

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

American Electric Power Service Corp.                     )  
                                                                                  )  
                                                                                  )                     Docket No. ER16-298-000

**COMMENTS OF THE INDEPENDENT MARKET MONITOR FOR PJM**

Pursuant to Rule 211 of the Commission’s Rules and Regulations,<sup>1</sup> Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM<sup>2</sup> (“Market Monitor”), submits these comments responding to the petition for waiver filed by American Electric Power Service Corp. (“AEP”) on November 9, 2015 (“November 9<sup>th</sup> Petition”). AEP requests waiver of Capacity Performance (“CP”) related penalties to FRR entities for the 2019/2020 Delivery Year. AEP argues that it faces regulatory uncertainty that bear upon its decision next year on whether to remain an FRR Entity instead of participating in the Reliability Pricing Model (“RPM”) auctions like most other PJM Load Serving Entities. The November 9<sup>th</sup> Petition fails to meet any of the requirements for waiving the tariff rules. The PJM market rules appropriately place the risks associated with providing capacity on AEP where they belong.<sup>3</sup> AEP circumstances do not materially differ from other suppliers and are not extraordinary. The request for a waiver should be denied.

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<sup>1</sup> 18 CFR § 385.211 (2011).  
<sup>2</sup> 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”).  
<sup>3</sup> RAA Schedule 8.1 § G.

## I. COMMENTS

### A. Summary of AEP's Requests.

In the November 9<sup>th</sup> Petition, AEP seeks (at 3) a waiver of provisions that apply Non-Performance Charges to Fixed Resource Requirement ("FRR") entities "beginning in the 2019/2020 Delivery Year." AEP faces a decision on whether to renew its FRR Plan by March 7, 2016. AEP claims that such relief is necessary so that it should have additional time to "phase in" compliance with the new Capacity Performance ("CP") rules governing capacity resources because (i) the CP rules are new and sellers do not have experience operating under them; (ii) there is regulatory uncertainty surrounding compliance with the Clean Power Plan, including state regulations associated with such plan; and (iii) there is regulatory uncertainty resulting from cases before the Supreme Court that bear upon state versus federal jurisdiction over resources. AEP claims (at 10) that the "problem exists only for the 2016 election," but the scope of concerns identified by AEP are too broad to support that assertion.

### B. The Standards Are Not Met to Grant Waiver of the Rules.

AEP states the applicable standard for evaluating a waiver request, i.e. whether the waiver request: "(1) is made in good faith; (2) is of limited scope; (3) addresses a concrete problem that will be remedied; and (4) does not have undesirable consequences."<sup>4</sup> Because AEP has not met any of these standards for a waiver of the market rules, the waiver request should be denied.

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<sup>4</sup> AEP at 5 & n. 10, citing *Indianapolis Power & Light Co.*, 149 FERC ¶ 61,047 at P 64 (2014); *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078 at P 38 (2014); *Cal. Indep. Sys. Operator Corp.*, 146 FERC ¶ 61,184 at P 18 (2014); *Southwest Power Pool, Inc.*, 148 FERC ¶ 61,013 at P 13 (2014); *Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,132 at P 8 (2014).

## 1. The Request Is Not in Good Faith.

AEP's approach to submitting the November 9<sup>th</sup> Petition does not demonstrate good faith. AEP fails to identify an underlying error for the Commission to remedy with a waiver.<sup>5</sup>

The November 9<sup>th</sup> Petition requests the waiver of a rule just approved by the Commission. AEP participated in that proceeding. In response to AEP's arguments that "FRR entities will have virtually no time to evaluate and incorporate the Commission's rulings [on CP] into their capacity plans" and "FRR entities [have no opportunity] to develop such strategies and comply with regulatory requirements for approval of those expenditures and inclusion of the costs in retail rates,"<sup>6</sup> the Commission found that "phase-in of the Capacity Performance rules for [FRR] entities is appropriate."<sup>7</sup> The Commission further ordered that "PJM apply the Capacity Performance rules to [FRR ] entities only after the conclusion of the [entities' current FRR plans]."<sup>8</sup>

Thus, AEP has already raised the same issue about FRR entities being subject to penalties and the March 7, 2016, deadline in its request for rehearing of the CP order.<sup>9</sup> Accordingly, the waiver request is an improper collateral attack on the prior Commission holding. Filing improper pleadings wastes the time and resources of the Commission and other stakeholders. Such a filing is not in good faith. Indeed, because the waiver is really a

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<sup>5</sup> The Commission has denied waivers where the petitioner does not identify an underlying error that could be remedied with a waiver. See *Vermont Electric Power Company, Inc.*, 132 FERC ¶ 61,068 at P 18 (2010).

<sup>6</sup> Protest of American Electric Power Service Corporation and Duke Energy Kentucky, Inc., Docket No. ER15-623 et al. (June 9, 2015) at 8-9.

<sup>7</sup> *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 at P 212 (2015), *reh'g pending*.

<sup>8</sup> *Id.*

<sup>9</sup> See Request for Clarification and Rehearing of American Electric Power Service Corporation, Docket No. ER15-623 et al. (July 9, 2015) at 21-24 ("AEP Rehearing Request").

collateral attack on the orders approving CP capacity market reform, the waiver request should be rejected on procedural grounds, without any need to consider its lack of merit.

There is no error in the establishment of the rule nor in its application to AEP. Nevertheless, AEP now requests that the Commission specially excuse it from the consequences of this specific holding. AEP has not identified an error that could be remedied through a waiver.

AEP failed to serve the Market Monitor a copy of the pleading and failed to alert PJM or serve PJM with a copy of the pleading.<sup>10</sup>

If the waiver request is not rejected, it should be denied because it is not submitted in good faith.

## **2. The Request Is Not of Limited Scope.**

AEP's requested waiver is not of limited scope.

AEP has not demonstrated that AEP has a problem specific to itself. The regulatory uncertainties identified by AEP apply to all market participants. The Commission has found that problems must be unique in order to meet the limited scope requirement.<sup>11</sup> In addition, the March 7, 2016, deadline applies to all LSEs, regardless of whether they are currently an FRR Entity. AEP has not shown that it has a special problem that requires extraordinary relief. The waiver request should be denied.

AEP has not phrased its request in way that limits its duration, even though AEP implies it is needed only for the March 7, 2016, deadline next year. AEP does not state when

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<sup>10</sup> This conclusion is based on communications with PJM legal staff.

<sup>11</sup> The Commission has denied waivers where the problem identified is not particular to the petitioner. *See Erie Power, LLC*, 148 FERC ¶ 61,038 at P 19 (2014) (“Erie Power's circumstances do not appear to be unique and limited to just Erie Power; we do not know what facts or circumstances would distinguish Erie Power from any other generator with a deactivated plant”); *see also Ampersand Energy Partners, LLC*, 130 FERC ¶ 61,176 at P 12 (2010) (“the request for waiver does not contain sufficient explanation regarding the underlying error”).

the waiver would end. Although AEP states (at 10) that the “problem exists only for the 2016 FRR election,” the uncertainties that explain this limitation will not necessarily be resolved prior to the March 7, 2017, deadline for electing FRR status. Indeed, the asserted rationale for the waiver, regulatory uncertainty, is a permanent feature of a regulated industry. AEP claims that its concerns are for only one year contrasts with its request for rehearing, which would, if granted, permanently relieve FRR Entities of penalties that apply to other CP resource providers.<sup>12</sup>

Regulatory uncertainty is too broad a basis to justify a waiver, and granting this relief would invite continual petitions for special rule changes. Granting such a waiver does not eliminate regulatory uncertainty; it merely shifts the costs of managing such uncertainty from AEP onto others. In a regulatory paradigm based on competition, AEP is the party best situated to manage uncertainty. The petition is not about a discrete rule problem. AEP seeks to fundamentally change the assignment of risks included in the PJM market design.

AEP’s request for a waiver is not sufficiently limited in scope and should be denied.

### **3. The Request Does Not Address a Concrete Problem.**

AEP has not shown that the relief requested addresses a concrete problem. Regulatory uncertainty may be a problem, but it is not a concrete problem. Vague and speculative concerns, such as those that AEP raises about regulatory uncertainty and lack of familiarity with new market design elements, are the opposite of concrete ones. No one knows what the Clean Power Plan will finally require and when and whether it will be implemented. All of the matters that concern AEP may be resolved in ways that do not affect AEP’s resources. The matters could be resolved in ways that benefit AEP’s resources. Even the level of uncertainty is speculative. Some of the specific regulatory uncertainties that AEP identifies could be alleviated by March 7, 2016.

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<sup>12</sup> AEP Rehearing Request at 21–24.

AEP does not face a concrete, problem because it has alternatives to obtaining a waiver. AEP is not required to remain an FRR Entity. AEP could avoid the application of Schedule 8.1(G), which applies only to FRR Entities, by electing to participate in the RPM auctions like most other Load Serving Entities and like AEP already does with a significant proportion of its units. The November 9<sup>th</sup> Petition should be denied.

#### **4. Granting the Request Would Have Undesirable Consequences.**

AEP has not shown that granting the relief requested would not have undesirable consequences. The capacity resource rules exist to ensure resource adequacy, which is accomplished through rules that ensure that resources are available to provide energy when needed. CP performance incentives (AEP calls them penalties) create incentives to ensure that capacity resources will fulfill their obligations. Waiver of the penalties would weaken those incentives and creates the risk that customers paying for capacity will not receive energy when they need it. Such risks are undesirable consequences.

The Market Monitor has demonstrated that the pre-CP performance incentives, to which AEP wishes to return, do not provide effective incentives.<sup>13</sup> PJM reached the same conclusion.<sup>14</sup>

Under the Capacity Performance rules, FRR entities may choose to be subject to the same financial incentives faced by all other capacity resources, or FRR entities may choose to be subject to incentives based on physical replacement of capacity resources.

For FRR Entities that choose to be subject to financial incentives, any charges assessed for under performance fund additional payments to over performers.<sup>15</sup> Excusing AEP from financial performance incentives means that less funds are available to pay to

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<sup>13</sup> See, e.g., 2014 State of the Market Report for PJM: January through September, Section 5: Capacity, Recommendations; IMM, Analysis of the 2016/2017 Base Residual Auction (April 18, 2014).

<sup>14</sup> PJM Filings, Dockets Nos. ER15-623-000, EL15-29-000 (December 12, 2014).

<sup>15</sup> OATT Attachment DD § 10A.

capacity resources that over perform. Such potential loss of funds to pay over performers is an undesirable consequence.

For FRR Entities that opt to be subject to physical non-performance assessments, there is a requirement to update the FRR Capacity Plan with additional MW of Capacity Performance Resources.<sup>16</sup> Specially excusing AEP from this requirement would mean that AEP is leaning on the MW provided by other capacity resources without providing compensation, all of whom must manage the same regulatory uncertainty that AEP must manage. That is not just and reasonable, and it is unduly discriminatory and is therefore an undesirable consequence.

All suppliers of capacity resources have an obligation to perform. AEP has not shown how the regulatory uncertainties that it identifies could have a greater impact on it than other sellers. It is plainly discriminatory to relax or eliminate potential penalties for AEP resources when they do not perform while continuing to apply potential penalties to all other resources. The Commission has denied waivers that could “create undue discrimination” among generators supplying capacity.<sup>17</sup> The November 9<sup>th</sup> Petition should be denied.

## II. CONCLUSION

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

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<sup>16</sup> RAA Schedule 8.1 § G.

<sup>17</sup> See *Allegany Generating Station LLC*, 147 FERC ¶ 61,147 at P 21 (2014).

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Respectfully submitted,



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Dated: 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 list compiled by the Secretary in this proceeding.

Dated at Eagleville, Pennsylvania,  
this 30<sup>th</sup> day of November, 2015.



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