 Complaint at 4.

8 Complainants state that February 12, 2013 is the date on which the D.C. issued its mandate in the *Calpine* case. *See id.* at 6 n.9.

9 *Id.* at 6.

10 *Id.*

11 *Id.* at 7.

12 *Id.*

13 The related litigation involved a complaint (a copy of which was provided as Exhibit IMP-001 to the Complaint) filed by Lawrenceburg Power in the U.S. District Court for the Southern District of Indiana seeking declaratory relief to the effect that any State or local law attempting to regulate station power in the PJM footprint is preempted and injunctive relief barring the City from discontinuing water and sewer services in response to Lawrenceburg Power's refusal to pay it for station power. In dismissing Lawrenceburg Power's complaint, the district court did not rule on the preemption issue but held only that

force of the precedent upon which Complainants rely.[14] In particular, P3 and EPSA agree that the more recent decision of the U.S. Supreme Court in *FERC v. Electric Power Supply Association*[15] "calls into question the continued validity of" the *Edison* decision, which prompted the *Duke Energy* orders, and the *Calpine* decision, which affirmed the *Duke Energy* orders.[16] As Lawrenceburg Power observed, the Supreme Court in *EPSA* upheld the Commission's regulation of compensation for demand response – *i.e.*, reductions in retail purchases – sold in wholesale markets "on the grounds that 'every aspect of the regulatory plan happens exclusively on the wholesale market and governs exclusively that market's rules.'"[17] Precisely the same is true of the station power provisions of the PJM Tariff, and the Commission should, therefore, revisit (or at least decline to extend to PJM) its holdings in *Duke Energy* in light of *EPSA*. P3 and EPSA urge the Commission to assert exclusive jurisdiction over the provision of station power pursuant to a tariff, like the PJM Tariff, that is on file with the Commission, recognizing that such a provision both prescribes a wholesale rate – in the sense that settlement adjustments for station power are effectively after the fact reductions in a generator's wholesale sales – and involves a practice that, like wholesale demand response compensation, directly affects or relates to wholesale rates. In so doing, the Commission should make clear that its exclusive jurisdiction in this area preempts any shorter netting interval prescribed by a State authority.

Lawrenceburg Power "cannot bring a private cause of action for an FPA preemption claim." *Lawrenceburg Power, LLC v. Lawrenceburg Mun. Utils.*, 410 F.Supp.3d 951 (S.D. Ind. 2019).

[14] *See* Plaintiff's Response in Opposition to Defendants' Motion to Dismiss and Motion to Stay at 18-25, *Lawrenceburg Power, LLC v. Lawrenceburg Mun. Utils.*, No. 4:18-cv-oo232-TWP-DML (S.D. Ind. Mar. 14, 2019) (the "Lawrenceburg Power Response").

[15] 136 S.Ct. 760 (2016) ("*EPSA*").

[16] Lawrenceburg Power Response at 24.

[17] *Id.* (quoting *EPSA*, 136 S.Ct. at 776).

Even if the Commission is not prepared to revisit its holdings in *Duke Energy*, there is no justification for granting the overbroad relief requested in the Complaint. Even accepting, for purposes of argument, the dubious proposition that *Duke Energy* and *Calpine* are still good law, it is neither necessary nor appropriate to declare the station power provisions of the PJM Tariff "null and void and unenforceable,"[18] as Complainants request. The Commission made no such declaration with respect to the CAISO Tariff provisions before it in *Duke Energy*; to the contrary, it only concluded that, light of *Edison*, "the Commission and the states can use different methodologies when the Commission determines the amount of station power that is transmitted on the Commission-jurisdictional grid and the state determines the amount of station power that is sold in state-jurisdictional retail sales."[19] The Commission did not declare and has not since declared the station power provisions of the CAISO Tariff to be null or void or unenforceable.

In addition to *Duke Energy* and *Calpine*, Complainants also rely on the Commission's order in *Midwest Independent Transmission System Operator, Inc.*[20] as support for their position. But the *MISO* order, issued since the *Duke Energy* orders, provides no support for the extravagant relief they seek here. In that case, the Commission accepted proposed revisions to the station power provisions of the Midwest Independent Transmission System Operator, Inc.'s ("MISO's") Open Access Transmission, Energy and Operating Reserve Markets Tariff (the "MISO Tariff"). These revisions were intended to recognize "that there may be state–by-state variation regarding the state-jurisdictional retail aspects of station power" and that the MISO

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18 Complaint at 6. *See also id.* at 30 (same).

19 *Duke Energy I*, 132 FERC ¶ 61,183 at P 16. *See also Duke Energy II*, 134 FERC ¶ 61,151 at P 24 (stating that, in *Duke Energy I*, the Commission "determined that the Commission and the states can use different methods, with the Commission determining the amount of station power that is transmitted on the interstate transmission grid and the states determining the amount of station power that is sold in state-jurisdictional retail energy sales").

20 139 FERC ¶ 61,113 (2012) ("*MISO*").

netting interval does not preempt a State-established netting interval and to ensure that "a generation owner that supplies its facility with station power pursuant to an applicable retail rate or tariff that includes charges for transmission service will not incur duplicative charges from MISO."[21] In no way did the *MISO* order declare or even imply that the station power provisions of the MISO Tariff were null or void or unenforceable in light of *Edison* or *Duke Energy*. To the contrary, the Commission merely accepted provisions designed to account for the fact that, under *Edison* and *Duke Energy*,[22] the netting interval under the MISO Tariff would not have preemptive effect in the face of a conflicting State-approved netting interval where sales of station power were concerned. The Commission expressly found MISO's proposed tariff changes to be "consistent with [*Duke Energy*]."[23]

Accordingly, even to the extent that *Duke Energy* and its progeny, including *MISO* and *Calpine*, are still good law in the wake of *EPSA*, those cases would, at most, support a declaration that the monthly netting interval prescribed by the station power provisions of the PJM Tariff does not have preemptive effect with respect to a shorter netting interval for retail sales prescribed by a State authority. As a practical matter, such a declaration seems unnecessary beyond, perhaps, the context of the dispute between Complainants and Lawrenceburg Power, for at least two reasons. First, PJM's Manual 28 already addresses the possibility that a generator may take station power service under a retail tariff, stating:

> If a superseding arrangement for the treatment of station power exists between a generation owner and the applicable electric distribution company (EDC) in whose service territory the generator resides, then net station power consumption (i.e., negative net generation MW) is not reported to PJM for settlements purposes. In this case, compensation for station power

[21] *Id.* at P 5.

[22] The *MISO* order was issued before the *Calpine* decision.

[23] *MISO*, 139 FERC ¶ 61,113 at P 20.

> consumption is handled bilaterally between the EDCs and generation owners and PJM billing adjustments for station power are not applicable.[24]

PJM has thus already addressed the circumstance in which a State-regulated utility has some alternative arrangement for netting station power.

Second, as a general rule, a rational generator will have no incentive to continue to participate in station power netting under the PJM Tariff where a State authority has imposed a shorter netting interval for retail station power sales, because, as recognized in the *Duke Energy II* and *MISO*, doing so will inevitably result in the equivalent of a double-charge: the generator will see adjustments to its PJM wholesale market settlements for station power it was deemed to have self-supplied under a monthly netting interval, ***and*** it will pay retail charges to the local utility for station power it was deemed to have purchased under the State's shorter netting interval.[25] As a result, the generator will derive no benefit from netting under the PJM Tariff and will, instead, be having its wholesale revenues reduced to account for a portion of the same station power for which it is also paying retail charges.[26]

Finally, if the Commission grants the Complaint, even in part, it should make clear that any relief granted is prospective only. Nullifying the station power provisions of the PJM Tariff back to February 12, 2013 would be grossly inequitable to market participants that have relied in good faith on the continuing effectiveness of those provisions. All parties concerned have made business decisions and otherwise acted over the last seven years with an understanding that the

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[24] PJM, *PJM Manual 28: Operating Agreement Accounting* at 101 (effective Dec. 3, 2019), https://www.pjm.com/-/media/documents/manuals/m28.ashx.

[25] *See Duke Energy II*, 134 FERC ¶ 61,151 at P 28; *MISO*, 139 FERC ¶ 61,113 at P 27.

[26] Of course, this only serves to underscore why the Commission's refusal to exercise its wholesale jurisdiction over station power netting under an independent system operator ("ISO")/regional transmission organization ("RTO") tariff, such as the PJM Tariff, is unsustainable, particularly in light of *EPSA*.

station power provisions of the PJM Tariff remained in full force and effect. Even in cases where an ISO/RTO has been found to have acted unlawfully, the Commission has properly denied retroactive relief based on its understanding that market participants who have relied on those provisions "cannot effectively revisit their economic decisions in these circumstances" or "retroactively alter their conduct."[27] The same is true here. Generators in States with retail choice, for example, cannot go back in time and arrange to take service from competitive suppliers for these past periods, instead of taking service from default providers that have, to date, never asserted any right to enforce some shorter netting interval purportedly prescribed by State authorities.

[27] *New York Indep. Sys. Operator, Inc.*, 92 FERC ¶ 61,073 at 61,307 (2000), *on reh'g*, 97 FERC ¶ 61,154 (2001). *See also, e.g.*, *California Indep. Sys. Operator Corp.*, 151 FERC ¶ 61,247 at n.46 (2015); *Astoria Generating Co. L.P. v. New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189 at P 141 (2012), *on reh'g*, 151 FERC ¶ 61,044, *on reh'g*, 153 FERC ¶ 61,274 (2015); *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157 at P 63 (2009); *Astoria Generating Co. v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244 at P 132 (2012); *DC Energy, LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,165 at P 101 (2012), *on reh'g*, 144 FERC ¶ 61,024 (2013); *Borough of Chambersburg v. PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,219 (2006), *reh'g denied*, 119 FERC ¶ 61,166 (2007).

III.

CONCLUSION

WHEREFORE, for the foregoing reasons, P3 and EPSA respectfully request that the Commission deny the Complaint or, if it grants the Complaint, limit the relief granted as requested herein.

Respectfully submitted,

PJM POWER PROVIDERS GROUP

By: */s/ David Tewksbury*
David G. Tewksbury
Stephanie S. Lim
McDERMOTT WILL & EMERY LLP
The McDermott Building
500 North Capitol St., NW
Washington, DC 20001

Glen Thomas
Diane Slifer
GT Power Group
101 Lindenwood Drive, Suite 225
Malvern, PA 19355

On behalf of
the **PJM Power Providers Group**

ELECTRIC POWER SUPPLY ASSOCIATION

By: */s/ Nancy Bagot*
Nancy Bagot
Senior Vice President
Sharon Royka Theodore
Senior Director, Regulatory Affairs
Electric Power Supply Association
1401 New York Ave, NW, Suite 950
Washington, DC 20005

On behalf of
the **Electric Power Supply Association**

Dated: May 1, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon 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 1st day of May, 2020.

/s/ Stephanie S. Lim
Stephanie S. Lim