

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

American Electric Power Service Corp.)

Docket No. ER16-298-000

**JOINT COMMENTS AND 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 (the “Commission”),¹ the PJM Power Providers Group (“P3”)² and the Electric Power Supply Association (“EPSA”)³ jointly submit comments on, and a protest to, American Electric Power Service Corporation’s (“AEP”) November 9, 2015 filing⁴ in the above-captioned proceeding (“Waiver Request”).⁵ In its Waiver Request, AEP is seeking a limited waiver of Section 10(A)(e) of Attachment DD of the PJM

¹ 18 C.F.R. § 385.211 (2015).

² P3 is a non-profit organization dedicated to advancing federal, state and regional policies that promote properly designed and well-functioning electricity markets in the PJM Interconnection, L.L.C. (“PJM”) region. Combined, P3 members own over 84,000 MWs of generation assets, produce enough power to supply over 20 million homes and employ over 40,000 people in the PJM region covering 13 states and the District of Columbia. 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. 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.

³ 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.

⁴ *Request for Waiver of American Electric Power Service Corporation*, Docket No. ER16-298-000, filed November 9, 2015 (“Waiver Request”).

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. ER16-298-000 (filed November 13, 2015); (doc-less) Motion to Intervene of the PJM Power Providers Group, Docket No. ER16-298-000 (filed November 17, 2015).

Interconnection L.L.C.'s ("PJM") Open Access Transmission Tariff ("Tariff") and Schedule 8.1(G) of the Reliability Assurance Agreement ("RAA") regarding Non-Performance Charges ("NPC" or "penalties") on Fixed Resources Requirements ("FRR") entities beginning in the 2019/2020 Delivery Year.

On November 10, 2015, AEP filed an Errata to its Waiver Request, correcting the date for which it is requesting that the Commission grant its Waiver Request to be January 30, 2016.⁶ On November 10, 2015, the Commission issued a Combined Notice of Filings setting November 30, 2015 as the date for comments and/or protests in this proceeding.

P3/EPSCA oppose AEP's Waiver Request. As described herein, the request not only fails all criteria of the Commission's four-part test for waiver requests, but it is also an impermissible collateral attack on a prior Commission order. Further, the AEP Waiver Request would result in an unduly discriminatory preference – a business advantage for AEP - available to no other market participant that allows underperforming AEP capacity potentially to lean on the investments of non-FRR capacity with no attendant penalty.

I. BACKGROUND

In its Waiver Request, AEP states that it is seeking what it describes as a limited waiver due, in large part, to its status as an FRR entity, including (1) the timing

⁶ *Errata to American Electric Power Service Corp.'s Request for Waiver*, Docket No. ER16-298-000, dated November 10, 2015.

requirements it is confronting in its upcoming decision, by March 7, 2016, as to whether to remain an FRR entity or to participate in PJM's Reliability Pricing Model ("RPM") capacity auction for the 2019/2020 Delivery Year, (2) the fact that PJM's Capacity Performance ("CP") has not yet been implemented, thus leaving PJM with no experience with system operations under the new CP unit parameters or rules, and (3) various issues surrounding the application, implementation and legal challenges to the Environmental Protection Agency's ("EPA") final Clean Power Plan ("CPP").

AEP filed a waiver request on January 26, 2015, seeking a limited waiver of its FRR requirements to notify PJM of its FRR election and to submit its FRR capacity plans for the 2018/2019 Delivery Year by March 11 and April 11, 2015, respectively. The Commission granted this "one-time waiver" on February 27, 2015.⁷

For the reasons as more fully explained herein, P3/EPSC oppose AEP's Waiver Request.

⁷ *Appalachian Power Co., Kentucky Power Co., Wheeling Power Co., and Indiana Michigan Power Co., Order Granting Waiver*, Docket No. ER15-909-000, dated February 27, 2015.

II. PROTEST

A. **AEP's Waiver Request Does Not Meet the Commission's Criteria for Granting a Waiver, Amounts to a Collateral Attack on a Prior Commission Order and Would be Prejudicial to Other PJM Generation Providers.**

AEP's Waiver Request should be denied in that it not only fails to meet the Commission's criteria for granting waivers, but that it also amounts to an impermissible collateral attack on the Commission's PJM Capacity Performance Order.⁸

The Commission will grant waivers when the following criteria are met: (1) the applicant has been unable to comply with the tariff provision at issue in good faith; (2) the waiver is of limited scope; (3) the waiver would address a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.⁹ AEP's Waiver Request fails to meet each of these criteria.

1. AEP has not shown that it is unable to comply with the tariff provision in good faith and its Waiver Request amounts to a collateral attack of a prior Commission order.

AEP has not shown that it is unable to comply with the tariff provision in good faith. In fact, as described more fully below, AEP has raised its request to either not have PJM's Capacity Performance rules apply to FRR entities or, in the alternative, if they do apply, to allow for a longer "phase-in" period, in its numerous filings in response to PJM's December 12, 2014 Capacity Performance filing.¹⁰

⁸ *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 (2015) ("Capacity Performance Order").

⁹ *Cal. Indep. Sys. Operator Corp.*, 147 FERC ¶ 61,132, at P 15 (2014); *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,058, at P 16 (2014); *Invenery Nelson*, 147 FERC ¶ 61,067 (2014).

¹⁰ *Protest of American Electric Power Service Corporation and Duke Energy Kentucky, Inc.* PJM Interconnection, L.L.C., Docket No. ER15-623-000, dated January 20, 2015 ("AEP CP Protest"); *Comments of American Electric Power Service Corporation*, PJM Interconnection, L.L.C., Docket No. ER15-623-000, dated April 13, 2015 ("AEP CP Comments"); *Request for Clarification and Rehearing of*

The Commission, in fact, found that the CP rules should apply to FRR entities, but allowed a phase-in of the rules for FRR entities "after the conclusion of the Fixed Resource Requirement plans to which (the) entities are currently obligated" as of June 9, 2015, the date of the PJM Capacity Performance Order ("Capacity Performance Order").¹¹ Indeed, the phase-in applicable to FRR entities is far less stringent than the transitional phase-in applicable to others which imposes 50% of the non-performance penalty in the 2016/17 delivery year and 60% in the 2017/18 delivery year. This level of penalties stands in stark contrast to the 0% penalty for FRR entities in both of those transition years and the first year that most RPM resources had to offer to perform to CP standards. AEP, therefore, was already insulated from any performance obligations for three delivery years under the new Capacity Performance rules – 2016/17 and 2017/18 – the CP Transitional Auction years, and 2018-19, the first year of full CP, when 80 percent of RPM resources were expected to meet CP requirements.

Despite receiving this special transition time from the Capacity Performance Order, in addition to the limited waiver it received beforehand for its 2015 FRR election, AEP is continuing to press for additional time beyond the 2018/2019 Delivery Year in which to not be subject to the non-performance changes for Capacity Performance.

AEP raised its objection to the Commission's transition time for FRR entities four months ago, on July 9, 2015, in its Request for Clarification/Rehearing of the

American Electric Power Service Corporation, PJM Interconnection, L.L.C., PJM Interconnection, L.L.C., Essential Power Rock Springs, L.L.C., Essential Power OPP, LLC and Lakewood Cogeneration, L.P. v. PJM Interconnection, L.L.C., Docket No. ER15-623-002; EL15-029-001; EL15-041-001, respectively, dated July 9, 2015 ("AEP Request for Clarification/Rehearing").

¹¹ Capacity Performance Order, *supra*, at P 212.

Commission's June 9, 2015 Capacity Performance Order,¹² making the same arguments that it is making in this current docket, by noting, in part that:

"AEP's concerns are heightened by the fact that the Capacity Performance rules will apply to its FRR companies beginning in the 2019/2020 Delivery Year. The election between FRR and RPM for that Delivery Year needs to be made in early March of 2016, meaning that current FRR companies have about eight months to evaluate how the Capacity Performance rules will apply and to coordinate with their state utility commissions and, potentially, receive approval to make the capital investments that may be required to ensure compliance with tariff changes that have not yet been finalized. While AEP appreciates the Commission extending the application of Capacity Performance rules to FRR entities until 2019/2020 Delivery Year, additional time is needed to address these concerns. AEP thus respectfully urges the Commission to rule that if the Capacity Performance rules will apply to current FRR entities, that those rules will not apply to FRR entities until the 2020/2021 Delivery Year. This timeframe will provide existing FRR entities with adequate time to consult and discuss with their state regulators: (i) the implications of the Capacity Performance rules ultimately approved by the Commission, including whether it would be appropriate to continue to rely upon the FRR option or to transition to RPM as a means to satisfy their capacity obligations; and (ii) the investments that might have to be made, and other costs that might have to be incurred, to comply with the Capacity Performance rules."¹³

AEP's reiteration of the exact, same requests in this docket (requesting a "limited waiver" of only the penalties associated with CP resource non-performance for one additional year (2019/2020) in order to collaborate with multiple state regulatory commissions), not only does not meet the test of a "good faith" showing of trying to meet a tariff provision, but is a clear, straight-forward collateral attack on the Commission's ruling on this very subject in its Capacity Performance Order.

¹² AEP Request for Clarification/Rehearing, *supra*, at pp. 22-23.

¹³ AEP Request for Clarification/Rehearing, *supra*, at p.23.

The Commission has a long and established record of rejecting arguments that are clearly designed as a collateral attack of its prior orders.¹⁴ In part, this Commission has held that:

". . . collateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative efficiency and are strongly discouraged."¹⁵

As clearly stated above, AEP has previously raised concerns regarding the applicability of CP to FRR units, and, in particular, the imposition of CP penalties on FRR units, in several of its filings regarding PJM's December 12, 2014, CP filing, including its Protest to that filing, made on January 20, 2015.¹⁶ The Commission considered these concerns in formulating its decision to deny the request that CP not apply to FRR units, but to allow a limited amount of time before requiring FRR units to comply with the Capacity Performance Order. AEP should be estopped from bringing the same concerns and request through a new docket in which interested parties must now take the time and expense in replying.

In the Capacity Performance Order, the Commission stressed the importance of penalties, concluding generally that "new and substantial penalties for non-performance . . . will help ensure the reliability of the PJM system. Maintaining reliability is not

¹⁴ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 134 FERC ¶ 61,229 at P 15 (2011) (citing *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co.*, 112 FERC ¶ 61,117, at P 12 (2005); *EPIC Merchant Energy NJ/PA L.P. v. PJM Interconnection L.L.C.*, 131 FERC ¶ 61,130 (2010) (dismissing as an impermissible collateral attack a complaint that merely sought to relitigate the same issues as raised in the prior case citing no new evidence or changed circumstances), ("San Diego Gas & Electric").

¹⁵ *San Diego Gas & Electric*, *supra*, at P 15.

¹⁶ *Protest of American Electric Power Service Corporation and Duke Energy Kentucky, Inc.*, PJM Interconnection, L.L.C., Docket No. ER15-623, see pp. 1-3; 25-27, dated January 20, 2015.

optional. . . .¹⁷ Specifically, with respect to FRR entities, the Commission also found it “ . . . generally appropriate to apply the increased performance expectations, **including more stringent consequences for failing to deliver energy or reserves during emergency conditions to [FRR] entities.**”¹⁸ The Commission reasoned that “ . . . applying a lesser standard to such entities could undermine the very purpose of PJM's Capacity Performance proposal – to ensure resources that receive capacity payments perform reliably.”¹⁹

AEP already raised concerns with penalties, and the Commission already considered AEP's concerns and provided a just and reasonable transition flexibility with regard to an FRR entity's CP requirements. Allowing AEP to utilize this flawed process in what is clearly a collateral attack of the Commission's CP Order must be rejected.

Moreover, AEP's request for special treatment, given the alleged, “unique obligation(s)” of FRR entities, including the timing of the notice requirements for FRR elections pursuant to PJM's RAA²⁰ must also be rejected as a collateral attack of prior Commission orders. AEP and other interested parties posited several arguments in rehearing requests of the CP Order – some in complete duplication as made herein – asserting that the CP rules and requirements should not apply to FRR entities, including that FRR entities are already subject to strong performance incentives from state regulators, the CP rules are allegedly inconsistent with the cost-of-service model, and, as

¹⁷ Capacity Performance Order at P 15, 158.

¹⁸ Capacity Performance Order at P 202. (emphasis added).

¹⁹ Capacity Performance Order, at P 204.

²⁰ Waiver Request, pp. 7-8, citing PJM's RAA, Schedule 8.1(C) and (D).

AEP argues in this proceeding, that FRR entities are subject to long planning horizons and multi-year plans.

This Commission affirmatively considered each of these “unique obligations” of the FRR entities and either rejected them as a reason for the CP rules to not apply or tailored the CP rules to address these concerns. Therefore, while the Commission found that a phase-in of the CP rules for FRR entities was appropriate, in order to comply with their as-filed FRR plans as of June 9, 2015,²¹ it rejected most all of the other arguments.

As to the argument that exempting FRR entities due to the fact that they already are subject to state performance requirements, the Commission stated that:

“ . . . Fixed Resource Requirement entities that already meet comparable performance standards, however, will not be unduly burdened by a requirement that they also meet PJM’s standards. To the contrary, these resources can be expected to benefit to the extent that their good performance, relative to other PJM resources, yields additional revenue in the form of Performance Bonus Payments.”²²

For all of these reasons, AEP’s Waiver Request must be denied as an impermissible collateral attack of the Commission’s prior Capacity Performance Order with respect to FRR entities’ obligations pursuant to the CP rules, generally, and AEP’s request for additional exemptions, specifically.

2. AEP's Waiver Request Would Not Address a Concrete Problem Specific to FRR Entities.

AEP raises several issues as its reasoning for requesting an additional year to comply with the Capacity Performance rules, namely that PJM has not had extensive

²¹ Capacity Performance Order, *supra*, at P 212.

²² Capacity Performance Order, *supra*, at P 203.

experience as of yet with the full implementation of its Capacity Performance rules; AEP's state regulators have not yet completed their respective reviews of the final EPA CPP rules; and that there are multiple state and federal jurisdictional issues affecting energy issues that are currently pending in the courts. However, none of these stated concerns are unique to AEP, specifically, to FRR entities as a group, or to capacity resource owners in PJM, in general.

Capacity Performance obligations have yet to begin for any generation resources. All owners of steam units, combined cycle units, combustion turbine units and other units offering into PJM's RPM will have to make the required investments and improvements in their units to assure their performance for the 2018/19 Delivery Year. AEP's units should be no exception.

Similarly, CPP implementation rules are not in place yet for any RPM resources. All generation unit owners face the risk of how their units will operate and fare economically as CPP is implemented. Further, proposed CPP rules are not likely to affect unit dispatch before the year 2022, at the earliest. PJM's need for resources to improve performance to CP standards is immediate. All PJM units are expected to perform more reliably beginning in the 2018/19 Delivery Year. AEP's units should be no exception.

There are, indeed, significant cases pending in the courts, including the U.S. Supreme Court, that could have an impact on state/federal jurisdictional matters as they relate to energy issues. All states and all generation resources – including renewable energy resources – could be impacted by the court decisions. None of these cases is specific to AEP's units.

3. AEP's Waiver Request Is Not Limited in Scope and Would, Instead, Give Preferential Treatment to One Class of PJM Generation Resources to the Detriment to Others.

AEP is seeking a "limited waiver" because it is apparently only seeking an additional year before it wants to be subject to CP penalties for non-performance. But granting such a waiver, after FRR entities already received an exception from performance guarantees during the first non-transitional auction year of CP in 2018/19, is neither limited nor non-discriminatory. Such a waiver, in fact, would be detrimental to other, similarly situated generation units that have had to commit to making the needed improvements and investments in their plants to ensure plant reliability.

PJM and this Commission have been committed to ensuring that PJM's reliability continues to improve for the entire PJM region. AEP states that it will comply with CP, but is only seeking to avoid non-performance charges.²³ AEP's approach would thus entirely eviscerate a fundamental premise of CP that more stringent penalties are needed to incent more meaningful performance for a full year. This is not limited in scope.

Furthermore, by AEP's own admission, it supports the new CP framework and is apparently already experiencing benefits of its implementation, by stating, in part that:

“The improvements PJM has made to the capacity market design are a step in the right direction to help support the investments needed for reliable generator performance. These higher auction prices for the next three years better reflect the value of reliable generation to meet peak electricity demand.”²⁴

²³ Waiver Request, *supra*, at p. 11.

²⁴ AEP Press Statement, Nicholas K. Akins, AEP chairman, president and chief executive officer, AEP Announces Outcome Of PJM Capacity Auctions, September 10, 2015. <http://www.aep.com/newsroom/newsreleases/?ID=1917>

As AEP acknowledges, the benefits and improvements that CP provides are incumbent upon all generators being subject to its rules and penalties. As PJM serves all loads in the region from the bundle of all committed supply resources, significant units, such as those in the AEP footprint, should not be awarded special treatment to the detriment of others. Such a result will invariably lead all loads in the PJM region with diminished supply reliability. The Commission has recognized the interconnectivity of the regional transmission system, noting the harms that could accrue given any one entity's discriminatory use of the system or otherwise receiving preferential treatment, by stating that:

" . . . where an interconnected transmission system is operated on regional basis as part of an organized market for electricity, as in California, all users of the system are interdependent, particularly with respect to reliability, *i.e.*, one participant's reliability decisions can impact the reliability of service available to other participants and the related costs the other participants must bear. As noted above, the Commission must act to ensure that rates for jurisdictional services provided in such an interconnected system remain just and reasonable and not unduly discriminatory or preferential pursuant to sections 205 and 206 of the FPA. We find that, in situations where one party's resource adequacy decisions can cause adverse reliability and costs impacts on other participants in a regionally operated system, it is appropriate for us to consider resource adequacy in determining whether rates remain just and reasonable and not unduly discriminatory."²⁵

Overall, as more fully explained above, the Commission has rejected an extended special treatment for FRR entities. As the Commission rightly determined, FRR entities, while receiving the initial grace period for CP implementation, should follow the same Capacity Performance rules as the RPM resources. In part, the Commission found that:

" . . . As an initial matter, we find it generally appropriate to apply the increased performance expectations, including more stringent consequences for

²⁵ *Order Conditionally Accepting the California Independent System Operator's Electric Tariff Filing to Reflect Market Redesign and Technology Upgrade*, 116 FERC ¶ 61,274, P 1113 (2006).

failing to deliver energy or reserves during emergency conditions, to Fixed Resource Requirement entities. . . We are not persuaded that a strong historical record of performance supports the conclusion that Fixed Resource Requirement entities warrant exemption from PJM's Capacity Performance requirements. In fact, while Fixed Resource Requirement entities do not procure their capacity commitments through PJM's capacity auctions, the ability of these resources to perform is equally critical to system reliability. Under these circumstances, applying a lesser performance standard to such entities could undermine the very purpose of PJM's Capacity Performance proposal – to ensure resources that receive capacity payments perform reliably."²⁶

The Commission should not retract from this holding, especially given a challenge via a collateral attack of its June 9, 2015 Capacity Performance Order.

For all of these reasons, AEP's Waiver Request should be denied in its entirety.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, P3 and EPSA respectfully request that the Commission consider this Protest and deny AEP's Waiver Request.

²⁶ Capacity Performance Order, P 202/204.

Respectfully submitted,

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November 30, 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 30th day of November, 2015.

On behalf of the PJM Power Providers Group

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