

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

XO Energy LLC, together with XO Energy MA, LP and XO Energy MA2, LP)	
v.)	Docket No. EL20-41-000
)	
PJM Interconnection, L.L.C.)	
)	

**ANSWER AND MOTION FOR LEAVE TO ANSWER OF
THE INDEPENDENT MARKET MONITOR FOR PJM**

Pursuant to Rules 212 and 213 of the Commission’s Rules and Regulations,¹ Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor (“Market Monitor”) for PJM Interconnection, L.L.C. (“PJM”),² submits this answer to the answer of XO Energy, LLC, et al. to the Market Monitor’s protest filed on June 1, 2020 (“XO Energy Answer”); the comments made in this proceeding on June 1, 2020, by Exelon Corporation (“Exelon”) and NextEra Energy Marketing, LLC (“NextEra”); by Appian Way (“Appian Way”); by VECO Power Trading, LLC (“VECO”); and by American Electric Power Service Corporation.³ On April 8, 2020, XO Energy, et al. filed a complaint seeking to

¹ 18 CFR §§ 385.212 & 385.213 (2019).

² Capitalized terms used herein and not otherwise defined have the meaning used in the PJM Open Access Transmission Tariff (“OATT”), the PJM Operating Agreement (“OA”) or the PJM Reliability Assurance Agreement (“RAA”).

³ AEP files on behalf of its affiliates: Appalachian Power Company; Indiana Michigan Power Company; Kentucky Power Company, Kingsport Power Company; Ohio Power Company; Wheeling Power Company; and AEP Energy Partners, Inc.

eliminate the FTR Forfeiture Rule (“Complaint”). On April 20, 2020, the Market Monitor filed a protest and motion to reject the Complaint (“IMM Protest”), which the Market Monitor explained constitutes an improper collateral attack on a Commission order issued January 19, 2017, directing PJM to implement the current FTR Forfeiture Rule (“Forfeiture Rule Directive”).⁴

Neither the XO Energy Answer nor comments supporting the Complaint do more than rehash arguments considered and rejected when the Forfeiture Rule Directive issued. XO Energy and others reveal that they dislike the FTR Forfeiture Rule and assert they have changed their behavior in response to the implementation of the rule. Such dislike and allegations of changed behavior do not support relitigating the Forfeiture Rule Directive. XO Energy and others fail to show that the current rule does not operate as intended.

The IMM Protest fully addressed XO Energy’s claims and the claims of others. The Market Monitor’s answer here is limited to addressing certain points that may create confusion in the record and to refuting XO Energy’s incorrect arguments for how collateral estoppel applies to complaints. The Complaint remains unsupported and amounts to an improper collateral attack on the Forfeiture Rule Directive. The Complaint should be rejected.

I. ANSWER

A. The Complaint Should Be Rejected Under Collateral Estoppel Doctrine.

XO Energy argues (at 4–5, 8) that collateral estoppel cannot apply because XO Energy has a right to file complaints under Section 206. Under XO Energy’s theory, no complaint could violate collateral estoppel. XO Energy has not been prevented from exercising its statutory rights. XO Energy filed its complaint under Section 206, as the statute permits. The Complaint should now be rejected because the Complaint seeks to

⁴ *PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,038; OA Schedule 1 § 5.2.1.

relitigate a settled matter. XO Energy raises the same arguments that have been recently considered and rejected.

The Complaint makes no attempt to demonstrate any material change to the facts and circumstances on which the Forfeiture Rule Directive relied.⁵ There have been no material changes to these facts and circumstances since 2017. The Complaint provides data and analysis that show the rule operating as intended. That XO Energy and other traders continue to dislike the rule for the same reasons that they opposed the rule does not constitute a change in circumstances. Financial traders also raised collateral attacks on the Forfeiture Rule Directive in Docket No. EL13-47 and in the compliance proceeding in Docket No. ER17-1433. XO Energy cites (at 7) to the continued unsupported attempts to relitigate the Forfeiture Rule Directive as evidence of material changes in circumstances. These filings are not properly part of the record of the Complaint proceeding.⁶ They are not properly part of the record of any proceeding. The Complaint is actually an improperly

⁵ See, e.g., *S. Co. Servs. v. Midcontinent Indep. Sys. Operator*, 153 FERC ¶ 61,026 at P 77 (2015) (“Commission precedent prohibits the filing of successive complaints that seek to re-litigate the same issue absent new evidence or changed circumstances. For example, in *Allegheny Electric Cooperative v. Niagara Mohawk Power Corp.*, [n.115: *Allegheny Electric Cooperative, Inc. v. Niagara Mohawk Power Corp.*, 58 FERC P 61,096, at 61,349 (1992).] the Commission dismissed a complaint that was identical in all relevant aspects to another complaint filed three weeks earlier that raised no new factual or legal allegations but was instead intended to thwart Congress’ intent in establishing the limited 15-month refund protection period if different refund effective dates were established. Similarly, in *EPIC Merchant Energy*, [n.116: *EPIC Merchant Energy*, 131 FERC P 61,130 at P 20.] the Commission rejected a second complaint filed over two years after the first complaint where second complainant sought to re-litigate the same issues raised in the prior complaint, citing no new evidence or changed circumstances, ... Further, in *California* the Commission rejected a request to open a new complaint proceeding responding to issues already being addressed in another proceeding, ... [n.117: *California*, 135 FERC P 61,178 at P 71.] Like the complainants in those cases, Entergy Export Customers and Morgan Stanley are attempting to re-litigate issues that are being addressed elsewhere without presenting any new evidence or changed circumstances. Therefore, we agree with MISO and protestors that the instant complaints are duplicative...).

⁶ See Answer and Motion for Leave to Answer of the Independent Market Monitor for PJM, Docket Nos. EL14-37-001, ER17-1433-000, -001 (July 10, 2017); Answer of the Independent Market Monitor for PJM, Docket Nos. EL14-37-001, ER17-1433-000 (July 17, 2019); and Answer of the Independent Market Monitor for PJM, Docket Nos. EL14-37-001, ER17-1433-000 (August 19, 2019).

filed request for rehearing of the Forfeiture Rule Directive. The opportunity to file for rehearing is closed. No cause or basis in the record exists for revisiting the determinations made in the Forfeiture Rule Directive.

XO Energy cites a case determining that collateral estoppel does not apply to arguments about an issue that the Commission determined had not been litigated.⁷ The finding in that case is unremarkable and irrelevant. The Market Monitor does not assert that collateral estoppel applies to issues that have not been litigated. The Market Monitor explained in its protest how each argument raised in the Complaint has been considered and rejected in the Forfeiture Rule Directive.⁸ XO Energy fails to identify even a single new argument, and even if had done so, it would have to explain why the argument was not raised in a timely request for rehearing of the Forfeiture Rule Directive.⁹

XO Energy argues (at 8), that the Market Monitor “ignores the two-prong approach of the XO Energy Complaint,[footnote omitted] focusing only on the request for rejection of the FTR Forfeiture Rule and not on the request to modify the rule.¹⁰ XO Energy ignores the structure of Section 206, which requires that the rule be shown to be unjust and unreasonable before there is any consideration of its replacement. XO Energy fails to show

⁷ XO Energy at 5–6, citing *La. Pub. Serv. Comm’n v. Entergy Corp.*, 149 FERC ¶ 61,245 at P 51 (2014).

⁸ Protest and Motion for Rejection of the Independent Market Monitor for PJM, Docket No. EL20-41-000 (June 1, 2020) at 5–7 (“IMM Protest”).

⁹ *See, e.g., La. PSC v. Entergy Servs.*, 163 FERC ¶ 61,117 at P 68 (2018) (“[C]ollateral estoppel bars the Louisiana Commission from raising new theories regarding retroactive ratemaking that it should have made on rehearing of the 2011 Order on Remand.[n.110: *See, e.g., California Ex Rel. Brown v. Powerex Corp.* 139 FERC P 61,210, at P 11 (2012) (noting that ‘the doctrine of issue preclusion, or collateral estoppel, prevents parties from reviving issues that were decided against them, or from raising new issues that should have been presented as part of a prior litigated claim.’)] Moreover, in the Commission orders that discussed the five issues raised by the Louisiana Commission, as discussed further below, the Commission upheld the use of the existing 2006 Compliance Tariff.”).

¹⁰ Even though there is no reason to examine the XO Energy’s proposal to eliminate the FTR Forfeiture Rule, the Market Monitor explains why the proposal has no merit and does not serve the public interest. *See* IMM Protest at 2–3 & *passim*.

the existing rule is unjust and unreasonable. Regardless, XO Energy's arguments have been resolved in prior proceedings and they are subject to collateral estoppel.

XO Energy is also confused about which rule is at issue. XO Energy cites (at 6) to the finding in the Forfeiture Rule Directive that the prior forfeiture rule was unjust and unreasonable as somehow relevant to the issues in its Complaint. Collateral Estoppel applies to the current rule, which was implemented by PJM consistent with the requirements of the Forfeiture Rule Directive.

XO Energy's support (at 2-3) for the motions to consolidate confirms the Market Monitor's argument that the Complaint should be rejected. XO Energy concedes its purpose is to relitigate the same matters resolved by the Forfeiture Rule Directive. A motion to consolidate must be supported by a showing of overlapping facts and law. The same overlap that is necessary to support a motion to consolidate, among other factors, also supports rejecting the Complaint based on collateral estoppel.¹¹ The motions should be denied because the Forfeiture Rule Directive is final.¹² Collateral estoppel applies because the directive is final.

The protests filed in PJM's compliance proceeding, to the extent that they concern matters beyond how PJM has complied with the Forfeiture Rule Directive, are improper and outside the scope of the compliance proceeding. No party sought rehearing of the Forfeiture Rule Directive. The compliance proceeding was not an opportunity to seek rehearing. Filing this Complaint does not create an opportunity to seek rehearing.¹³ Collateral estoppel doctrine bars the Complaint and it should be rejected.

¹¹ See Answer of the Independent Market Monitor for PJM, Docket No. EL20-41-000 (June 5, 2020).

¹² *Id.*

¹³ See, e.g., 163 FERC ¶ 61,117 at P 68.

B. The FTR Forfeiture Rule Is Consistent with the Forfeiture Rule Directive.

In the Forfeiture Rule Directive, the Commission found that an established forfeiture rule is a just and reasonable way to address concerns about the impacts of participants' virtual portfolios on their FTRs. The Commission stated:

We find that a version of the FTR forfeiture rule, as modified herein under our Section 206 authority, is a just and reasonable way in PJM to address concerns that a market participant will enter into virtual transactions to benefit its FTR positions.¹⁴

The Commission found that with such a rule there was no need to prove intent or study violations on a case by case basis.

Contrary to XO Energy's claims (at 18), the Forfeiture Rule Directive did not require PJM to model its rule after the version relied on by the California Independent System Operator ("CAISO"). Specifically, the Forfeiture Rule Directive did not require PJM to consider portfolios of FTRs rather than individual FTRs.¹⁵ CAISO's market design differs in significant ways from PJM's and the specifics of CAISO's rule are irrelevant.

PJM made its compliance filing consistent with the Forfeiture Rule Directive.¹⁶

C. There Is No Evidence that the FTR Forfeiture Rule Is Deterring Efficient Market Participation or Operating Other than as Expected.

Several commenters claim that their reduced or eliminated participation in the virtual market is a direct result of the FTR forfeiture rule.¹⁷ XO Energy repeats these claims

¹⁴ Forfeiture Rule Directive at P 33.

¹⁵ The Forfeiture Rule Directive did require (at P 62) application of a portfolio approach to virtual trades, which the Market Monitor recommended: "[W]e direct PJM to submit a compliance filing ... to modify section 5.2.1(c) of its Tariff to: (1) evaluate the net impact of a market participant's entire portfolio of virtual transactions on its FTR positions; (2) measure the portfolio's net impact using the load-weighted reference bus; (3) revise the threshold for triggering forfeiture to reflect the previous two changes; and (4) consider all virtual transactions held by entities that share common ownership as part of the same portfolio."

¹⁶ Answer of PJM Interconnection, L.L.C., Docket No. EL20-41-000 (June 1, 2020).

(at 12). XO Energy argues (*id.*) that this is evidence that the current rule has inefficiently deterred virtual activity.

Even if some market participants modified their behavior in response to the rule, that is evidence that the rule is working as intended. The fact that individual participants assert that they can identify which of their virtual activity triggered FTR forfeitures demonstrates the transparency of the rule. This transparency allows any participant to avoid forfeitures consistent with the Commission's Order.^{18 19}

There is no evidence that the rule has had a negative impact on markets. The evidence shows that the markets continue to be vibrant. The markets are working fine. The purpose of market rules is not to protect the specific behaviors of individual participants despite negative impacts on the market. The purpose of market rules is to protect the functioning of competitive, efficient markets. The FTR forfeiture rule has contributed to the effective functioning of competitive, efficient markets.

The asserted negative impacts on markets did not happen. The fact is that the FTR market continues to clear high levels of FTRs, that ARR values as a share of congestion are at historic highs and that virtual activity remains high. There was an increase in unique participants in the FTR market and an increase in FTR revenues from the 2017/2018 planning period to the 2019/2020 planning period. FTR cleared MW volume has increased each year since the 2017/2018 planning period.²⁰ The FTR auction revenue paid to ARRs has

¹⁷ Exelon and NextEra at 15, Appian Way at 5–6

¹⁸ Forfeiture Rule Directive at P 79.

¹⁹ *Id.* at P 81.

²⁰ *2019 Quarterly State of the Market Report for PJM: January through June*, Section 13: Financial Transmission and Auction Revenue Rights, Figure 13-3.

increased since the 2017/2018 planning period.²¹ The total share of congestion returned to load through ARRs has increased since the 2017/2018 planning period.²² Despite a number of significant changes to the design of the virtual markets, virtual activity increased from 2018 to 2019, with increases in the submitted volumes of INCs, DECs and UTCs.²³

D. Neither Elimination nor Changes to the Rule Can Be Considered in a Proceeding that is a Collateral Attack on the Forfeiture Rule Directive.

XO Energy advocates eliminating the FTR Forfeiture Rule. Commenters advocate changes to the FTR Forfeiture Rule including additional thresholds, FTR portfolio considerations, exempting locations, not using day-ahead limits and constraint based forfeitures. Neither elimination nor changes to the rule can be considered in a proceeding that is a collateral attack on the Forfeiture Rule Directive. Neither elimination nor changes to the rule comply with the Forfeiture Rule Directive.

Even if it were appropriate to consider the proposals in this proceeding, none have merit. All of the identified changes would weaken the rule and decrease transparency.²⁴ Use of an FTR portfolio approach for the forfeiture rule is a mischaracterization of the Forfeiture Rule Directive and would decrease transparency, weaken the rule and treat FTRs differently depending on the composition of the portfolio they were a part of. Exemption of some virtual bidding locations was specifically rejected by the Forfeiture Rule Directive.²⁵

²¹ 2019 *State of the Market Report for PJM*, Volume 2, Section 13: Financial Transmission and Auction Revenue Rights, Table 13-17.

²² *Id.* Table 13-20.

²³ IMM Protest at 26-28.

²⁴ See "Answer of the Independent Market Monitor for PJM," July 17, 2019. Dockets EL14-37-001 and ER17-1433.

²⁵ Forfeiture Rule Directive at P 63.

II. MOTION FOR LEAVE TO ANSWER

The Commission's Rules of Practice and Procedure, 18 CFR § 385.213(a)(2), do not permit answers to answers or protests unless otherwise ordered by the decisional authority. The Commission has made exceptions, however, where an answer clarifies the issues or assists in creating a complete record.²⁶ In this answer, the Market Monitor provides the Commission with information useful to the Commission's decision making process and which provides a more complete record. Accordingly, the Market Monitor respectfully requests that this answer be permitted.

²⁶ See, e.g., *PJM Interconnection, L.L.C.*, 119 FERC ¶61,318 at P 36 (2007) (accepted answer to answer that "provided information that assisted ... decision-making process"); *California Independent System Operator Corporation*, 110 FERC ¶ 61,007 (2005) (answer to answer permitted to assist Commission in decision-making process); *New Power Company v. PJM Interconnection, L.L.C.*, 98 FERC ¶ 61,208 (2002) (answer accepted to provide new factual and legal material to assist the Commission in decision-making process); *N.Y. Independent System Operator, Inc.*, 121 FERC ¶61,112 at P 4 (2007) (answer to protest accepted because it provided information that assisted the Commission in its decision-making process).

III. CONCLUSION

The Market Monitor respectfully requests that the Commission afford due consideration to this answer as it resolves the issues raised in this proceeding.

Respectfully submitted,



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Dated: June 30, 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 Eagleville, Pennsylvania,
this 30th day of June, 2020.



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