UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Tilton Energy LLC	)	Docket Nos. EL16-108-000
	)	
v.	)	
	)	
Midcontinent Independent System Operator, Inc.	)	
American Municipal Power, Inc.	)	EL17-29-000
	)	
v.	)	
	)	
Midcontinent Independent System Operator, Inc.	)	
Northern Illinois Municipal Power Agency	)	EL17-31-000
	)	
v.	)	
	)	
PJM Interconnection, L.L.C.	)	
American Municipal Power, Inc.	)	EL17-37-000
	)	
v.	)	
	)	
PJM Interconnection, L.L.C.	)	
Dynegy Marketing and Trade, LLC Illinois Power Marketing Company	)	EL17-54-000
	)	
v.	)	
	)	
Midcontinent Independent System Operator, Inc.	)	(consolidated)

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

PJM Interconnection, L.L.C. ("PJM") hereby answers the Joint Request for Rehearing and Clarification of Tilton Energy, LLC ("Tilton"), Dynegy Marketing and Trade, LLC and Illinois Power Marketing Company (jointly, "Dynegy"), American

Municipal Power, Inc. ("AMP"), and Northern Illinois Municipal Power Agency ("NIMPA") (collectively, "Complainants")[1] of the four orders issued in these proceedings on May 16, 2019.[2] Those orders granted in part and denied in part several complaints alleging that each Complainant was separately assessed transmission congestion charges by both PJM and the Midcontinent Independent System Operator ("MISO") for the same congestion.

PJM submits this limited response primarily to respond to Complainants' allegation[3] that PJM and MISO (collectively, the "RTOs") engaged in dilatory behavior that warrants an extension of the refund period otherwise prescribed by section 206 of the Federal Power Act ("FPA").[4] Neither facts nor law support application of the "dilatory behavior" exception to PJM, and policy counsels strongly against it. PJM is not the source of payment of any refunds to Complainants, and has no financial incentive to limit their refund period. PJM, in conjunction with MISO, reasonably pursued a joint, coordinated solution to the difficult interregional double-payment claims at issue through the RTOs' stakeholder processes. That process was successful, as the Federal Energy Regulatory

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1 Joint Request for Rehearing and Clarification of Tilton Energy, LLC, Dynegy Marketing and Trade, LLC and Illinois Power Marketing Company, American Municipal Power, Inc. and Northern Illinois Municipal Power Agency, Docket No. EL16-108-001 (June 17, 2019) ("Joint Request for Rehearing").

2 *Tilton Energy LLC v. Midcontinent Indep. Sys. Operator, Inc.*, 167 FERC ¶ 61,147 (2019) ("Tilton Order"); *Am. Mun. Power, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 167 FERC ¶ 61,148 (2019) ("AMP Order"); *N. Ill. Mun. Power Agency v. PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,149 (2019) ("AMP-NIMPA Order"); *Dynegy Mktg. & Trade, LLC v. Midcontinent Indep. Sys. Operator, Inc.*, 167 FERC ¶ 61,150 (2019) ("Dynegy Order") (collectively, "May 16 Orders").

3 Joint Request for Rehearing at 18.

4 16 U.S.C. § 824e.

Commission ("Commission") accepted the resulting FPA section 205[5] filings as just and reasonable. Such open, interregional, stakeholder-informed processes are and should be encouraged by Commission policy, and not tarnished with the label of "dilatory."

PJM also uses this response to correct Complainants' mischaracterization of the PJM Open Access Transmission Tariff ("Tariff") provisions that set a time limit on past billing adjustments, and are not a means (as proposed by Complainants) to negate the past application of lawfully effective tariff provisions.[6]

PJM also notes in this answer its support for MISO's thorough rebuttal in its July 2, 2019 answer to Complainants' rehearing arguments regarding the RTOs' Phase 1 and 2 filings.[7]

I. MOTION FOR LEAVE TO ANSWER

The Commission's rules provide that a party may answer a request for rehearing when allowed by the decisional authority,[8] and such answers have been accepted when they aid the Commission's decision-making process.[9] PJM respectfully submits that an

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5 16 U.S.C. § 824d.

6 PJM's limited focus in this brief response should not be read as agreement with any other argument or allegation in the Joint Request for Rehearing.

7 *See* Motion for Leave to Answer and Answer of the Midcontinent Independent System Operator, Inc., Docket Nos. EL16-108-001, et al., at 19-22 (July 2, 2019) ("MISO Answer").

8 *See* 18 C.F.R §385.213(a)(2).

9 *See, e.g.*, *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 2 n.6 (2016) (accepting answer to rehearing request because it assisted in the Commission's decision-making process); *Nat'l Fuel Gas Supply Corp.*, 164 FERC ¶ 61,084, at P 9 (2018) (accepting answers to a rehearing because "the Commission finds good cause to waive Rule 213(a)(2)").

answer is warranted in these unique circumstances to permit PJM to respond to Complainants' allegation on rehearing that PJM engaged in this proceeding in dilatory behavior tending or intending to deny them refunds.

II. ANSWER

A. Background

The complaints in these now-consolidated proceedings were separately filed on dates ranging from August 25, 2016, to March 28, 2017. The May 16 Orders granted the complaints only as necessary to determine "the extent to which the MISO/PJM Complainants in the MISO/PJM Pseudo-Tie Congestion Complaints may have been subject to overlapping or duplicative congestion charges and are due refunds."[10] The Commission set the refund effective date for each complaint as of the date the complaint was filed,[11] and noted that "[FPA] [s]ection 206(b) permits the Commission to order refunds for a 15-month refund period following the refund effective date."[12]

The cited language of FPA section 206(b) provides that "the Commission may order refunds . . . for the period subsequent to the refund effective date through a date fifteen months after such refund effective date."[13] That limitation on the refund period comes with a proviso, however, applicable only "if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month

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10 AMP-NIMPA Order at P 53.

11 *See, e.g.*, *id*. at P 55.

12 AMP-NIMPA Order at P 55.

13 16 U.S.C. § 824e(b).

period primarily because of dilatory behavior by the public utility."[14] In such a case, the "Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding."[15]

In their Joint Request for Rehearing, Complainants argue that the Commission erred in not finding that the complaints have been pending for more than fifteen months primarily because of dilatory behavior by PJM and MISO.[16] Relatedly, Complainants also question whether the Commission set the refund period at fifteen months.[17]

Complainants also argue that Tariff provisions that allow for past period billing adjustments of no more than two years serve as a vehicle that would allow the Commission to order refunds of congestion charges they paid PJM—pursuant to the then-effective Tariff—for a period of up to two years after the refund effective date.[18]

Last, as relevant here, Complainants also argue that the Commission erred in finding that its orders on separate FPA section 205 filings by MISO and PJM reasonably resolved the congestion overlap issue going forward.[19]

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14 *Id.*

15 *Id.*

16 Joint Request for Rehearing at 18.

17 *Id.*

18 *Id.* at 28-33.

19 *See* MISO Answer at 19-22.

B. PJM Has Not Engaged in Dilatory Behavior.

Complainants' attempted recourse to the "dilatory behavior" exception of FPA section 206 is plainly misguided in this case.[20] They ignore clear Congressional intent that the 1988 amendments to FPA section 206 were designed to counter public utility incentives to reduce the utility's financial exposure to rate reductions and refunds; they cite not a single case where the Commission has found dilatory behavior; and they suggest the Commission's first application of this provision should be to target independent RTOs' use of their stakeholder processes.

As originally enacted, FPA section 206 did not have refund authority. Congress added that option in 1988, through the Regulatory Fairness Act.[21] The Senate report that accompanied the final legislation noted the Commission's experience of longer average duration for FPA section 206 cases and found that "[o]ne probable reason for [this] longer period . . . is that public utilities *have no incentive* to settle meritorious section 206 complaints since any relief is prospective."[22] As the Senate Report explained, "[u]nder present law, public utilities *keep revenues* collected during the pendency of a section 206

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20 Complainants' separate request that the Commission clarify that the fifteen-month limit of FPA section 206 does not apply to them has no merit. *See* Joint Request for Rehearing at 60-61. FPA section 206 expressly limits the refund period to fifteen months. The only exception the statute allows is where the Commission finds that the proceeding was delayed beyond fifteen months primarily due to dilatory behavior by the public utility. The Commission made no such finding here, so the fifteen-month limit set by the statute applies, by simple operation of law.

21 *Regulatory Fairness Act*, Pub. L. No. 100-473, 102 Stat. 2299 (1988) ("RFA").

22 S. Rep. No. 100-491, at 3-4 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2684 (emphasis added) ("Senate Report").

proceeding, even if those revenues are subsequently determined to be excessive."[23] Reviewing this legislative history, the Commission concluded "the RFA was [thus] intended to correct the problem of public utilities *engaging in dilatory behavior* in section 206 proceedings *in order to delay the effectiveness of proposed, presumably lower, rates*."[24] The Commission held that the RFA corrected this problem by granting the Commission refund authority "for a period of up to 15 months from the refund effective date (longer if the public utility is found to have *engaged in dilatory behavior* during the hearing)."[25] In the Commission's view, therefore, the "dilatory behavior" the RFA set as a reason to extend the refund period was the same "dilatory behavior" the RFA sought to counter by authorizing section 206 refunds (i.e., conduct in which public utilities engaged "in order to [reduce their exposure to] presumably lower [] rates").[26]

To put it mildly, PJM and MISO do not fall neatly into the RFA's model of public utility incentives. Neither RTO pays any refunds itself; rather, they act only as settlement conduits between those receiving refunds and those (e.g., other market participants) bearing the cost of the refunds. Neither RTO has investors that bear the cost of refunds, nor do they have retained capital that would be reduced by such refunds. Neither RTO "keep[s] revenues" (as contemplated by the Senate Report) that would otherwise be paid as refunds if a refund period was extended. The RTOs do not, per the Commission's

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23 *Id.* (emphasis added).

24 *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Services*, 93 FERC ¶ 61,121, at 61,379 (2000) (emphasis added).

25 *Id.* (emphasis added).

26 *Id.*

understanding of the RFA "engag[e] in dilatory behavior in section 206 proceedings in order to [reduce their exposure to] presumably lower [] rates."[27]

To be clear, PJM does not argue that the Commission may never apply the "dilatory behavior" exception in an RTO-related proceeding. But entities like PJM and MISO plainly were not the model Congress had in mind when it passed the RFA. Complainants certainly cite no case in which the Commission has applied the FPA section 206 "dilatory behavior" exception to an RTO or Independent System Operator. Indeed, they cite no case in which the Commission has applied this exception to *any* public utility. Complainants' position, therefore, is that the very first time the Commission should find such "dilatory behavior" is not by investor-owned utilities concerned about "keeping revenues," as contemplated by the Senate Report, but by RTOs concerned with finding a solution through their stakeholder processes to a challenging inter-regional issue; that would be a striking and disturbing departure from Congress's stated objectives for the RFA.

Even looking beyond Complainants' effort to ignore Congress's intent, nothing in the RTOs' conduct in this case can fairly be called "dilatory." 'Dilatory' is commonly defined as "tending or intended to cause delay" or "characterized by procrastination."[28] Here, however, PJM's and MISO's efforts were directed at *finding a solution*, not causing a delay. PJM and MISO asked the Commission to hold the complaint proceedings in

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27 *Id.*

28 *Dilatory*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/dilatory (last visited July 10, 2019).

abeyance in order to engage their stakeholder processes to "come to agreement on a proposed solution" and attempt to resolve the issues "in the most efficient manner."[29]

The RTOs' ensuing conduct clearly embodied their goal of finding a solution. The RTOs filed their Abeyance Motion on January 25, 2017. Only nine months later (on October 23, 2017), the RTOs had not only arrived at a solution to the essence of the overlap problem, they had shepherded and refined it through both their interregional and individual stakeholder processes, converted the concepts into amendatory language in their Joint Operating Agreement, prepared the necessary FPA section 205 filing, and submitted it to the Commission as a "Phase I" solution. Moreover, PJM and MISO each developed and filed (as "Phase II") supporting and related changes to their respective market rules to address the potential for overlapping balancing congestion payments resulting from deviations between Day-ahead and real-time positions.

By the most important metric, the RTOs' efforts to "come to agreement on a proposed solution"[30] were successful, because the Commission accepted the resulting FPA section 205 filings of the Joint Operating Agreement between MISO and PJM ("JOA") and Tariff changes as just and reasonable.[31] Likewise, the Commission has expressly found that PJM's Phase I and Phase II filings reasonably resolved the congestion duplication

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29 Joint Motion of PJM Interconnection, L.L.C. and Midcontinent Independent System Operator, Inc. to Hold Proceedings in Abeyance, Docket Nos. EL17-31-000, et al. (Jan. 25, 2017) ("Abeyance Motion").

30 *Id*. at 19.

31 *See Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,069 (2018); *PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,073 (2018); *Midcontinent Indep. Sys. Operator, Inc.*, 166 FERC ¶ 61,186 (2019).

concerns raised in the complaints.[32] In short, the RTOs efforts were not "tending or intended to cause delay," nor where they "characterized by procrastination."[33] Rather, the RTOs' efforts to find a solution were sustained, deliberate, and successful.

Reflecting the inherent complexity and challenges of the congestion overlap issue, a comprehensive solution required changes not only to the JOA, but also to the RTOs' respective tariffs. One could always hope for stakeholder processes or tariff change proceedings to move more quickly. But those processes can be inherently time-consuming, and at risk of setbacks and delays. That does not mean those processes were used in this case to reduce potential refunds, and Complainants provide zero evidence of any such abuse of those processes here.

Complainants also fail to show (as required by FPA section 205(b)) that the proceedings on their complaints exceeded fifteen months "primarily due" to action of the RTOs.[34] That contention assumes the Commission would have concluded the proceedings on the complaints in fifteen months or less if the RTOs had not sought to develop a solution through their stakeholder processes. But Complainants provide no basis for that counter-factual scenario. Whether resolved through the RTO stakeholder processes and FPA section 205 filings, or solely through an FPA section 206 proceeding, the underlying issues are no less complex or contentious, and thorough solutions still would require changes not only to the JOA, but also each RTO's market rules. Complainants also overlook that the Commission lacked a quorum for months during this period.

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32 *See* Tilton Order at P 83.

33 *See supra* note 28.

34 16 U.S.C. § 824d(b).

Complainants also ignore that the Commission evidently *chose* to rely on the RTOs' efforts as a reasonable means to resolve these complaints, at least as to the going-forward tariff changes. The Abeyance Motion was opposed, but the Commission never intervened to deny it. The RTOs duly provided status reports every sixty days thereafter (from March 2017 through April 2018), many of which elicited adverse comments from one or more complainants, but the Commission never found that those adverse comments warranted a change in course. In other words, the RTOs developed for the Commission an *optional* path to resolving the complaints, and the Commission chose to take it.

C. PJM's Two-Year Limit on Billing Adjustments Is Not a Vehicle for Retroactive Departures from Filed Rates.

Complainants also argue that their refunds should not be constrained by the fifteen-month limit stated in FPA section 206 because PJM and MISO have tariff provisions that allow billing adjustments to extend back in time up to two years.[35] The Commission can readily dismiss that argument.

As to PJM, Complainants cite section 10.4 of the Tariff, in effect until December 22, 2017,[36] which provided:

> No claim seeking an adjustment in the billing for any service, transaction, or charge under the Tariff may be asserted with respect to a month, if more than two years has elapsed since the first date upon which the billing for that month occurred. The Transmission Provider and PJMSettlement may make no adjustment to billing with respect to a month for any service, transaction, or charge under this Tariff, if more than two years has elapsed since the first date upon which the billing for that month occurred, unless a claim seeking such adjustment had been received by the Transmission Provider prior thereto.

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35 *See* Joint Request for Rehearing at 28-33.

36 Tariff § 10.4(a) (Limitation on Claims).

Section 15.6 of the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C.,[37] which Complainants also cite, uses virtually identical language to set a two-year time limit on past billing adjustments under that agreement.

The flaw in Complainants' argument is easily apparent. These provisions limit PJM's liability for adjustments in past billings. They do not expand the authority to change past filed rates beyond that granted by Congress to the Commission—but that is the result Complainants seek. If any Complainant was assessed a duplicative congestion charge by PJM, it was because PJM applied its then-effective filed tariff provisions on congestion pricing in accordance with their terms. The duplication (if any) arises not from the four corners of the Tariff, but rather because MISO *also* charged for *the same* congestion, as a result of applying *MISO's* FERC-filed and effective market rules. The May 16 Orders expressly find that those PJM and MISO tariff provisions themselves remain just and reasonable.[38]

As such, Complainants have no claim that PJM departed from or misapplied its then-effective Tariff, and thereby miscalculated their bills. Complainants' claim, rather, is that the PJM charges became unjust and unreasonable to the extent MISO also charged for the same congestion. Their desired relief is that PJM (or MISO) should *not charge* (or not charge in full) the congestion charges prescribed by the then-effective Tariff. But that relief can be ordered only by the Commission, in accordance with the constraints in FPA section 206—including the express fifteen-month limit on refunds.

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37 Operating Agreement § 15.6 (Limitation on Claims).

38 *See* AMP-NIMPA Order at P 46; AMP Order at P 78; Dynegy Order at P 57; Tilton Order at P 69.

D. PJM Supports MISO's Rebuttal of Complainants' Attack on the Commission's Finding that the Phase I and Phase II Filings Reasonably Resolved the Congestion Overlap Issue Going Forward.

Complainants also argue that the Commission erred in finding that the PJM and MISO Phase I filings and the PJM Phase II filing under FPA section 205 reasonably resolved the congestion overlap issue as of August 1, 2018. The MISO Answer convincingly shows that argument fails on both the facts and the law, and is moreover a collateral attack on the Commission's orders accepting the Phase I and Phase II filings.[39] PJM agrees with MISO's thorough rebuttal, and will not burden the record with duplication of it.

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[39] MISO Answer at 19-22.

III. CONCLUSION

Based on the foregoing, the Commission should deny Complainants' request for rehearing and clarification.

Respectfully submitted,

/s/ Paul M. Flynn

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July 15, 2019

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., this 15th day of July 2019.

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