UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

ANSWER OF PJM INTERCONNECTION, L.L.C.

PJM Interconnection, L.L.C. ("PJM"), pursuant to Rule 213 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure[1] and the notice of extension of time issued in this docket on April 27, 2020,[2] submits this Answer to the complaint filed by XO Energy LLC, together with XO Energy MA, LP and XO Energy MA2, LP (the three entities collectively "XO Energy" or "Complainant"), on April 8, 2020.[3] As demonstrated in this Answer, the Commission should deny the Complaint, particularly the portions of the Complaint that seek to change the Financial Transmission

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1 18 C.F.R. § 385.213.

2 *XO Energy, LLC v. PJM Interconnection, L.L.C.*, Notice Extending Comment Period, Docket No. EL20-41-000 (Apr. 27, 2020).

3 Complaint of XO Energy LLC, Docket No. EL20-41-000 (Apr. 8, 2020) ("Complaint").

Rights[4] ("FTR") forfeiture rule ("FTR Forfeiture Rule")[5] effective before the Complaint was filed. PJM further demonstrates that in the event the Commission grants the Complaint, it should provide a remedy on a prospective basis only, consistent with Federal Power Act ("FPA") section 206.[6]

I. INTRODUCTION AND OVERVIEW

The Complaint challenges as unjust and unreasonable tariff changes that PJM filed and implemented in 2017 at the direction of the Commission. To the extent the Complaint seeks to change the FTR Forfeiture Rule effective before the Complaint was filed, that relief cannot be granted, since FPA section 206 authorizes tariff changes no earlier than the complaint filing date.[7] Even beyond that statutory impediment to the Complaint's requested relief, it would be inequitable for the Commission to now unwind compliance directives that have been in place for over three years, particularly in light of the substantial administrative challenge of unwinding past FTR market settlements and the fact that Market Participants have quite reasonably engaged in market transactions since that time

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4 All capitalized terms not defined expressly herein have the meaning ascribed to them in the PJM Open Access Transmission Tariff ("Tariff"), Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. ("Operating Agreement") and Reliability Assurance Agreement Among Load-Serving Entities in the PJM Region ("RAA").

5 The FTR Forfeiture Rule is set forth in PJM Operating Agreement, Schedule 1, section 5.2.1.

6 *See* 16 U.S.C. § 824e(a) ("Whenever the Commission . . . shall find that . . . any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract *to be thereafter observed and in force*, and shall fix the same by order." (emphasis added)).

7 *See id.* § 824e(b) ("In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint . . . .").

based on an expectation that PJM's implementation of the January 2017 Order[8] would stand.

If instead viewed as a late or supplemental protest to PJM's still-pending 2017 compliance filing, XO Energy's pleading is unpersuasive, as well as procedurally defective. The only relevant issue for assessing PJM's April 2017 compliance filing is whether it complied with FERC's January 2017 Order. It did. The order prescribed "specific modifications required to ensure that PJM's specific FTR forfeiture rule is just and reasonable,"[9] and PJM filed those specific modifications. On the one aspect of the rule for which the compliance filing had to fill in some implementation details the Commission had not already specified—part one of the directive in paragraph 60 on what threshold should trigger FTR forfeiture—the filed approach adopting the "Penny Test" is consistent with the January 2017 Order's express directive that the FTR Forfeiture Rule may only trigger forfeiture when the net flow is "in the direction to increase the value of an FTR."[10] While there could be vigorous debate in the abstract about whether to include or how to design an FTR forfeiture rule, there is no serious argument that the April 2017 filing did not reasonably comply with the January 2017 Order.

The January 2017 Order decreed that the revised forfeiture rule, with the Commission-required changes, would be effective "as of the date of this order," January 19, 2017.[11] PJM, of necessity, honored that directive, and in the nearly three years since

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8 *PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,038 (2017) ("January 2017 Order").

9 *Id.* at P 29.

10 *Id.* at P 60.

11 *Id.* at P 4.

the compliance filing, and comments and protests on that filing, were submitted, the Commission has given no indication that the rules PJM has been implementing are non-compliant.

Moreover, XO Energy's proposed replacement alternatives, i.e., enhanced market monitoring rather than a generic forfeiture rule, or a dramatically revised multi-step forfeiture rule with numerous complex formulae, are far beyond the scope of the January 2017 Order. Those proposals therefore provide no basis for retrospective revisions to the compliance filing.[12]

As to whether the FTR Forfeiture Rule should be changed prospectively, PJM observes that PJM's and the Commission's shared objective, and PJM's firm commitment, was to prevent market manipulation, but PJM did not agree with all changes directed by the January 2017 Order. In particular, PJM advocated: (1) retaining the impact threshold of 75% as appropriate to trigger the FTR Forfeiture Rule because that threshold is not too limiting on Market Participants, but still captures apparent market activities that substantially impact FTR values; and (2) not applying any aspect of the FTR Forfeiture Rule on a portfolio basis.[13]

Notwithstanding the fact that PJM reasonably implemented the Penny Test in response to the Commission's directive regarding the criteria for triggering an FTR forfeiture, implementation of the Penny Test has tended to make application of PJM's FTR

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[12] The January 2017 Order itself denied retrospective impact back to 2014 given the disruptive impacts that would have. *Id.* at P 90. Thus, even if the Commission finds that changes are needed to PJM's 2017 compliance filing, it should follow that same approach here, and make any changes prospective only.

[13] *See* Comments of PJM Interconnection, L.L.C., Docket No. EL14-37-000, at 4 (May 29, 2015) ("PJM Technical Conference Comments").

Forfeiture Rule more strict, and, according to the accounts of some Market Participants, may at times unintentionally capture legitimate market activity and lead some participants to withdraw from virtual bidding. Although PJM understands that an FTR forfeiture rule may in practice be more prescriptive than sole reliance on after-the-fact, case-specific enforcement like that recommended by XO Energy, a forfeiture rule nonetheless may be significantly more effective at protecting the FTR market from manipulation. An objective FTR forfeiture rule also can generally be enforced in a more cost-effective manner than the necessarily subjective, after-the-fact, case-specific market monitoring the Complaint requests. An appropriate approach to FTR forfeiture must be one that balances these competing benefits and challenges.

PJM further notes that there has been a lack of consensus among its Market Participants regarding the merits of PJM's current rule on FTR forfeiture and how that rule could be modified or improved. In 2018 and 2019, PJM explored through a stakeholder process adopting a more balanced approach aimed at continuing to satisfy the January 2017 Order's directives while addressing certain unintended impacts of the rule, but ended that effort when it did not receive the necessary super-majority approval from stakeholders.

While there should be little question that PJM complied with the January 2017 Order and administers a just and reasonable set of rules for its FTR market, PJM acknowledges that there may have been unintended effects from the FTR Forfeiture Rule as modified by the January 2017 Order. PJM therefore would entertain making enhancements or changes to its FTR forfeiture provisions on a prospective basis.

Accordingly, PJM supports the Commission examining the evidence presented regarding these impacts, focusing solely on whether forward-looking changes to the rule may be appropriate. To the extent the Commission finds the Complainant has met its

burden under section 206 to demonstrate that the FTR Forfeiture Rule currently administered by PJM is unjust and unreasonable, PJM encourages the Commission to engage PJM's stakeholders in either settlement conference or technical conference proceedings to attempt to develop Market Participant-supported replacement provisions rather than simply adopting one of the remedial options outlined by the Complaint. That approach would recognize that building consensus around the FTR Forfeiture Rule will be essential if such new rules are to succeed without sparking protracted future litigation or calls for yet more stakeholder processes on the issue.

II. BACKGROUND

On August 29, 2014, the Commission instituted an investigation, pursuant to FPA section 206,[14] concerning, as relevant to this proceeding, PJM's proposed revisions to the Tariff for the application of PJM's FTR Forfeiture Rule to Up-to-Congestion ("UTC") transactions.

On January 19, 2017, the Commission issued the January 2017 Order finding that PJM's current application of its FTR Forfeiture Rule to Virtual Transactions was no longer just and reasonable.[15] The Commission required PJM to submit a compliance filing within ninety days of the date of its order to: (1) implement a portfolio approach for determining which Virtual Transactions (i.e., incremental offers of supply ("INCs"), decrement demand bids ("DECs"), and UTCs) may be subject to FTR forfeiture;[16] (2) apply the forfeiture rule

14 16 U.S.C. § 824e.

15 January 2017 Order at P 2.

16 *Id.* at PP 57–58.

to all FTRs;[17] (3) utilize a load-weighted reference bus rather than the worst-case scenario transaction in evaluating power flows;[18] (4) utilize a trigger based on a percentage of the total binding megawatt ("MW") limit of the constraint related to the FTR path, rather than the 75% threshold, where (a) the net flow is in the direction to increase of the value of an FTR; and (b) the net flow exceeds a certain percentage of the physical limit of a binding constraint;[19] and (5) consider all Virtual Transactions held by entities that share common ownership as part of the same portfolio.[20] The Commission's January 2017 Order further provided that the tariff revisions made through the required compliance filing would be effective January 19, 2017, the same date as the order.[21]

PJM submitted a compliance filing on April 18, 2017,[22] as amended on June 2, 2017, implementing Tariff revisions to comply with the January 2017 Order.[23] The Compliance Filing revised Operating Agreement, Schedule 1, section 5.2.1 as shown in blackline below:

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17 *Id.* at PP 63, 73.

18 *Id.* at P 59.

19 *Id.* at P 60.

20 *Id.* at P 61.

21 *Id.* at P 4.

22 Compliance Filing of PJM Interconnection, L.L.C. Concerning the FTR Forfeiture Rule, Docket No. ER17-1433-000 (Apr. 18, 2017) ("April Compliance Filing")

23 Amendment to Compliance Filing of PJM Interconnection, L.L.C. Concerning the FTR Forfeiture Rule, Docket No. ER17-1433-001 (June 2, 2017) ("Compliance Filing Amendment" and together with the April Compliance Filing, the "Compliance Filing").

5.2 Transmission Congestion Credit Calculation.

5.2.1 Eligibility.

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(b) If an Effective FTR Holder between specified delivery and receipt buses acquired the Financial Transmission Right in a Financial Transmission Rights auction (the procedures for which are set forth in Section ~~Part~~ 7 of this Schedule 1) and~~(i)~~ had a Virtual Transaction portfolio which includes ~~an~~ Increment Offer(s), ~~and/or~~ Decrement Bid(s) and/or Up-to Congestion Transaction(s) that was accepted by the Office of the Interconnection for an applicable hour in the Day-ahead Energy Market, ~~for delivery or receipt at or near delivery or receipt buses of the Financial Transmission Right or had an Up-to-Congestion Transaction that was accepted by the Office of the Interconnection for an applicable hour in the Day-ahead Energy Market for a path at or near the path of the Financial Transmission Right; and (ii) the result of the acceptance of such Increment Offer, Decrement Bid or Up-to Congestion Transaction is~~ whereby the Effective FTR Holder's Virtual Transaction portfolio resulted in ~~that the~~ (i) a difference in Locational Marginal Prices in the Day-ahead Energy Market between such delivery and receipt buses which is greater than the difference in Locational Marginal Prices between such delivery and receipt buses in the Real-time Energy Market, and (ii) an increase in value between such delivery and receipt buses, then the Market Participant shall not receive any Transmission Congestion Credit, associated with such Financial Transmission Right in such hour, in excess of one divided by the number of hours in the applicable month multiplied by the amount that the Market Participant paid for the Financial Transmission Right in the Financial Transmission Rights auction. For the purposes of this calculation, all Financial Transmission Rights of an Effective FTR Holder shall be considered.

(c) For purposes of Section 5.2.1(b), an Effective FTR Holder's Virtual Transaction portfolio shall be considered if the absolute value of the attributable net flow across a Day-ahead Energy Market binding constraint relative to the Day-ahead Energy Market load weighted reference bus between the Financial Transmission Right delivery and receipt buses exceeds the physical limit of such binding constraint by the greater of 0.1 MW or ten percent, or such other percentage under certain circumstances further defined in the PJM Manuals~~bus shall be considered at or near the Financial Transmission Right delivery or receipt bus if seventy five percent or more of the energy injected or withdrawn at that bus and which is withdrawn or injected at any other bus is reflected in the constrained path between the subject Financial Transmission Right delivery and~~

~~receipt buses that were~~ ~~acquired in the Financial Transmission Rights auction~~.

(d) For purposes of Section 5.2.1(c) a binding constraint shall be considered if the binding constraint has a $0.01 or greater impact on the absolute value of the difference between the Financial Transmission Right delivery and receipt buses.[24]

The Commission's directives concerning use of the portfolio approach, applying the forfeiture rule to all FTRs, and use of the load-weighted average reference bus for determining power flows were prescriptive and PJM's proposed language in section 5.2.1(b) and (c) reflects the changes required by the Commission.

With respect to the Commission's directive to modify the trigger for FTR forfeiture, the Commission held "to trigger a forfeiture, the net flow across a given constraint attributable to a participant's portfolio of virtual transactions must meet two criteria: (1) *the net flow must be in the direction to increase the value of an FTR*; and (2) the net flow must exceed a certain percentage of the physical limit of a binding constraint."[25] To comply with this directive, PJM proposed and implemented a two-step process, referred to as the "FTR Impact Test," for determining if FTR revenues must be forfeited under the rule. First, PJM will look to see if the Effective FTR Holder's Virtual Transactions have an appreciable impact on the limit of any binding constraint, with the threshold for such

[24] April Compliance Filing at 2–3 (outlining changes to Operating Agreement, Schedule 1, section 5.2.1(a) through (d)); Compliance Filing Amendment at 3 (outlining supplemental changes to Operating Agreement, Schedule 1, section 5.2.1(c) to respond to intervenor concerns and add additional detail to the Operating Agreement that otherwise would have been set forth in PJM Manuals). The only other modification to this section 5.2.1 in the Compliance Filing was to update a subsection reference.

[25] January 2017 Order at P 60 (emphasis added).

impact being the greater of 0.1 MW or 10% (or such other amount necessary as defined further in the PJM Manuals).[26]

Second, once PJM determines that a binding constraint is appreciably impacted by an Effective FTR Holder's Virtual Transactions, PJM will determine if the net flow increases the value of an FTR by $0.01 or greater.[27] This second step has come to be known as the "Penny Test." As PJM showed in the Compliance Filing, it is just and reasonable to require forfeiture of *any* FTR profits associated with inefficient virtual trading, i.e., those FTR paths for which the Day-ahead Energy Market value of the path diverges from Real-time Energy Market congestion, because in such case an inefficient arbitrage directly led to FTR profits.[28] Such forfeiture is consistent with the Commission's finding that, "the use of virtual transactions with the intent to benefit FTR positions constitutes cross-product manipulation. An FTR forfeiture rule serves to deter such manipulation."[29]

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26 *See* Operating Agreement, Schedule 1, section 5.2.1(c).

27 *See id.*, Schedule 1, section 5.2.1(d).

28 April Compliance Filing at 5.

29 *Id.* at 5; January 2017 Order at P 33 (citing *MISO Virtual & FTR Trading*, 146 FERC ¶ 61,072, at P 13 (2013)). In addition to the above-outlined revisions, PJM also explained in the Compliance Filing that with respect to the Commission's directive to apply the FTR Forfeiture Rule in a unitary manner to entities that share common ownership, PJM made that change as part of a Tariff, Operating Agreement and RAA clean-up and clarification filing, which was accepted by the Commission, during the pendency of the Commission's FPA section 206 investigation. April Compliance Filing at 5–6; *see* Submittal of PJM Interconnection, L.L.C., Docket No. ER16-1520-000 (Apr. 28, 2016) ("Clean-Up Filing"). Specifically, for purposes of the FTR Forfeiture Rule, PJM added a new term, "Effective FTR Holder," to ensure all entities under common ownership or control will be monitored for purposes of the FTR Forfeiture Rule. *See* Clean-Up Filing, Attachment A at 1–2. The Commission later accepted PJM's proposed

The Commission has not to date issued an order on the Compliance Filing. However, under the express terms of the January 2017 Order, the Compliance Filing received an effective date of January 19, 2017, requiring PJM to implement the Compliance Filing provisions as of that date.[30] PJM accordingly implemented the revisions in the Compliance Filing in late summer 2017, invoicing Market Participants in September 2017 for FTR forfeitures under the revised FTR Forfeiture Rule since January 19, 2017, in compliance with the January 2017 Order.[31] At that time, PJM also began administering the FTR Forfeiture Rule in accordance with the Compliance Filing.

Following implementation of the Compliance Filing, PJM and its stakeholders explored modifying the FTR Forfeiture Rule to address concerns raised by some FTR Market Participants that the FTR Forfeiture Rule might be overly prescriptive.[32] To that end, the PJM Market Implementation Committee ("MIC") approved an Issue Charge in March 2018 committing to "[r]eview the current FTR Forfeiture Rule and propose changes to allow market participants to more effectively manage their FTR portfolios."[33] The MIC thereafter completed its issue charge and recommended a package of Tariff revisions to the

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definition of Effective FTR Holder. *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,303 (2016).

30 January 2017 Order at P 4.

31 *See* Complaint at 9.

32 *See* Brian Chmielewski, *FTR Forfeiture Rule*, PJM Interconnection, L.L.C. (Apr. 25, 2019), https://pjm.com/~/media/committees-groups/committees/mrc/20190425/20190425-item-03a-ftr-forfeiture-rule-presentation.ashx (presentation to the PJM Markets and Reliability Committee ("MRC")).

33 *Id.* at 2.

PJM MRC, but those revisions failed to receive the necessary stakeholder endorsement at the MRC level.[34]

Specifically, the MIC-approved package would have made two key changes to the FTR Forfeiture Rule. First, the package would have modified the existing FTR forfeiture calculation to include loop flow impacts when evaluating whether there was a 10% or greater impact from Virtual Transaction flow in the Day-ahead Energy Market on coordinated market-to-market ("M2M") Flowgates. Implementing that change would have removed an inconsistency between how coordinated M2M Flowgates are handled by the FTR Forfeiture Rule as compared to the treatment of internal constraints. The change would have adjusted the FTR Forfeiture Rule to account for the total flow across each binding constraint regardless of whether it is coordinated or internal. Second, the package endorsed by the MIC also would have revised the FTR forfeiture trigger to replace the Penny Test with a new, less stringent first criterion for forfeiture, calling for forfeiture if FTR flows were greater than or equal to 10% across a constraint instead of when the value of an FTR increases by a penny or more. This package of proposed revisions thus would have retained the concept and most aspects of the FTR Forfeiture Test while addressing some stakeholders' concerns about inconsistent treatment of internal versus M2M constraints and the level of strictness of the Penny Test as a criterion for triggering FTR forfeiture.

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[34] *See* PJM Interconnection, L.L.C., https://www.pjm.com/-/media/committees-groups/committees/mrc/20190425/20190425-summarized-mrc-voting-reports.ashx (last visited June 1, 2020) (item 3 in the summarized voting report for the April 25, 2019 MRC meeting).

PJM supported the package of proposed Tariff revisions endorsed by the MIC and considered by the MRC during the stakeholder process. However, because that package did not receive the necessary endorsement from the MRC, PJM did not submit the proposed Tariff revisions for Commission consideration and has not proposed any revisions to the FTR Forfeiture Rule since submitting the Compliance Filing.

On April 8, 2020, XO Energy filed the Complaint, alleging that the FTR Forfeiture Rule "is unjust and unreasonable, and the rule has been implemented in a manner that is inconsistent with Commission orders and the existing tariff."[35] In support, Complainant principally contends that: (1) the FTR Forfeiture Rule "fails to consider whether a market participant has financial leverage, rendering the rule unjust and unreasonable," which it argues is a problem because "if financial leverage does not exist, further scrutiny of a market participant's activity is unnecessary;"[36] and (2) the FTR Forfeiture Rule lacks a mechanism to assess whether there is sufficient credible evidence of manipulative intent underlying an FTR transaction for the transaction to constitute a potential violation of the rule.[37]

The Complaint also alleges that PJM's implementation of the FTR Forfeiture Rule has been inconsistent with the Operating Agreement, citing alleged inconsistences in the administration of the FTR Forfeiture Rule to counterflow FTRs and the virtual portfolio test.[38]

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35 Complaint at 1.

36 *Id.* at 2.

37 *Id.*

38 *Id.* at 12.

As remedy for these allegations, XO Energy requests the Commission "reject" the Compliance Filing and order revisions to the FTR Forfeiture Rule to include, among other provisions, a "structured market monitoring function."[39] On April 27, 2020, upon a motion by the PJM Independent Market Monitor ("IMM"), the Commission extended the deadline for answers and comments on the Complaint to June 1, 2020.[40]

III. ANSWER

A. Legal Standard

Under FPA section 206,[41] XO Energy, as the Complainant, bears the burden of proving that the PJM Tariff provisions outlining the FTR Forfeiture Rule and PJM's implementation thereof are unjust, unreasonable, or unduly discriminatory.[42] If XO Energy fails to meet its burden of proof to show that PJM's Tariff, or application of its Tariff is unjust, unreasonable, or unduly discriminatory, XO Energy is not entitled to a remedy.[43] Because XO Energy has failed to demonstrate that PJM's Tariff on its face, or PJM's

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39 *Id.* at 1–2.

40 *See supra* note 2.

41 16 U.S.C. § 824e.

42 *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,161, at P 9 (2008) ("Complainants carry the burden of proof . . . and therefore must demonstrate, on the basis of substantial evidence, . . . that the rate in effect is unjust and unreasonable . . . ."), *order on reh'g*, 127 FERC ¶ 61,121 (2009); *see also Cal. Mun. Utils. Ass'n v. Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,315, at PP 69–72 (2009) (same), *reh'g denied*, 143 FERC ¶ 61,174 (2013); *Nantahala Power & Light Co.*, Opinion No. 139, 19 FERC ¶ 61,152, at 61,276 (same), *reh'g denied*, Opinion No. 139-A, 20 FERC ¶ 61,430, *reh'g denied & clarified*, Opinion No. 139-B, 21 FERC ¶ 61,222 (1982).

43 *See Cal. Indep. Sys. Operator Corp.*, 111 FERC ¶ 61,337, at P 27 (2005) (stating that current rates "must first be found to be unjust, unreasonable, or unduly discriminatory before alternative proposals are ripe for consideration" (quoting *Cal. Indep. Sys. Operator Corp.*, 106 FERC ¶ 63,026, at P 346 (2004))).

application of its Tariff to XO Energy, is unjust, unreasonable, or unduly discriminatory, and additionally because this Answer refutes XO Energy's allegations, the Commission should deny XO Energy's Complaint.

Moreover, section 206 of the FPA authorizes relief on a prospective basis only.[44] Assuming, therefore, for the sake of argument, that the Commission decides to grant any relief on the Complaint, it should do so on a solely prospective basis.

B. PJM Fully Complied with the Commission's January 2017 Compliance Directives.

XO Energy asks the Commission to "reject" the Compliance Filing.[45] That relief is not available in this FPA section 206 proceeding, because the Compliance Filing took effect on January 19, 2017, and thus cannot be "rejected" by a Complaint filed on April 8, 2020. The Commission has yet to accept the Compliance Filing, but the deadline for comments and protests to that filing has long passed, and XO Energy has not submitted the Complaint into the proceedings on the Compliance Filing.

Nonetheless, assuming for the sake of argument that the Commission would give any consideration to the Complaint in its action on the Compliance Filing, PJM shows here that there is no basis to "reject" the Compliance Filing, because that filing complied with the January 2017 Order.

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44 *See supra* note 7.

45 Complaint at 1 (asking the Commission to reject the Compliance Filing); *id.* at 19 (noting stakeholder concerns that the FTR Impact Test might not comply with the January 2017 Order); *id.* at 27 (claiming PJM's treatment of counterflow FTRs is inconsistent with the January 2017 Order)

1. PJM Fulfilled Its Compliance Obligations by Revising Its Tariff as Directed by the January 2017 Order and Implementing Those Revisions.

The sole question in evaluating a compliance filing is whether the filing "actually does what the Commission has ordered."[46] To that end, the Commission routinely accepts compliance filings when they comply with the directives of the subject order,[47] and respects PJM's discretion to reasonably implement the Commission's directives through appropriate tariff language.[48] XO Energy's Complaint fails to show that the Compliance Filing does not comply with the directives of the January 2017 Order. Thus, the Commission should not reject the Compliance Filing, and instead should accept it effective January 19, 2017, as contemplated by the January 2017 Order.[49]

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46 *Dominion Res., Inc.*, 93 FERC ¶ 61,214, at 61,708 (2000) ("The issue in a compliance proceeding is narrow: whether the compliance filing actually does what the Commission has ordered.").

47 *See, e.g., Va. Elec. & Power Co.*, 167 FERC ¶ 61,134, at P 8 (2019) ("We find that Virginia Electric's filing complies with the December 2018 Order . . . . Accordingly, we accept the compliance filing, effective June 27, 2018, and terminate the captioned section 206 proceeding."); *Monongahela Power Co.*, 164 FERC ¶ 61,217, at P 59 (2018) ("We accept the Schedule 6 Compliance Filing, which we find complies with the February 15 Order."); *Old Dominion Elec. Coop.*, 164 FERC ¶ 61,006, at P 72 (2018) ("We find the Amended Compliance Filing complies with Opinion No. 555, and, therefore, we accept it.").

48 *See PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,264, at P 24 (2008) ("PJM properly filed the compliance filing, which reflects its determination of how best to comply with the Commission's directives.").

49 Indeed, the Complaint focuses chiefly on XO Energy's argument that the FTR Forfeiture Rule is unjust and unreasonable because it fails to consider as a prerequisite to forfeiture whether a trader has: (1) leverage in the FTR market; and (2) the requisite scienter (mental state) to manipulate the market. Neither of these elements was required by the Commission in its directives in the January 2017 Order, and thus the lack of these elements in the FTR Forfeiture Rule provides no reason for rejecting the Compliance Filing.

2. The Penny Test Complied with the Commission Directive that the First Criterion for FTR Forfeiture Test Is that the Net Flow Must Be "in the Direction to Increase the Value of an FTR."[50]

As described in Section II above, PJM timely responded to the January 2017 Order by submitting tariff revisions that did exactly what the Commission asked.[51] The Compliance Filing thus included adopting the FTR Impact Test to comply with the Commission's directive that PJM modify the trigger for FTR forfeiture such that, "to trigger a forfeiture, the net flow across a given constraint attributable to a participant's portfolio of virtual transactions must meet two criteria: (1) the net flow must be in the direction to increase the value of an FTR; and (2) the net flow must exceed a certain percentage of the limit of a binding constraint."[52] While XO Energy objects that PJM's Compliance Filing did not appropriately implement the Commission's first criterion for triggering FTR forfeiture,[53] its objection is no more than a disagreement with how PJM met that directive, rather than a demonstration that PJM did not do as the Commission asked.

As explained above, when a compliance directive leaves room for interpretation, the responding public utility properly uses its judgment to determine and propose tariff language that "best . . . compl[ies]" with the Commission's directive.[54] That is what PJM

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50 January 2017 Order at P 60.

51 *See supra* pp. 7–10. As noted *supra* note 24, PJM amended the original Compliance Filing submission only to address intervenor requests for more transparency by moving certain compliance details regarding step one of the FTR Impact Test from a PJM manual to the Operating Agreement.

52 January 2017 Order at P 60.

53 *See* Complaint at 27–28.

54 *See supra* note 48.

did here. PJM implemented the Commission's directive that the first criterion should require forfeiture only where the net flow is "in the direction to increase the value of an FTR,"[55] by adding language to Operating Agreement, Schedule 1, section 5.2.1, stating that "a binding constraint shall be considered if the binding constraint has a $0.01 or greater impact on the absolute value of the difference between the Financial Transmission Right delivery and receipt buses."[56] PJM's implementation reflects a literal and straightforward interpretation of the Commission's directive, which referenced only a value "increase" without conditioning, limiting, or specifying a threshold for that "increase." PJM developed the one-penny threshold language in consultation with the IMM as a means to meet the Commission's directive in a bright-line, objective fashion without requiring the inclusion of any negligible transactions that may have less than a penny impact on an FTR. The fact that XO Energy would have preferred other language does not mean PJM filed language inconsistent with *the Commission's* directive concerning the first criterion for the trigger for FTR forfeiture.

The Commission rarely specifies all required language or details in its compliance directives, and thus routinely relies on the filing public utility to fill in any gaps and submit tariff language or details that reasonably meet a given compliance directive.[57] Here, PJM reasonably read the January 2017 Order's directive that the trigger for FTR forfeiture

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55 January 2017 Order at P 60.

56 Operating Agreement, Schedule 1, section 5.2.1(d).

57 *See supra* note 48.

includes that the net flow of Virtual Transactions is "in the direction to increase the value of an FTR,"[58] by setting the threshold for that unspecified increase in value at $0.01.

XO Energy alleges that the Penny Test misinterprets "the Commission's first criterion regarding the trigger of a forfeiture, namely, that 'the net flow must be in the direction to increase the value of an FTR.'"[59] According to XO Energy, the January 2017 Order actually meant "that a (i) prevailing flow virtual position must sync with a prevailing flow FTR position, and (ii) counterflow virtual position must sync with a counterflow FTR position."[60] But XO Energy provides no evidence that its alternative interpretation is compelled by the language of the January 2017 Order, or that the Compliance Filing language unreasonably departed from the Commission's directive.

Given that XO Energy's only argument for "rejection" of the Compliance Filing is that the Penny Test misinterprets of the January 2017 Order's directive on the first criterion for triggering FTR forfeiture, and that XO Energy provides no support for that argument, the Commission should deny XO Energy's request to reject the Compliance Filing.

3. XO Energy's Request for a Portfolio Approach to FTRs Is Outside the Scope of the January 2017 Order and Attendant Compliance Filing.

Although XO Energy argues vigorously for the FTR Forfeiture Rule to be modified to include a portfolio approach as to both Virtual Transactions and FTRs,[61] the January

58 January 2017 Order at P 60.

59 Complaint at 27 (quoting January 2017 Order at P 60).

60 *Id.* at 28.

61 *See id.* at 24–27.

2017 Order directed a portfolio approach as to Virtual Transactions only.[62] Thus, to the extent the Commission is persuaded to modify the FTR Forfeiture Rule to apply a portfolio approach to its FTR analysis, the Commission may do so only on a prospective basis and may not reject the Compliance Filing for not pursuing a portfolio approach as to FTRs.

The Commission routinely rejects compliance filings (or portions thereof) that make tariff proposals that exceed the Commission's directives that led to the compliance filing.[63] Thus, even if PJM had been inclined to pursue a portfolio approach to FTRs (it was not),[64] including such approach in the Compliance Filing would have exceeded the scope of the January 2017 Order's compliance directives. PJM therefore properly did not include a portfolio approach to FTRs in the Compliance Filing.

Accordingly, even if the Commission agreed with XO Energy that the FTR Forfeiture Rule is unjust and unreasonable due to a lack of a portfolio approach to FTRs,

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62 *See* January 2017 Order at P 62.

63 *See, e.g.*, *PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,217, at P 103 (2016) ("We also agree with the MISO Parties that the ATSI June 30, 2011 Compliance Report exceeds the limited conditions of the MISO Order and therefore is not authorized by the MISO Order. . . . Thus, we reject the ATSI June 30, 2011 Compliance Report."); *Duke Energy Carolinas, LLC*, 151 FERC ¶ 61,021, at P 34 (2015) ("Although Filing Parties request the Commission treat revisions that exceed compliance directives as a section 205 filing, the Commission generally does not permit a party to combine a compliance filing with an unrelated or unnecessary tariff filing under section 205. We thus reject this proposed new language as outside the scope of the compliance filing . . . ." (footnote omitted)); *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,186, at P 28 (2010) (finding that an RTO's filing "exceed[ed] the scope of compliance and include[d] material that should have been filed under section 205 of the FPA" and rejecting the extraneous tariff revisions without prejudice), *order on reh'g & clarification*, 135 FERC ¶ 61,007 (2011), *reh'g denied*, 138 FERC ¶ 61,039 (2012).

64 *See* PJM Technical Conference Comments at 4.

the Commission could direct such a Tariff change under section 206 no earlier than the filing date of the Complaint.

In such an event, PJM asks that the Commission also take account of the concerns PJM expressed regarding the portfolio approach in Docket No. EL14-37. There, PJM opposed application of any portfolio-based approach to either Virtual Transactions or FTRs as part of the FTR Forfeiture Rule.[65] PJM's opposition was grounded in its belief that adopting a portfolio approach would run the risk of "discouraging Virtual Transactions at locations where there is a small impact on a Market Participant's FTR positions" and its belief that "it is not in the best interest of the market to restrict legitimate market activity that provides market convergence and increases market efficiency."[66] PJM further explained that adopting a portfolio approach when looking at Virtual Transactions and FTRs would subject to forfeiture market activity at even the most liquid locations—locations where there are thousands of transactions clearing at any given time such that it is highly unlikely that an individual Market Participant (or a group of affiliates) could engage in behavior that would otherwise trip the FTR Forfeiture Rule.[67] These concerns expressed by PJM in 2015 remain relevant and applicable today.

4. XO Energy's Charge that It Is Unjust and Unreasonable to Base Forfeitures on the Total Day-Ahead Marginal Congestion Component and Total FTR Cost Runs Directly Counter to the January 2017 Order.

XO Energy complains that "[u]nder the FTR Forfeiture Rule, forfeitures that are based upon the total day-ahead marginal congestion component . . . and total FTR cost are

65 *Id.*

66 *Id.* at 5.

67 *Id.*

not just and reasonable,"[68] but that objection is directly counter to the January 2017 Order. Specifically, the January 2017 Order, "decline[d] Select Financial Marketers' request that the FTR forfeiture rule only forfeit the increased profits associated with an FTR position instead of the entire profit."[69]

As the January 2017 Order explicitly declined to adopt intervenors' request for a change to forfeiture calculation, the Compliance Filing appropriately retained PJM's then-effective method for calculating forfeiture amounts. The Compliance Filing declining to include a change expressly denied by the January 2017 Order plainly provides no basis to "reject" the Compliance Filing. In short, the Compliance Filing reasonably complied with the January 2017 Order; the Complaint does not show otherwise; and the Commission should deny the Complaint's request to "reject" the Compliance Filing.

5. Equity and Technical Procedural Aspects Also Make Rejection of the Compliance Filing Improper.

In addition to the fact that section 206 authorizes relief on a prospective basis only, it would be inequitable for the Commission to now reject the Compliance Filing and effectively unwind its compliance directives from 2017, especially in light of the significant administrative challenge of unwinding past FTR market settlements and the fact that Market Participants reasonably made market transactions under the expectation that PJM's implementation of the January 2017 compliance directives would stand. The administrative challenges would include the painstaking task of looking back to old planning periods to resettle FTR forfeitures. Going back to 2018 or 2019, for example,

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68 Complaint at 12; *see also id.* at 36.

69 January 2017 Order at P 82.

would require rerunning all of PJM's congestion billing calculations, including calculation of the end-of-planning-period excesses, which will impact Auction Revenue Rights and FTR holders. Additionally, software coding that supports PJM's FTR Forfeiture Rule calculations requires a substantial amount of time to run, thus diverting PJM staff from other important market administration-related tasks.

Furthermore, as a technical matter, this is not the appropriate docket to debate the Compliance Filing, which XO Energy already had the opportunity to address Docket No. ER17-1433 (the compliance filing docket) and Docket No. EL14-37. Moreover, any attack on the Compliance Filing is not only significantly out-of-time but is also a collateral attack on the January 2017 Order. Thus, no matter the Commission's conclusion on the present justness and reasonableness of PJM's FTR Forfeiture Rule, the Commission cannot and should not use this docket to change PJM's implementation of the January 2017 Order's directives through the Compliance Filing or unwind PJM's past administration of the FTR Forfeiture Rule. Instead, the Commission should ensure that any action taken in this docket has only forward-looking effect from no earlier than the date of the filing of the Complaint.

C. XO Energy Attempts to Use Inconclusive Data to Blame the Current FTR Forfeiture Regime for Virtual Transaction Market Exits and Declines in Transaction Volume.

XO Energy's Complaint presents data purporting to support its allegations that the FTR Forfeiture Rule has forced Market Participants to exit from the virtual market, and that these exits are evidence that the FTR Forfeiture Rule is unjust and unreasonable.

PJM is aware of public statements from Market Participants noting the FTR Forfeiture Rule in connection with their exit from the virtual market. However, it is uncertain whether recent exits from the virtual market would have occurred under a different FTR forfeiture regime. Moreover, the data provided by XO Energy does not

clearly demonstrate that these market developments warrant reformation of the FTR Forfeiture Rule as unjust and unreasonable.

First, PJM notes that most of the data presented by XO Energy, including but not limited to the data illustrated in Figure 1 and Figure 2 of the Complaint, is presented without disclosing or citing to the source of the data, making it difficult for the Commission, PJM, or other interested parties to verify the data. PJM has not independently verified the data presented in the Complaint, but some of the data (including Figure 2) appears to be sourced from IMM presentations or publications. The data thus may very well be credible, but without proper identification of the source, it is difficult to properly evaluate that data.

Second, much of the evidence presented by XO Energy is only evidence of either XO Energy's or another Market Participant's positions on how the FTR Forfeiture Rule could have or should have been modified through the PJM stakeholder process. Standing alone, that evidence does not show that any Market Participant that exited virtual trading did so as a result of the FTR Forfeiture Rule.

Third, XO Energy's putative evidence of a reduction of FTR Market Participants and a decrease in INCs, DECs, and UTCs since the Compliance Filing is not sufficient to prove that any such reduction or decrease is due solely or predominantly to the FTR Forfeiture Rule. XO Energy has not demonstrated that the Penny Test, the FTR Impact Test as a whole, or the general FTR Forfeiture Rule as it was revised by the Compliance Filing has led to a reduction in participants or bids in the FTR market. Although the data shows there was a spike in FTR forfeitures in September 2017 around the time PJM back-billed for FTR forfeitures to the date of the January 2017 Order and began administering

the revised FTR Forfeiture Rule on a going-forward basis,[70] that spike in forfeitures was not accompanied by exits from the virtual market. Additionally, while there was a reduction in bidding in February 2018, XO Energy concedes that reduction in bidding appears to be due to a reduction in biddable points, not to any revised aspect of the FTR Forfeiture Rule.[71] Thus, beyond XO Energy's or other Market Participants' public statements on their reasons for exiting the virtual market, the data XO Energy cites does not establish XO Energy's conclusion that the FTR Forfeiture Rule is the reason Market Participants have exited the virtual market.

Fourth, exiting a market as a consequence of a market rule does not compel a conclusion that the market rule is flawed or unreasonable. A properly functioning market is one where participants cannot take advantage of or manipulate market rules to their advantage. If the FTR Forfeiture Rule prevented participants from engaging in such potentially manipulative activity, and the participant exited the market as a consequence of that constraint, then that sort of market exit would be evidence the FTR Forfeiture Rule is doing its job.

Fifth, XO Energy cites other regional transmission organizations' ("RTOs") FTR market rules or practices in attempted support of XO Energy's preferred rule changes, but that argument neglects the Commission's long history of recognizing the value of regional differences in RTO markets.[72] PJM's FTR Forfeiture Rule, which has been heavily

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70 *See* Complaint at 23, 32–34 (noting an increase in forfeitures in September but saying nothing about reductions in FTR or virtual trading or exits from the virtual market).

71 *See id.* at 10.

72 *See, e.g.*, *PJM Interconnection, L.L.C.*, 149 FERC ¶ 61,250, at P 112 (2014) ("The Commission took a principles-based approach because it recognized that regional

influenced by the Commission's own January 2017 Order, need not match the FTR market monitoring procedures of other RTOs. PJM notes that XO Energy's reliance on the treatment of financial transmission rights in the Electric Reliability Council of Texas ("ERCOT") region is particularly unhelpful given that, although the Commission does have jurisdiction to enforce the market manipulation rule in ERCOT, the Commission does not have regulatory jurisdiction over ERCOT's market rules or governing documents themselves.

D. To the Extent the Commission Grants the Complaint, Any Relief Should Be Forward-Looking.

Although, as shown above, the Compliance Filing reasonably implemented the January 2017 Order, and there is no basis for retroactive changes, PJM remains open to the potential for improvement to the FTR Forfeiture Rule. While it is uncertain whether recent exits from the virtual market would have occurred under a different FTR forfeiture regime, the causes of these exits in particular may be worth exploring. It is after all possible that

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differences may warrant distinctions in cost allocation methods among transmission planning regions."); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051, at P 61 (2011) ("Nevertheless, the Commission recognizes that each transmission planning region has unique characteristics and, therefore, this Final Rule accords transmission planning regions significant flexibility to tailor regional transmission planning and cost allocation processes to accommodate these regional differences."), *order on reh'g & clarification*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g & clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, 114 FERC ¶ 61,104, at P 97 ("In regard to the terms 'regional Reliability Standard' and 'regional variance,' we recognize that regional 'differences' of several sorts are possible as more fully discussed under section IV.B.5, Reliability Standards, of the Preamble." (footnote omitted)), *order on reh'g*, Order No. 672-A, 114 FERC ¶ 61,328 (2006).

the revised FTR Forfeiture Rule has had some unintended effects that could be improved. PJM acknowledges that the directives the Commission made in the January 2017 Order were quite prescriptive, and notes for example that PJM itself expressed a preference for retaining the prior 75% threshold trigger for FTR forfeitures as a less limiting mechanism that would still capture apparent market activities that impact FTR values.[73] PJM thus does not have a strong position on how the Commission should proceed if it does find merit in XO Energy's Complaint insofar as it seeks a prospective remedy, except that PJM requests that the Commission solicit and seriously consider PJM and diverse stakeholder feedback before ordering any changes to PJM's current FTR Forfeiture Rule.

It is true now just as it was true in 2018 to 2019 that PJM would entertain making enhancements or changes to its FTR forfeiture provisions. Accordingly, PJM supports the Commission examining the evidence presented regarding these impacts, focusing solely on whether forward-looking changes to the rule may be appropriate. To the extent the Commission finds the Complainant has met its burden under FPA section 206 to demonstrate that the FTR Forfeiture Rule currently administered by PJM is unjust and unreasonable, PJM encourages the Commission to engage PJM's stakeholders in either settlement conference or technical conference proceedings to attempt to develop Market Participant-supported replacement provisions rather than simply adopting one of the remedial options outlined by the Complaint, in recognition that building consensus around the FTR Forfeiture Rule will be essential if such new rules are to succeed without sparking protracted future litigation or calls for yet more stakeholder processes on the issue.

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73 *See* PJM Technical Conference Comments at 4.

IV. ADMISSIONS AND DENIALS PURSUANT TO 18 C.F.R. § 385.213(c)(2)(i)

Rule 213(c)(2)(i) of the Commission's Rules of Practice and Procedure[74] requires PJM to admit or deny each material allegation of the Complaint. Upon a review of the Complaint, the material allegations in the Complaint are that: (1) the Commission should reject the Compliance Filing; (2) the FTR Forfeiture Rule is unjust and unreasonable because it fails to consider whether a trader has leverage and the requisite scienter to manipulate the FTR market; (3) The FTR Forfeiture Rule fails to incorporate a portfolio approach to FTRs; (4) The FTR Impact Test is inherently flawed; (5) FTR forfeitures that are based upon the total day-ahead marginal congestion component and total FTR cost are not just and reasonable; (6) the FTR Forfeiture Rule's counterflow FTR implementation violates the Compliance Filing and is flawed; (7) PJM's application of the FTR Forfeiture Rule's virtual portfolio test in Operating Agreement, Schedule 1, section 5.2.1(c) has significant inconsistencies; and (8) a lack of transparency in the data used to apply the FTR Forfeiture Rule prevents Market Participants from reasonably responding to the forfeitures they incur.[75] PJM denies all of these allegations. Furthermore, to the extent that any material allegation set forth in the Complaint is not specifically admitted here or elsewhere in this answer, it is denied.

V. AFFIRMATIVE DEFENSES PURSUANT TO 18 C.F.R. § 385.213(c)(2)(ii)

PJM's affirmative defenses are set forth above in this Answer, and include the following, subject to amendment and supplementation.

1. XO Energy, as the Complainant, has failed to satisfy its burden of proof under FPA section 206, and has not demonstrated that PJM violated any

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74 18 C.F.R. § 385.213(c)(2)(i).

75 *See* Complaint at 1–2, 11–12 (outlining major arguments and listing supposed "defects" of PJM's FTR Forfeiture Rule)

law, Commission order, the Tariff, the Operating Agreement, RAA, or any other Commission-jurisdictional governing document.

2. PJM fully complied with the directives of the January 2017 Order by filing and implementing the Tariff revisions in its Compliance Filing.

3. In administering the FTR Forfeiture Test, PJM has adhered to its filed rate as set forth in the Tariff.

4. PJM's application of the FTR Forfeiture Test has been and is just and reasonable, not unduly discriminatory, and consistent with the PJM Tariff.

5. PJM has make information regarding the FTR Forfeiture Test available to stakeholders and Market Participants consistent with all applicable laws, Commission orders, the Tariff, the Operating Agreement, RAA, and any other Commission-jurisdictional governing document.

6. To the extent XO Energy has met its burden under FPA section 206, that statute authorizes relief on a prospective basis only.

VI. COMMUNICATIONS AND SERVICE

PJM requests that the Commission place the following individuals on the official service list for this proceeding:[76]

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[76] To the extent necessary, PJM requests a waiver of Commission Rule 203(b)(3), 18 C.F.R. § 385.203(b)(3), to permit more than two persons to be listed on the official service list for this proceeding.

VII. CONCLUSION

For the reasons set forth in this Answer, the Commission should deny the Complaint.

Respectfully submitted,

/s/ *Victoria M. Lauterbach*

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June 1, 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 Washington, D.C., this 1st day of June 2020.

/s/ *Victoria M. Lauterbach*
Victoria M. Lauterbach