UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.	**)**	**Docket No. ER23-2649-000**

ANSWER OF THE ELECTRIC POWER SUPPLY ASSOCIATION

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"),[1] the Electric Power Supply Association ("EPSA")[2] respectfully answers the comments of the Independent Market Monitor for PJM (the "IMM")[3] on the proposal of PJM Interconnection, L.L.C. ("PJM")[4] to establish a mechanism through which generation owners could recover costs of upgrades

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1 18 C.F.R. §§ 385.212, 385.213 (2022).

2 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 filed a timely motion to intervene in this proceeding. *See* (doc-less) Motion to Intervene, Docket No. ER23-2649-000 (filed Aug. 29, 2023).

3 Comments of the Independent Market Monitor for PJM, Docket No. ER23-2649-000 (filed Sept. 8, 2023) (the "IMM Comments"). EPSA is entitled to answer the Comments as a matter of right, because the Comments are not "a protest, an answer, a motion for oral argument, or a request for rehearing" to which an answer is not permitted without leave under Rule 213(a)(2), 18 C.F.R. § 385.213(a)(2) (2022). *See* 18 C.F.R. § 385.213(a)(3) (2022) ("An answer may be made to any pleading, if not prohibited under paragraph (a)(2) of this section."). If and to the extent that the Comments are deemed to be a protest (notwithstanding the IMM's having styled them as "comments"), Applicants respectfully request leave to answer pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.213 (2022). Although Rule 213 does not allow for answers to protests or answers as a matter of right, the Commission regularly accepts otherwise impermissible answers where, as here, they will assist the Commission's understanding of the record and its decision-making. *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,033 (2023); *New York Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,028 at P 15 (2023); *ISO New England Inc.*, 181 FERC ¶ 61,260 at P 11 (2022); *PJM Interconnection, L.L.C.*, 181 FERC ¶ 61,162 at P 29 (2022).

4 IROL Critical Resource Cost Recovery, Docket No. ER23-2649-000 (filed Aug. 18, 2023) (the "August 18 Filing").

necessary as a result of being designated as "IROL Critical Resources" under North American Electric Reliability Corporation reliability standards. As discussed below, there is no basis for the IMM's contentions that the opportunity to recover costs of complying with mandatory reliability standards under Section 219 of the Federal Power Act (the "FPA")[5] is limited to investments in transmission facilities and that generators should only be allowed to recover such costs pursuant to their market-based rate tariffs.[6] To the contrary, it is both lawful and appropriate that generators incurring costs as a result of being designated as IROL Critical Resources be allowed to recover those costs under cost-based rate schedules.

I. ANSWER

A. The Commission Should Reject the IMM's Erroneous Interpretation of FPA Section 219

The relevant language in Section 219 of the FPA commands, in unambiguous terms, that the rule promulgated by the Commission thereunder "shall . . . allow recovery of . . . all prudently incurred costs necessary to comply with mandatory reliability standards . . . ."[7] This provision is not, as the IMM posits, "applicable only to transmission."[8] To the contrary, it requires the Commission to provide for recovery of all such costs, regardless of whether they are incurred by transmission providers or generators.

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5 16 U.S.C. § 824s (2022).

6 *See* IMM Comments at 4-6.

7 16 U.S.C. § 824s(b) (2022).

8 IMM Comments at 4.

As an initial matter, in its rule implementing Section 219, Order No. 679, the Commission properly complied with the statutory command by providing for "recovery of all prudently incurred costs necessary to comply with the mandatory reliability standards under section 215 . . . ."[9] Specifically, the Commission adopted Section 35.35(f) of its regulations, which states, in full: "The Commission will approve recovery of prudently-incurred costs necessary to comply with the mandatory reliability standards pursuant to section 215 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential."[10] In perfect accord with the statutory command, neither Order 679 nor Section 35.35(f) contains any implicit or explicit limitation of the kind the IMM imagines.

According to the IMM, "PJM's reliance on Section 219, Transmission infrastructure investment, is misplaced because, as the name of this provision makes clear, it is applicable only to transmission."[11] But it is black-letter law that "the heading of a section cannot limit the plain meaning of the text."[12] A section heading, like Section 219's, is "but a short-hand reference to the general subject matter" that often "can do no more than indicate the provisions in a most gen[e]ral manner . . . ."[13] That being the case, "matters in the text which deviate from those falling within the general pattern are frequently

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9 *Promoting Transmission Inv. through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 at P 343 ("Order No. 679"), *on reh'g*, Order No,. 679-A, 117 FERC ¶ 61,345 (2006), *on reh'g*, 119 FERC ¶ 61,062 (2007).

10 18 C.F.R. § 35.35(f) (2022).

11 IMM Comments at 4.

12 *Brotherhood of R.R. Trainmen v. Baltimore Ohio R.R. Co.*, 331 U.S. 519, 529 (1947) ("*Brotherhood*"). *See also Fulton v. City of Phila.*, 141 S.Ct. 1868, 1879 (2021) ("[A] title or heading should never be allowed to override the plain words of a text." (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 222 (2012) (alteration in original)).

13 *Brotherhood*, 331 U.S. at 528.

unreflected in the headings and titles."[14] In this instance, the section heading refers to "Transmission infrastructure investment" as the general subject matter. The heading understandably and unremarkably does not attempt to describe each and every matter addressed in that section, and there are various matters, including not only recovery of costs of complying with mandatory reliability standards and other matters, such as incentives for transmission owner participation in regional transmission organizations and independent system operators, "unreflected in th[at] heading[] . . . ."[15]

The IMM also points to language in Section 219(b)(1) purportedly stating that Section 219's "purpose is to 'promot[e] capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy.'"[16] At the outset, the subsections of Section 219(b) describing what shall be in the rule promulgated by the Commission pursuant to Section 219 are conjunctive, not disjunctive. The Commission's rule was, therefore, required to satisfy each and every requirement set forth in the subsections of Section 219(b), including the requirement of subsection (4)(B) to "allow recovery of . . . all prudently incurred costs necessary to comply with mandatory reliability standards . . . ."[17] Even assuming *arguendo* that Section 219(b)(1) can be construed as expressing the purpose of Section 219, as the IMM asserts, it still could not defeat the plain language of Section 219(b)(4)(B). It is well-established that prefatory language of this kind "does not change the plain meaning of

14 *Id.*

15 *Id.*

16 IMM Comments at 4 (quoting 16 U.S.C. § 824s(b)(1) (2022)).

17 16 U.S.C. § 824s(a) (2022).

[an] operative clause . . . ."[18] The operative clause relevant here states unambiguously that the Commission must "allow recovery of . . . ***all*** prudently incurred costs necessary to comply with mandatory reliability standards . . . ."[19]

The Commission has, of course, already allowed generators in the ISO New England Inc. ("ISO-NE") market to recover costs of complying with mandatory reliability standards – specifically the same kind of critical infrastructure protection costs for which PJM proposes to allow recovery.[20] Tellingly, in none of these proceedings has the Commission or any intervenor challenged the proposition that Section 219 allows and, in fact, requires that the Commission let generators recover these costs, provided they were prudently incurred and just and reasonable. Rather, all concerned accepted that Congress meant what it said when it "direct[ed] the Commission through its regulations to allow recovery of 'all' such costs when consistent with FPA section 205 . . . ."[21]

B. Precluding Recovery of these Costs Would Distort the Market and Be Contrary to Sound Public Policy

The IMM's policy objections to the proposed cost recovery mechanism are similarly without merit. At the outset, these objections are simply irrelevant to the Commission's

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[18] *Kingdomware Techs., Inc. v. U.S.*, 579 U.S. 162, 173 (2016) (citing *Yazoo & Mississippi Valley R. Co. v. Thomas*, 132 U.S. 174, 188 (1889)). *See also District of Columbia v. Heller*, 554 U.S. 570, 578 (2008) (stating that "a prefatory clause does not limit or expand the scope of [an] operative clause").

[19] 16 U.S.C. § 824s(b)(4)(A) (2022).

[20] *See ISO New England Inc.*, 171 FERC ¶ 61,160 (accepting ISO-NE filing establishing mechanism for cost recovery), *on reh'g*, 172 FERC ¶ 62,046, *on reh'g*, 172 FERC ¶ 61,251 (2020) ("*ISO-NE*"), *aff'd sub nom. Cogentrix Energy Power Mgmt., LLC v. FERC*, 24 F.4th 677 (D.C. Cir. 2022). *See also, e.g.*, *Essential Power Newington, LLC*, 180 FERC ¶ 61,169 (2022) (accepting generator rate schedule for cost recovery); *Dynegy Mktg. & Trade, LLC*, 174 FERC ¶ 61,155 (2021) (same).

[21] *ISO-NE*, 172 FERC ¶ 61,251 at P 15.

review of the August 18 Filing. Congress already made the policy choice that public utilities should be allowed to recover these costs, and the Commission, as a "creature[] of statute,"[22] cannot reasonably be asked to disregard that choice, as the IMM would have it do.

In any event, Congress's policy choice, as reflected in the August 18 Filing, is entirely reasonable. As EPSA explained in its earlier comments, such recovery is necessary and appropriate because these mandated costs occur outside of the markets, affect some units but not others, are not discretionary in any way, and may be imposed on very short notice for as brief a period as one year.[23] That being the case, the IMM's approach would put IROL Critical Resources at a competitive disadvantage relative to other resources, which would, as PJM noted, increase "the likelihood that the Generation Owner may alternatively pursue other options (e.g., unit retirement) that may have an adverse impact on reliability."[24] The upshot is that the IMM's preferred policy choice would have the perverse effect of putting resources that are, by definition, "essential to maintaining IROLs, and by extension, the reliability of the PJM Region,"[25] at greater risk to exit the market than others.

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22 *National Fed'n of Indep. Bus. v. Department of Lab.*, 595 U.S. 109, 117 (2022).

23 *See* Comments of the Electric Power Supply Association at 3-5, Docket No. ER23-2649-000 (filed Sept. 8, 2023).

24 August 18 Filing at 13.

25 *Id.*

II. CONCLUSION

Wherefore, EPSA respectfully requests that the Commission take this answer into consideration in issuing an order on the August 18 Filing.

Respectfully submitted,

ELECTRIC POWER SUPPLY ASSOCIATION

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CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., this 26th day of September 2023.

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