Duquesne Light Company  

v.  

Docket No. EL20-59-000  

PJM Interconnection, L.L.C.  

MOTION TO DISMISS OR, IN THE ALTERNATIVE, ANSWER OF PJM INTERCONNECTION, L.L.C. TO COMPLAINT OF DUQUESNE LIGHT COMPANY

PJM Interconnection, L.L.C. (“PJM”), pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure,¹ hereby moves to dismiss the July 30, 2020 complaint of Duquesne Light Company (“Duquesne” or “Complainant”)² in this proceeding. The Complaint seeks to bar PJM from submitting, under Federal Power Act (“FPA”) section 205,³ future amendments to the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (“Operating Agreement”) that, in the views of one or more Transmission Owners, violate the terms and conditions of the Consolidated Transmission Owners Agreement (“CTOA”) or Commission precedent. As discussed below, the Commission should dismiss as unripe and speculative this request to bar future filings, not yet conceived, that violate the CTOA or precedent in ways not yet knowable let alone defined.


² Complaint of Duquesne Light Company, Docket No. EL20-59-000 (July 30, 2020) (“Complaint”).

³ 16 U.S.C. § 824d.
If the Commission does not dismiss the Complaint as unripe, the Commission’s statutory obligations under the FPA would be best served by reserving its ruling on the Complaint until after it has issued an order on the proposed revisions to the Operating Agreement filed in Docket No. ER20-2308-000.\(^4\) The arguments raised by Duquesne in this Complaint are already pending before the Commission in Duquesne’s protest of the Joint Stakeholder EOL Filing.\(^5\) No urgent Commission action is required on the Complaint because it seeks guidance about unknown future FPA section 205 filings. Accordingly, ruling on the Complaint after the Commission issues its order on the Joint Stakeholder EOL Filing would be the most efficient use of the Commission’s resources and it may narrow (or at least clarify) what issues, if any, remain outstanding on the merits of this Complaint.

That being said, although the Commission should dismiss the Complaint as wholly speculative, even if the Commission proceeds to the merits, it should deny the Complaint. The Complaint unreasonably seeks to impose new limits on PJM’s authority as a Regional Transmission Organization (“RTO”) to submit FPA section 205 filings to modify the Operating Agreement. Duquesne’s proposed sweeping limits on PJM’s exercise of FPA section 205 authority are overbroad, unworkable, and unjust and unreasonable on the merits.

\(^4\) PJM Interconnection, L.L.C., Joint Stakeholders Revisions to the PJM Operating Agreement, Docket No. ER20-2308-000 (July 2, 2020) (“Joint Stakeholder EOL Filing”).

\(^5\) See infra nn. 22-24.
I. BACKGROUND

PJM recently filed the Joint Stakeholder EOL Filing as approved by the PJM Members Committee. As PJM explained in comments submitted the same day as the Joint Stakeholder EOL Filing, that filing “is novel in that PJM disagrees with the amendments approved by the Members Committee.” PJM therefore “[wrote] separately to provide [its] views as the independent [RTO] . . . on the matter,” including PJM’s view that the filed Operating Agreement amendments “[are] inconsistent with, or contrary to [] PJM governing documents; [and certain] Commission precedent.”

On July 30, 2020, Duquesne filed the Complaint, requesting that the Commission issue an order directing PJM to refrain from submitting any future amendments to the Operating Agreement that PJM has “determined” violate the CTOA or Commission precedent. In its Complaint, Duquesne states it does not ask the Commission to address the merits of the Joint Stakeholder EOL Filing; rather the Complaint seeks a blanket rule preventing certain future PJM filings under FPA section 205.

II. MOTION TO DISMISS

The Commission should dismiss as unripe and speculative the Complaint, which seeks to bar future FPA, section 205 filings by PJM that a Transmission Owner may argue “violates” the CTOA in ways not yet specified, or that violate Commission precedent in

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6 See Operating Agreement, section 10.4(xiii).


8 Comments at 2-3.

9 Complaint at 2 (“This Complaint does not ask the Commission to address the merits of the Joint Stakeholder EOL filing . . . .”).
ways not yet explained.

The Commission has made clear that it is “not inclined” to decide complaints that “are speculative,” or “would require [the Commission] to adjudicate future actions that [an RTO] may take under the provisions of its tariff.”10 Similarly, the Commission dismisses complaints that make no allegations of actual harm and instead “advance[] theoretical concerns that [Complainant] could in the future be harmed;”11 or that “do[] not present a ripe controversy due to the speculative nature of [Complainant]’s allegations and the lack of sufficient evidence of harm.”12

Applying those principles here, the Commission should dismiss the Complaint. As explained above, the Complaint makes clear it is not asking the Commission to address the merits of the Joint Stakeholder EOL Filing, which is the only active proceeding arguably presenting the issues the Complaint raises. Instead, the Complaint is solely concerned with FPA section 205 Operating Agreement amendment filings that PJM may submit at some point in the future. The Complaint therefore “would require [the Commission] to adjudicate future actions that [an RTO] may take;”13 “advances theoretical concerns that [Complainant] could in the future be harmed;”14 and “does not present a ripe


13 CSOLAR IV at P 47.

14 Southwest Gas at 62,464.
controversy;”15 thus warranting dismissal under the Commission’s precedent.

Whether and how any future filing violates the CTOA will depend entirely on the specifics of the future filing, which the Commission cannot pre-decide now. Similarly, whether and how any future FPA section 205 Operating Agreement amendment filing “violate[s] FERC precedent” is even more speculative. The Complaint does not specify the precedent that would prohibit a future filing, or explain how such unspecified precedent would prohibit PJM from even submitting an FPA section 205 filing to amend the Operating Agreement. This is not surprising, because how any particular precedent applies to future filings will depend on the circumstances and substance of the future filings, and therefore cannot be known, let alone decided, now. Moreover, the Complaint fails to recognize that it is PJM, as an independent RTO, that must be able to exercise its judgment on how to proceed when there are differing views as to whether a particular proposed revision to a governing document “violates” the CTOA or Commission precedent, thus rendering the requested relief wholly unworkable and impractical, if not illegal.16

Nor does the Commission need to take any affirmative action on this Complaint in order to establish what is already a black-letter principle of administrative law: the Commission must apply relevant precedent to future cases, unless it can distinguish that precedent based on the particulars of the future dispute.17 The Commission’s eventual action on the Joint Stakeholder EOL Filing will establish such a precedent (one way or the

15 Michigan Electric at P 16.

16 See, e.g., 18 C.F.R. § 35.34(j)(1)(ii)-(iii).

other), by resolving a live controversy contested by parties with concrete economic and other interests in the outcome of that dispute. That is how the Commission guides and influences the development of future filings. It does not pre-decide future cases based on facts and circumstances yet unknown.

Nor would the Complaint be ripe if limited to future FPA section 205 filings that “PJM determines”\(^\text{18}\) violate agreements or precedents. The Commission “determines” whether FPA section 205 filings violate Commission precedent or other agreements. PJM’s expression of its views on a filing to the Commission is not a binding determination on the lawfulness of that filing. Indeed, in the current pending proceedings, PJM determined that the best course of action was to present to the Commission PJM’s views on the Joint Stakeholder EOL Filing precisely so that the Commission, as regulator, could resolve the legal conflict regarding the validity of the Joint Stakeholder EOL Filing.\(^\text{19}\)

The Complaint also makes no showing whether, how, or to what extent Duquesne will be harmed by future FPA section 205 filings that the Complaint asks the Commission to prohibit. The Complaint only discusses alleged harm from the Joint Stakeholder EOL Filing,\(^\text{20}\) even though the Complaint otherwise makes clear it is seeking relief as to future filings, and not as to the Joint Stakeholder EOL Filing. This omission is not surprising, because Duquesne cannot show any harm from possible future filings that have not been—

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\(^{18}\) Complaint at 11.


\(^{20}\) Complaint at 8-9.
and may never be—submitted.  

          In short, the Complaint is unripe and speculative, and consistent with Commission precedent, should be dismissed.

III.  ANSWER

          In furtherance of the Commission’s interest in maintaining administrative efficiency, any consideration of the merits of the Complaint should be reserved until after the Commission issues an order on the Joint Stakeholder EOL Filing. In its protest to the Joint Stakeholder EOL Filing, Duquesne raises many of the same arguments raised in the Complaint, including that: “PJM cannot submit filings that it determines violate the CTOA, FERC orders, or FERC precedent”; the CTOA is entitled to a Mobile-Sierra presumption; and stakeholders may submit amendments to the Commission on their own behalf if PJM determines such amendments contravene its governing documents. Accordingly, Commission action on the Complaint should await issuance of the Commission’s order on the Joint Stakeholder EOL Filing. Doing so would be the most

21 In addition to failing to show harm, the Complaint fails to establish a prima facie case that a violation of the FPA has occurred. The Complaint does not argue, as required under Rule 206 of the Commission’s regulations, 18 C.F.R. § 385.206, that the Operating Agreement or CTOA are somehow unjust and unreasonable, or that PJM’s actions under those governing documents are unjust and unreasonable in contravention of the FPA. Rather, the Complaint simply alleges that PJM be estopped from engaging in a process set forth in its Commission-approved governing documents. See Complaint at 2.

22 See PJM Interconnection, L.L.C., Motion to Intervene and Protest of Duquesne Light Company, Docket No. ER20-2308-000, at 2, 14 (July 23, 2020) (“Duquesne Protest”); Complaint at 2, 8 (“PJM may not submit a filing ‘in contravention of its contractual obligations’ under the CTOA or that contravenes a Commission order issued pursuant to the FPA.” (citations omitted)).

23 Duquesne Protest at 7; Complaint at 8. At this time, PJM is not briefing the Mobile-Sierra claims, as reaching these arguments is absolutely unnecessary to dispose of this spurious Complaint, but reserves the right to submit supplemental materials detailing the precedent in this area and applying that precedent to the CTOA.

24 Duquesne Protest at 12; Complaint at 11-15.
efficient use of the Commission’s resources by determining what issues raised in the Complaint, if any, are unresolved.

If and when the Commission does proceed to the merits of the Complaint, the Commission should deny the Complaint.

A. The Complaint Unreasonably Seeks to Impose New Limits on PJM’s Authority to Submit FPA Section 205 Filings to Modify the Operating Agreement.

If the Commission does not dismiss the Complaint, it should deny the Complaint because it is an unreasonable attempt to create new and additional obstacles to PJM’s submission of FPA section 205 filings of Operating Agreement amendments. Authority over FPA section 205 filings is an attribute of RTO independence expressly demanded by the Commission’s RTO regulations, and PJM alone possesses the independence to determine how best to address potential conflicting views. The proposed limitations on PJM’s authority do not satisfy that regulatory requirement. Tellingly, the Complaint says nothing on this topic, and makes no case for limiting PJM’s section 205 filing authority in this manner.

Regardless, such a filing limitation is unnecessary. Whether a filing violates any agreement or Commission precedent is an inquiry the Commission is entirely capable of conducting and resolving in response to PJM’s submittal of an FPA section 205 filing. The Commission could find, for example, that the changes proposed in a section 205 filing

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25 18 C.F.R. § 35.34(j)(iii) (“The Regional Transmission Organization must have exclusive and independent authority under section 205 of the Federal Power Act (16 U.S.C. 824d), to propose rates, terms and conditions of transmission service provided over the facilities it operates.

Note to paragraph (j)(1)(iii): Transmission owners retain authority under section 205 of the Federal Power Act (16 U.S.C. 824d) to seek recovery from the Regional Transmission Organization of the revenue requirements associated with the transmission facilities that they own.”).

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seeking to amend the Operating Agreement are not just and reasonable if they are contrary to precedent or other Commission-accepted agreements. In such a case, the Operating Agreement would not and could not be amended because there would be no “approval and/or acceptance for filing of the amendment by FERC.”

 Thus, there are already sufficient protections under the FPA and the Operating Agreement from the imposition of unlawful or unreasonable Operating Agreement revisions.

The Complaint also does not explain its contemplated mechanism, and, simply put, cannot prevent such a filing from being placed before the Commission. As noted above, it is PJM that has the right to determine the course of action and it is the Commission that ultimately determines whether a filing violates Commission precedent or other agreements.

B. In the Sole Example It Cites, i.e., the Joint Stakeholder EOL Filing, Duquesne Does Not Establish that the Submission of the Filing Was Improper.

The Complaint rests on the premise that the filing of the Joint Stakeholder EOL filing under FPA section 205 was improper. That premise is incorrect—the Operating Agreement amendments were properly filed—so the Complaint lacks foundation.

First, Operating Agreement, section 10.4(xiii) speaks to PJM filing with the Commission amendments to the Operating Agreement that are approved by the Members Committee. PJM did so here.

Second, the Operating Agreement does not state any separate requirement of Transmission Owner (or any other particular member or sector) approval as a pre-condition to filing Operating Agreement amendments under FPA section 205.27

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26 Operating Agreement, section 18.6(a).

27 The Transmission Owners instead are recognized as one of five sectors used for Members Committee voting—including on Operating Agreement revisions. See Operating Agreement, section 8.1.1.
Third, the Complaint does not demonstrate (and instead seems simply to assume) that the CTOA implicitly establishes an additional pre-condition to the filing of Operating Agreement amendments. Although the CTOA has a number of stated rules relevant to how the CTOA can be amended,28 the CTOA neither references, nor expresses any limitations on, amendments to the Operating Agreement.

PJM recognizes that it is possible that changes to the Operating Agreement could attempt to modify an area of Transmission Owner-reserved responsibility. Indeed, PJM’s view of the Transmission Owners’ reserved responsibilities for certain end of life matters was a major part of PJM’s substantive disagreement with the Joint Stakeholders’ proposal.29 However, a super-majority of the Members Committee that voted (or gave their proxies to others who voted for them) did not share PJM’s view on that question.

Here, the respective filing rights procedures separately prescribed by the CTOA and Operating Agreement were followed, but led to competing filings on the same subject matter. When presented with such an unusual scenario of competing filings under different agreements, each facially compliant with the filing procedures specified for the respective agreement, the Commission is entirely capable of resolving that competition on the merits.

Finally, while the Complaint repeatedly invokes the Mobile-Sierra doctrine,30 there is no Mobile-Sierra issue here. There is no proceeding pending before the Commission.

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28 See, e.g., CTOA section 8.5.1(a) (amendment of any portion of the CTOA requires action by a two-thirds majority of the TOA-Administrative Committee).

29 See Comments at 9-14; see also PJM Interconnection, L.L.C., 172 FERC ¶ 61,136 (2020).

under either FPA section 205 or section 206 to modify the CTOA. Moreover, in practice, the *Mobile-Sierra* doctrine ultimately concerns the standard under which the Commission reviews a proposed change in proceedings pending before it, and not whether the filing can be submitted by an RTO in the first instance. Put simply, the *Mobile-Sierra* doctrine constrains the Commission as regulator, and not PJM as the RTO.\(^{31}\)

For these reasons, if the Commission does not dismiss the Complaint, it should deny the Complaint.

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

Pursuant to Rule 213(c)(2)(i) of the Commission’s rules of Practice and Procedure,\(^{32}\) PJM affirms that any allegation in the Complaint that is not specifically and expressly admitted above 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.

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\(^{31}\) *See also supra* n. 23.

\(^{32}\) 18 C.F.R. § 385.213(c)(2)(i).
VI. COMMUNICATIONS AND SERVICE

PJM requests that the Commission place the following individuals on the official service list for this proceeding:33

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33 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, PJM respectfully requests that the Commission dismiss the Complaint as unripe and speculative, or, in the alternative, deny the Complaint on its merits.

Respectfully submitted,

/s/ Paul M. Flynn

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September 18, 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 18th day of September 2020.

/s/ Elizabeth P. Trinkle
Elizabeth P. Trinkle

Attorney for PJM Interconnection, L.L.C.