UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

MOTION FOR LEAVE TO ANSWER AND ANSWER OF PJM INTERCONNECTION, L.L.C.

PJM Interconnection, L.L.C. ("PJM"), pursuant to Federal Energy Regulatory Commission ("Commission" or "FERC") Rules of Practice and Procedure 212 and 213,[1] submits this Motion for Leave to Answer and Answer to the May 1, 2020 Comments of Buckeye Power, Inc. ("Buckeye")[2] and the May 1, 2020 Answer of American Electric Service Corporation ("AEP")[3].

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[1] 18 C.F.R. §§ 385.212, 385.213.

[2] Motion to Intervene and Supporting Comments of Buckeye Power, Inc., Docket No. EL20-30-000 (May 1, 2020) ("Buckeye Comments").

[3] Answer of the American Electric Power Service Corporation, Docket No. EL20-30-000 (May 1, 2020) ("AEP Answer").

I. MOTION FOR LEAVE TO ANSWER

Although Commission Rule 213(a)(2) does not generally permit answers to answers,[4] the Commission permits answers for good cause shown, such as when an answer contributes to a more accurate and complete record or provides useful information that assists the Commission's deliberative process.[5] This Answer will aid the Commission's decision-making process by 1) conveying PJM's support for the stakeholder process requested by AEP; and 2) clarifying the legal framework appropriate to addressing Buckeye's request for the Commission to help resolve in this proceeding a separate Buckeye dispute with a generator located in its retail service territory. PJM therefore asks that the Commission accept this Answer.

II. ANSWER

A. *Once the Commission Resolves the Jurisdictional Debate Between Complainants and Lawrenceburg Power, PJM Supports the Stakeholder Process Approach Requested by AEP to Implement that Commission Guidance.*

AEP, in its answer to the Complaint,[6] asks the Commission to direct a stakeholder process to develop "appropriate revisions" to PJM's Open Access Transmission Tariff ("Tariff") as a "more measured approach" compared to the Complaint's request that the Tariff provisions be declared null and void.[7] Quoting the Commission's recognition of

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4 18 C.F.R. § 385.213(a)(2).

5 *See, e.g.*, *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137, at P 29 (2017) ("We will accept the Companies' and the Complainants' answers because they have provided information that assisted us in our decision-making process."); *Colonial Pipeline Co.*, 157 FERC ¶ 61,173, at P 23 (2016) ("In the instant case, the Commission will accept the Protestors' Answers and Colonial's Answer because they have provided information that assisted us in our decision-making process.").

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

7 AEP Answer at 13.

court precedent that "the netting periods for transmission and power need not be the same"[8] (a key point echoed by the Indiana Utility Regulatory Commission, Lawrenceburg Power, LLC ("Lawrenceburg Power"), and the PJM Power Providers Group/Electric Power Supply Association),[9] AEP faulted the Complaint's request for relief because "it ignores the fact that if retail transmission service is provided on an unbundled basis in a particular portion of PJM, then PJM *does* have the right to determine how much transmission service is consumed."[10] AEP suggests that the stakeholder process develop Tariff changes that "recognize[e] state or local jurisdiction may determine if retail sales occur," but provide flexibility for Load Serving Entities, address recognition of PJM's monthly netting for transmission, and recognize variations among different states.[11]

PJM emphasized in its Answer the Commission's unquestioned authority over transmission service regarding station power, and that PJM's implementation of the existing Tariff is consistent with that precedent.[12] PJM further demonstrated that the Complainants have not set forth grounds for relief as it relates to the Tariff, and seeks dismissal of the Complaint on that basis.[13] Nevertheless, as a prospective matter, PJM supports AEP's request for a stakeholder process as a preferred approach to consider

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8 *Id.* at 13 n.21.

9 *See* Comments of the Indiana Utility Regulatory Commission, Docket No. EL20-30-000, at 13 (May 1, 2020) ("there is also no inherent conflict in the differing netting periods such as would warrant federal preemption over these issues"); Answer of Lawrenceburg Power, LLC, Docket No. EL20-30-000, at 45 ("Lawrenceburg Power Answer") ("undeniable . . . FERC had jurisdiction for determining whether any transmission service is actually used by a generator with regard to station power"); Joint Protest of the PJM Power Providers Group and the Electric Power Supply Association, Docket No. EL20-30-000, at 6-7 (May 1, 2020).

10 AEP Answer at 13.

11 *Id.* at 14.

12 PJM Answer at 7-10.

13 *See id.* at 9-10.

possible prospective changes to the Tariff. The lawfully permitted difference between measurements of transmission usage and retail usage poses essentially practical issues of whether and how to reconcile those differences. Such practical issues lend themselves to development through a stakeholder process, since the stakeholders themselves are closest to and best understand the practical implications for their specific operations, arrangements, and regulatory circumstances.

Moreover, this approach aligns with the Commission's approach to the California Independent System Operator Corp.'s ("CAISO") tariff in response to *SoCalEd.*[14] In its order on remand, the Commission concluded that, "[i]n light of the D.C. Circuit's remand order, . . . states need not use the same methodology the Commission uses to determine the amount of station power that is transmitted in interstate commerce to determine the amount of station power that is sold at retail,"[15] and noted that "[s]hould CAISO or any stakeholder believe that station power protocols of the CAISO tariff require modification, they should avail themselves of the previously-approved stakeholder procedures provided for in the CAISO tariff."[16]

The stakeholder focus on practical implementation issues can be productive, however, only if the Commission first lays to rest the threshold legal debate, framed in the Complaint[17] and Lawrenceburg Power, LLC's answer[18] regarding the application of

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14 *Duke Energy Moss Landing LLC v. Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,183 (2010) ("Remand Order"); *S. Cal. Edison Co. v. FERC*, 603 F.3d 996 (D.C. Cir. 2010) ("*SoCalEd*").

15 Remand Order at P 2.

16 *Id.* at P 16 n.21.

17 *See* Complaint at 20-23.

18 *See* Lawrenceburg Power Answer at 23-27.

Calpine[19] and *SoCalEd* to PJM, and the role of the states as to station power. With that guidance and framework clearly established, PJM is confident the stakeholder process can produce a reasonable implementation approach for prospective application. As a result, should the Commission wish to adopt AEP's recommendation, PJM urges that the Commission resolve the legal debate so that the stakeholder process is not sidetracked by the jurisdictional dispute in this proceeding.

B. Buckeye's Request that the Commission Take Action in this Case to Resolve Buckeye's Dispute with a Generator over Charges Dating Back to January 30, 2017 Highlights the Fatal Retroactive Ratemaking Flaws Inherent in the Complaint.

Buckeye supports the Complaint's request that the Commission declare Tariff, Attachment K-Appendix, section 1.7.10(d)(i) null and void because it would "bring closure" to a separate dispute between Buckeye's member cooperative Washington Electric Cooperative ("WEC") and Lightstone Generation L.L.C. ("Lightstone") regarding sales of station power.[20] Buckeye alleges that Lightstone has disregarded WEC's invoices

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[19] *Calpine Corp. v. FERC*, 702 F.3d 41 (D.C. Cir. 2012) ("*Calpine*").

[20] Buckeye Comments at 6.

for retail service since January 30, 2017 at Lightstone's generation facility,[21] and asserts that the Tariff's station power provisions "were a nullity . . . as of February 12, 2013."[22]

To the extent Buckeye (like the Indiana Municipal Power Agency ("IMPA") in the Complaint) seeks any change in any past rate or charge assessed by PJM under the Tariff, the relief sought is plainly unlawful.

As courts have made clear, "[t]he filed rate doctrine and the rule against retroactive ratemaking leave the Commission no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations."[23] Tariff, Attachment K-Appendix, section 1.7.10(d)(i) was the duly filed and formally accepted tariff provision governing PJM's determination of transmission service charges for station power throughout the entire time period of the rate disputes described by both Buckeye and IMPA. Any change to those rates and charges back to 2013 would contravene the filed rate and constitute impermissible retroactive ratemaking.

Buckeye alleges that Tariff, Attachment K-Appendix, section 1.7.10(d) became "a nullity" when the *Calpine* court's mandate was issued.[24] Buckeye seems to rely for that argument on the Complaint's contention[25] that the California station power court decisions addressed and determined not only CAISO tariff provisions, but also somehow addressed and *invalidated* PJM's Tariff provisions. Since PJM's Tariff provisions were not even before the court, this reading is unsupportable. As explained below, their assumption that

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21 *Id.*

22 *Id.*

23 *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018) (citing *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 794-97 (D.C. Cir. 1990)).

24 Buckeye Comments at 6.

25 Complaint at 16.

the filed rate can be so lightly and retroactively disregarded, with no substantive or procedural protections afforded to PJM or PJM Market Participants, is invalid.

First, as PJM explained in its Answer, the premise that Tariff, Attachment K-Appendix, section 1.7.10(d) can be declared null and void as *ultra vires* is incorrect, because that section's determination of transmission charges is authorized by, and under the exclusive jurisdiction of, the Commission in accordance with the Federal Power Act ("FPA").[26] There was and is nothing *ultra vires* about PJM's compliance with Tariff, Attachment K-Appendix, section 1.7.10(d) to assess transmission charges—which are the only Tariff charges PJM assesses under this provision. *Calpine* and *SoCalEd* did not upset that; to the contrary, they made clear that transmission was in the Commission's exclusive jurisdiction.[27]

Second, cases addressing the Commission's remedial authority when it finds a tariff violation[28] are inapplicable, because there is no claim that PJM violated the Tariff. The Commission accepted Tariff, Attachment K-Appendix, section 1.7.10(d) and PJM has complied with that provision. Neither Buckeye nor Complainants claim otherwise.

Third, cases on the Commission's remedial discretion to correct past legal error in response to a court decision[29] are inapplicable, because there is no court decision finding legal error in Tariff, Attachment K-Appendix, section 1.7.10(d). PJM acknowledges that

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[26] *See* PJM Answer at 9.

[27] *See id.*

[28] *See, e.g.*, *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 815 (D.C. Cir. 1998) (recognizing that the Commission may order recalculation of payments for a tariff violation, but that the Commission has discretionary authority as to whether to order those refunds).

[29] *See, e.g.*, *Exxon Co., USA v. FERC*, 182 F.3d 30, 47 (D.C. Cir. 1999); *Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 162 (D.C. Cir. 1993) ("This court has previously recognized FERC's authority to order retroactive rate adjustments when its earlier order disallowing a rate is reversed on appeal.").

Calpine and *SoCalEd* are relevant precedent, but that is far different from saying that either of those court decisions found legal error in the Commission's acceptance—years ago—of Tariff, Attachment K-Appendix, section 1.7.10(d). They obviously did not, as PJM's provisions were not before the courts in either *Calpine* or *SoCalEd*, or before the Commission in the underlying proceedings. The Commission proceedings on *PJM's* Tariff provision became final and non-appealable long ago when no party petitioned for review of the Commission's acceptance of Tariff, Attachment K-Appendix, section 1.7.10(d).[30] There is simply no proceeding, no record, and no decision on the existence, nature, or extent of any legal error on this Tariff provision. Consequently, neither PJM nor any PJM Market Participant has been afforded any prior opportunity to address or defend the proper application and interpretation of the specific PJM netting provision. Buckeye's (and IMPA's) contention that those court decisions nullified Tariff, Attachment K-Appendix, section 1.7.10(d) thus ignore the FPA's substantive and procedural requirements (including appellate review rights), as well as the filed rate doctrine and the ban on retroactive ratemaking.[31]

Fourth, Buckeye (and the Complaint) also obscure the fact that any change to PJM's charges would be a rate *increase*, which cannot be ordered retrospectively. Monthly

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[30] The Commission initially accepted PJM's station power provisions, including hourly netting, in *PJM Interconnection, L.L.C.*, 93 FERC ¶ 61,061 (2000); *PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251, *reh'g denied*, 95 FERC ¶ 61,333 (2001), and accepted PJM's change from hourly netting to monthly netting in *PJM Interconnection, L.L.C.*, 95 FERC ¶ 61,470 (2001). No party petitioned for review of these orders.

[31] *Columbia Gas Transmission Corp. v.* FERC, 404 F.3d 459, 462-63 (D.C. Cir. 2005) is not to the contrary. In that case, the court held that the Commission could not use its past acceptance of gas pipeline tariff provisions requiring the installation of meters to justify requiring the pipeline company to install meters on non-jurisdictional gas gathering facilities. *Id.* at 460. In other words, the fact that those provisions had been part of the filed rate did not dictate or limit the judicial determination of whether the metering directive was *ultra vires* as to meters on gathering facilities. *Id.* at 461, 462. Contrary to Buckeye's and IMPA's proposed approach here, Columbia Gas Transmission Corp. and the gas producers who requested the meters had the full right to address

netting, by allowing more opportunity (compared to shorter netting periods) to offset transmission billing determinants, results in lower net transmission of station power to the plant, and lower transmission charges. Revising PJM's transmission charge determinations to match a shorter netting period used in a retail rate would therefore increase PJM's transmission charges. But FPA, section 206[32] provides no such relief. Even the 1988 amendment that authorizes the Commission to grant relief back to the filing date of an FPA, section 206 complaint only "applies in cases where the complainant is a *purchaser* alleging that the rates it paid were too high [as it] permits FERC-ordered refunds '*of any amounts paid* . . . in excess of those which would have been paid under the just and reasonable rate.'"[33] To the extent Buckeye (and IMPA) seek an increase in any Tariff charge imposed even before the date of the Complaint, the request is even more untethered from any authority.[34]

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these issues, and the court's jurisdictional decision and its holding on the consequences for the filed rate were not only in the same proceeding, but in the very same opinion. Here, by contrast, Buckeye and IMPA would deem a court's decision on one regional transmission organization's tariff provisions to have simultaneously invalidated a different regional transmission organization's different tariff provisions. *Columbia Gas* also is misapplied here because, in that case, the court held the Commission exceeded its jurisdiction in its metering directive. By contrast, in this proceeding, the only charges PJM assessed were for transmission service, and the Complainants concede "the Commission's right to regulate the rates, terms, and conditions of Commission-jurisdictional transmission service used to supply retail station power service." Complaint at 7 n.10.

32 16 U.S.C. § 824e,

33 *City of Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009) (quoting FPA, section 206(b)).

34 Buckeye also has the further obstacle that it has not filed an FPA, section 206 complaint. The Commission has long held that "allowing a third party to join in a complaint by filing comments would circumvent our public notice requirements and deprive the respondent of the opportunity to address the assertions of that third party." *Tilton Energy LLC v. Midcontinent Indep. Sys. Operator, Inc*., 169 FERC ¶ 61,122, at P 39 (2019) (internal quotes and cites omitted). Rather, "a third party 'seek[ing] Commission action for a perceived violation against it . . . is free to file its own complaint alleging each violation, presenting facts in support, and requesting specific relief." *Id.* Having not filed a complaint, Buckeye is not entitled to any change in any charge PJM has assessed in accordance with the Tariff.

III. CONCLUSION

PJM asks that the Commission accept and consider this answer as it resolves how to address the Complaint.

Respectfully submitted,

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May 21, 2020

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., this 21st day of May 2020.

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