UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Essential Power OPP, LLC, et al.	)	
v.	)	Docket No. EL23-53-000
PJM Interconnection, L.L.C.	)	(not consolidated)
Aurora Generation, LLC	)	
Elwood Energy LLC	)	
Jackson Generation, LLC	)	
Lee County Generating Station, LLC	)	
Lincoln Generating Facility, LLC	)	
LSP University Park, LLC	)	
Rockford Power, LLC	)	
Rockford Power II, LLC	)	
University Park Energy, LLC	)	
v.	)	Docket No. EL23-54-000
PJM Interconnection, L.L.C.	)	(not consolidated)
Coalition of PJM Capacity Resources	)	
v.	)	Docket No. EL23-55-000
PJM Interconnection, L.L.C.	)	(not consolidated)
Talen Energy Marketing, LLC	)	
v.	)	Docket No. EL23-56-000
PJM Interconnection, L.L.C.	)	(not consolidated)
Lee County Generation Station, LLC	)	
v.	)	Docket No. EL23-57-000
PJM Interconnection, L.L.C.	)	(not consolidated)
SunEnergy1, L.L.C.	)	
v.	)	Docket No. EL23-58-000
PJM Interconnection, L.L.C.	)	(not consolidated)

Lincoln Generating Facility, L.L.C.	)	
v.	)	Docket No. EL23-59-000
PJM Interconnection, L.L.C.	)	(not consolidated)
Parkway Generation Keys	)	
Energy Center LLC	)	
v.	)	Docket No. EL23-60-000
PJM Interconnection, L.L.C.	)	(not consolidated)
Old Dominion Electric Cooperative	)	
v.	)	Docket No. EL23-61-000
PJM Interconnection, L.L.C.	)	(not consolidated)
Energy Harbor LLC	)	
v.	)	Docket No. EL23-63-000
PJM Interconnection, L.L.C.	)	(not consolidated)
Calpine Corporation	)	
v.	)	Docket No. EL23-66-000
PJM Interconnection, L.L.C.	)	(not consolidated)
Invenergy Nelson LLC	)	
v.	)	Docket No. EL23-67-000
PJM Interconnection, L.L.C.	)	(not consolidated)

ANSWER OF PJM INTERCONNECTION, L.L.C.
TO MOTION FOR LIMITED WAIVER

PJM Interconnection, L.L.C. ("PJM"), pursuant to Rule 213 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure,[1] submits this answer the motion of Parkway Generation Operating LLC, Parkway Generation Keys Energy Center LLC, and Parkway Generation Sewaren Urban Renewable Entity LLC (collectively, "Parkway") for a "limited waiver" of the PJM Open Access Transmission Tariff ("Tariff") to impose the requirement that PJM "collect only net Non-Performance

Charges and hold such payments in an interest-bearing escrow account until the final disposition of the above-captioned matters" associated with the Performance Assessment Intervals[2] during Winter Storm Elliott.[3]

The Commission should deny the Motion on any one of the following grounds: (1) a waiver is not the appropriate procedural vehicle for Parkway's request; (2) the requested relief amounts to an improper preliminary injunction; (3) under the facts here, Parkway lacks authority to seek its requested relief; and (4) invoicing only net Non-Performance Charges and holding such payments in an interest-bearing escrow account would not be feasible.

I. ANSWER

A. Parkway's Requested Relief Cannot Be Achieved Through a Waiver of PJM's Tariff.

Parkway requests that PJM collect only Non-Performance Charges "net" of any bonus payments that a Market Participant may be due, and to "hold such payments in an interest-bearing escrow account" until the captioned complaint proceedings are resolved.[4] In contrast, the current Tariff, Attachment DD, section 10A(j) requires PJM to collect all Non-Performance Charges assessed, without first determining any bonus payments which

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[1] 18 C.F.R. § 385.213.

[2] Capitalized terms used, but not otherwise defined, in this pleading have the meaning provided in, as applicable, the Tariff, the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C., or the Reliability Assurance Agreement Among Load-Serving Entities in the PJM Region.

[3] *Essential Power OPP, LLC v. PJM Interconnection, L.L.C.*, Motion for Limited Waiver of Parkway Generation Operating LLC, Parkway Generation Keys Energy Center LLC, and Parkway Generation Sewaren Urban Renewable Entity LLC, Docket Nos. EL23-53, et al., at 3 (May 18, 2023) ("Motion") (footnote omitted).

[4] *Id.*

may be due a Market Participant,[5] and the Tariff *does not* require PJM to hold any monies in an interest-bearing escrow account.

Thus, while ostensibly seeking a "waiver" of Tariff the Non-Performance Charge billing requirement, the Motion, in fact, seeks to impose on PJM *new* obligations not currently in the Tariff, i.e., to determine the "net" amounts, then hold such collections in an interest-bearing escrow account. Such relief is beyond what the Commission may grant via waiver of a Tariff provision. "A typical waiver seeks to suspend a tariff provision,"[6] and such waiver is granted under section 205 of the Federal Power Act ("FPA");[7] in contrast, a third party seeking to replace the existing requirements and imposing new and different requirements can only achieve such relief under FPA section 206.[8] Changes under section 206 can only be instituted upon a demonstration that the existing Tariff is unjust and unreasonable, a showing that Parkway has not made here even if it had submitted its filing under section 206 (which it has not).[9]

[5] As discussed below, PJM *cannot* determine the bonus payments due until all Non-Performance Charges are collected.

[6] *Brookfield Renewable Energy Trading & Mktg., LP*, 178 FERC ¶ 61,078, at P 12 (2022).

[7] 16 U.S.C. § 824d. *See Waiver of Tariff Requirements*, 171 FERC ¶ 61,156, at P 10 (2020); *see also N.Y. Indep. Sys. Operator, Inc.*, 117 FERC ¶ 61,164, at P 10 n.4 (2006) ("We remind [the New York Independent System Operator, Inc. ("NYISO")] that any request to change its tariffs or waive their requirements appropriately is filed in a section 205 application . . . .").

[8] 16 U.S.C. § 824e.

[9] Parkway identifies no precedent supporting imposing a new obligation on the tariff holder through a waiver or that waiver is the proper vehicle for such changes. Parkway cites two cases but they do not support such relief. In those cases, PJM sought only to *suspend* billing practices—to maintain the status quo, and hold off re-billing two years of settlements while a Market Participant pursued a complaint, *see PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,109 (2011), or to give PJM time to correct a software error that led to incorrect settlement calculations, so PJM could re-calculate and re-bill affected Market Participants. *See PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,184 (2011). Neither case imposed new requirements not stated in the Tariff.

B. Parkway's Requested Relief Amounts to Seeking a Preliminary Injunction from the Commission.

In addition, by seeking to reduce the amount of Non-Performance Charges PJM collects, the Motion requests, in effect, a preliminary injunction barring PJM's collection of lawful charges under PJM's Commission-approved Tariff, i.e., the full amount assessed. Such request overlooks, however, that the Commission expressly removed provisions for such preliminary relief when it adopted its currently effective procedural rules governing complaints.[10] Moreover, the Commission denied a similar request for interim relief in *Brookfield Energy Marketing LP v. PJM Interconnection, L.L.C.*[11] Like Parkway, the complainant in *Brookfield* asked the Commission to set aside an applicable provision of the PJM Tariff pending the resolution of its complaint. The Commission declined, noting its elimination of "all references to preliminary relief" from its complaint rules, in order to "eliminate . . . concern that the Commission was attempting to establish procedures for granting injunctive-type relief."[12] The Commission's decision finds ample support in judicial precedent.[13] Accordingly, there is no basis for the Commission to grant the interim relief that Parkway requests at this time.

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[10] *See Complaint Procedures*, Order No. 602-A, 88 FERC ¶ 61,114, 1996-2000 FERC Stats. & Regs., Regs. Preamble ¶ 31,076, at 30,863-64, *order on reh'g*, Order No. 602-B, 88 FERC ¶ 61,294, 1996-2000 FERC Stats. & Regs., Regs. Preamble ¶ 31,083 (1999). The Commission made this change in response to contentions that granting interim relief on a complaint would contravene section 5 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717d, which, like FPA section 206, requires a determination that an existing rate or tariff is unjust and unreasonable before the Commission may require a different rate or requirement. *See* Order No. 602-A at 30,863. Because the NGA and the FPA are so similarly structured, interpretations of one apply equally to the other. *See FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956).

[11] 168 FERC ¶ 61,112, at PP 34-36 (2019).

[12] *Id.* at P 36 n.56 (quoting Order No. 602-A at 30,863-64).

[13] *See, e.g., W. Res. Inc. v. FERC*, 9 F.3d 1568, 1579-80 (D.C. Cir. 1993) (holding that a Commission order changing a pipeline's pre-existing rate on an interim basis pending a future proceeding failed to comply with NGA section 5); *Am. Smelting & Refining Co. v. FPC*, 494 F.2d 925, 933 (D.C. Cir. 1974) ("No emergency can excuse these procedural requirements" of NGA section 5.).

C. Under the Facts Here, Parkway Lacks Authority to Seek Its Requested Relief.

Parkway also lacks authority to request a "waiver" of *PJM's* Tariff under the specific facts here. Because the waiver "request[s] that PJM collect only net Non-Performance Charges and hold such payments in an interest-bearing escrow account until the final disposition of" the Winter Storm Elliott complaints,[14] Parkway is plainly seeking to change PJM's Tariff through FPA section 205. However, Parkway has no section 205 rights to change PJM's Tariff; that authority rests solely with PJM. Thus, seen for what it is, the request usurps PJM's "exclusive and unilateral right to file pursuant to section 205 of the Federal Power Act and the [Commission's] rules and regulations thereunder to make changes in or relating to the terms and conditions of the PJM Tariff."[15] Indeed, the authority Parkway relies upon in support of its requested relief[16] confirms that PJM (and not a Market Participant like Parkway) is authorized to seek the type of relief sought here.[17]

Further, Parkway's request seeks to direct: what monies PJM collects or does not collect, where to store any collected monies, and for how long to store those monies. This requested relief impermissibly frustrates one of PJM's required RTO functions: to

[14] Motion at 3 (footnote omitted).

[15] Tariff, Part I, section 9.2(a); *see also* 18 C.F.R. § 35.34(j)(1) , (j)(1)(iii) (stating that regional transmission organizations ("RTOs"), like PJM, "must be independent of any market participant. . . . [and it] must have exclusive and independent authority under section 205 of the [FPA] . . . to propose rates, terms and conditions of transmission service").

[16] *See* Motion at 3 n.8. PJM discusses the cases on which Parkway relies above in footnote 9.

[17] Tariff, Part I, section 9.2(c) reserves a party's right to make filings under FPA section 206. But as noted above, *see supra* Section I.A, Parkway has not challenged Tariff, Attachment DD, section 10A(j) as unjust and unreasonable pursuant to section 206, nor has it made such a showing here even if it had submitted a section 206 filing.

administer its own transmission tariff—particularly, Tariff, Attachment DD, section 10A(j).[18]

D Parkway's Requested Relief Is Not Feasible.

Finally, Parkway's request to collect "only" the Non-Performance Charges net of any bonus payments[19] would be discriminatory and lacks sufficient detail to implement. As the Motion recognizes,[20] bonus payments are wholly derived from "[r]evenues collected from assessment of Non-Performance Charges for a Performance Assessment Interval."[21] This rule was developed so that bonus payments are entirely funded by Non-Performance Charges assessed on Capacity Resources that had performance shortfalls during Performance Assessment Intervals. This ensures that other PJM Members, including load, would not be on the hook for funding bonus payments.

Parkway's proposal to bill only the net Non-Performance Charges effectively requires PJM to assume that 100 percent of the Non-Performance Charges will be collected in calculating the bonus payments. However, such an approach would not only increase the risk for other PJM Members to become responsible for any unpaid Non-Performance Charges but would also be discriminatory to Capacity Market Sellers that are owed net bonus payments. This is because Parkway's proposal would require PJM to deposit all net Non-Performance Charges in an escrow account, which effectively ties PJM's hands in paying out any net bonus payments until the pending complaints are resolved. Such an approach is clearly discriminatory as it would immediately provide

[18] 18 C.F.R. § 35.34(k)(1) ("[t]he [RTO] must administer its own transmission tariff.").

[19] Motion at 3.

[20] Motion at 6-7.

[21] Tariff, Attachment DD, section 10A(g).

Capacity Market Sellers that owe a net Non-Performance Charge with 100% of their bonus payments, while paying entities 0% of any owed net bonus payments during the pendency of these complaints. Furthermore, Parkway's proposal also lacks specificity as to how much interest and where such interest would distributed. In short, Parkway's proposal should be denied as it is discriminatory and lacks sufficient detail to implement.

II. CONCLUSION

For the reasons set forth in this answer, the Commission should deny the Motion.

Respectfully submitted,

/s/ Ryan J. Collins

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June 2, 2023

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 2nd day of June 2023.

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