

174 FERC ¶ 61,035
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee, Richard Glick,
Allison Clements, and Mark C. Christie.

Indiana Municipal Power Agency
City of Lawrenceburg, Indiana

Docket Nos. EL20-30-001

v.

PJM Interconnection, L.L.C.,
American Electric Power Service Corp.
Lawrenceburg Power, LLC

PJM Interconnection, L.L.C.

EL20-56-001

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued January 19, 2021)

1. On September 17, 2020,¹ the Commission granted, in part, and denied, in part, a petition for declaratory relief and complaint filed by Indiana Municipal Power Agency (IMPA) and the City of Lawrenceburg, Indiana (City) (together, Petitioners) against PJM Interconnection, L.L.C. (PJM), American Electric Power Service Corp. (AEP), as designated agent for the AEP Operating Companies, and Lawrenceburg Power, LLC (Lawrenceburg Power) concerning the station power self-supply monthly netting provision of the PJM Open Access Transmission Tariff (Tariff).² The Commission also instituted a proceeding under section 206 of the Federal Power Act (FPA).³ Lawrenceburg Power seeks rehearing of the Commission's September 2020 Order. In

¹ *Ind. Mun. Power Agency v. PJM Interconnection, L.L.C.*, 172 FERC ¶ 61,243 (2020) (September 2020 Order).

² PJM Interconnection, L.L.C., Intra-PJM Tariffs, Open Access Transmission Tariff, Attachment K-Appendix, Section 1-Market Operations, § 1.7.10(d) Other Transactions (21.0.0).

³ 16 U.S.C. § 824e.

addition, IMPA and the City filed a limited request for clarification or rehearing of the September 2020 Order.

2. Pursuant to *Allegheny Defense Project v. FERC*,⁴ the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the FPA,⁵ we are modifying the discussion in the September 2020 Order and continue to reach the same result in this proceeding, as discussed below.⁶

I. Background

3. Lawrenceburg Power owns and operates the Lawrenceburg Plant (Plant), a 1,160 MW combined-cycle natural gas-fired generation facility located within the City.⁷ Lawrenceburg Power sells the entire output of the Plant, pursuant to its FERC-approved market-based rate tariff, into the PJM wholesale electric market. The Plant's generating units are interconnected directly and solely to 345 kV high-voltage interstate transmission facilities, which are owned by AEP subsidiary Indiana Michigan Power Company (I&M) and which are regulated by the Commission and subject to the operational control of PJM. The Plant's interconnection with I&M's interstate transmission facilities is governed by a PJM Interconnection Service Agreement.⁸

4. Prior to January 1, 2019, Lawrenceburg Power (and its predecessor) were meeting the Plant's station power needs pursuant to a retail electric service agreement (Retail Contract) with the City and Lawrenceburg Municipal Utilities (LMU), a member of IMPA. In December 2017, Lawrenceburg Power, after purchasing the Plant from an

⁴ *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

⁵ 16 U.S.C. § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

⁶ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the September 2020 Order. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁷ This background summary addresses only those facts necessary to provide context for the issues raised in Lawrenceburg Power's rehearing request. For a full discussion of the background and the Petitioners complaint, see September 2020 Order, 172 FERC ¶ 61,243 at PP 2-24.

⁸ *Id.* P 12.

affiliate of AEP, provided written notice to the City of its intent to terminate the Retail Contract effective January 1, 2019, and to begin serving its station power needs via the self-supply monthly netting option in the PJM Tariff. Lawrenceburg Power also requested that effective January 1, 2019, AEP remove recordation of electric supply to the Plant from IMPA's PJM load-serving entity account. AEP complied with the request.⁹

5. In their petition, Petitioners sought to enforce the rights of IMPA to provide contracted-for all-requirements wholesale electric service to the City, to obtain the wholesale electric service from PJM necessary to do so, and to have that power transmitted to the Plant under IMPA's Network Integration Transmission Service Agreement with PJM, in order for the City to serve the Plant's station power load. Petitioners also sought to enforce the rights of the City, under state and local law, to supply the Plant with station power at retail in accordance with the 30-minute intervals established by municipal ordinance. Petitioners asserted that PJM, AEP and Lawrenceburg Power, through their actions and inactions, have violated and continue to violate the City's retail service rights.¹⁰

6. Petitioners asserted that the provision of station power, specifically when a generating facility is offline and not generating, is a retail sale subject to state jurisdiction. Petitioners stated that when an electrical generating plant is not operating, it necessarily must consume energy from another source to operate the plant's electric equipment—i.e., station power. Petitioners argued that the provision of station power is a “quintessential retail sale” within the plain meaning of the FPA, because it is a sale directly to an end user (rather than for resale). Petitioners asserted that state and local authorities regulate the rates, terms, and conditions of service governing the supply of station power because it is a retail sale.¹¹

7. In the September 2020 Order, the Commission found that when a generating facility is not online and not producing electricity to supply its station power needs, it is consuming electricity as an end-user and thus, consistent with the boundaries of the Commission's jurisdiction under the FPA, the provision of station power is a retail sale subject to state jurisdiction.¹² The Commission found that the self-supply of station power does not directly affect wholesale rates, and the interval in which a self-supply netting occurs does not allocate power between energy consumed as station power and

⁹ *Id.* P 13.

¹⁰ *Id.* P 15.

¹¹ *Id.* P 18.

¹² *Id.* P 89.

energy available at wholesale. It thus does not affect how much energy a generator can sell at wholesale.¹³

8. The Commission rejected Lawrenceburg Power's argument that because Petitioners concede that the Commission has jurisdiction over "Permitted Netting," they have conceded Commission jurisdiction over all self-supply station power netting. The Commission noted that Permitted Netting refers to netting behind-the-meter generation to determine a generator's net power output during a metered interval when a generator is online and producing electricity.¹⁴ With Permitted Netting, a generating facility is using its own real-time electric generation to supply its station power behind-the-meter; it is not receiving station power supply from the interconnected grid. The Commission explained that the self-supply monthly netting at issue here concerns the ability of a generating facility to net the electric energy it consumes from the interconnected grid when it is offline and not producing against its wholesale sales.¹⁵ When a generating facility is offline and not producing energy and seeks to acquire power from the interconnected grid for its station power, it is a retail sale of electric energy for end use. The Commission stated that there is no such sale in the case of Permitted Netting.¹⁶

9. In its rehearing request, Lawrenceburg Power maintains that the Commission made four errors in the September 2020 Order. Specifically, Lawrenceburg Power argues that the Commission erred: (1) in failing to address LMU's and IMPA's jurisdictional status under the FPA;¹⁷ (2) in concluding that a wholesale generation facility's self-supply of station power is not a practice directly affecting wholesale rates;¹⁸ (3) by impermissibly forcing the owners of generation facilities to engage in retail transactions, which exceeds the Commission's authority under the FPA and deprives Lawrenceburg Power of the right to use its own product;¹⁹ and (4) in failing to address arguments that

¹³ *Id.* P 99.

¹⁴ *Id.* P 100.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Lawrenceburg Power Rehearing Request at 9-16.

¹⁸ *Id.* at 9, 16-23.

¹⁹ *Id.* at 9, 23-26.

adopting LMU's and IMPA's erroneous jurisdictional theory would produce anti-competitive results.²⁰

II. Discussion

10. As discussed below, in response to Lawrenceburg Power's request for rehearing, the September 2020 Order is hereby modified and the result sustained.

11. Lawrenceburg Power argues that the September 2020 Order is "internally inconsistent in its application of the Commission's jurisdiction over practices affecting rates."²¹ According to Lawrenceburg Power, the Commission found in the September 2020 Order that netting of self-supplied station power is not a practice affecting rates, but the Commission also stated that "Permitted Netting," i.e., netting the self-supply of station power behind-the-meter, is within the Commission's jurisdiction.²²

Lawrenceburg Power contends that there is "no principled basis" for the Commission to conclude that it has jurisdiction over self-supply netting that occurs behind-the-meter but not self-supply netting that occurs in front of the meter, i.e., through acquisition of power from another source in a retail transaction.²³ Lawrenceburg Power states that the only difference between the two is that behind-the-meter netting affects a generator's wholesale rate by reducing its output into PJM "as a physical matter," while netting in front of the meter "affects the generator's wholesale rate as an accounting matter in the PJM settlement process."²⁴

12. Lawrenceburg Power also argues that the Commission has repeatedly used netting, in other contexts, as a valid basis for determining whether a wholesale transaction has taken place and, therefore, whether it has jurisdiction over sales that might otherwise be state-jurisdictional retail sales.²⁵ Lawrenceburg Power goes on to note that in Order

²⁰ *Id.* at 9, 26-28.

²¹ *Id.* at 21.

²² *Id.*

²³ September 2020 Order, 172 FERC ¶ 61,243 at P 100 ("When a generating facility is offline and not producing energy and seeks to acquire power from the interconnected grid for its station power, this is a retail sale of electric energy for end use.").

²⁴ Lawrenceburg Power Rehearing Request at 22.

²⁵ *Id.* (citing *Participation of Distributed Energy Res. Aggregations in Mkts. Operated by Reg'l Transmission Orgs. and Indep. Sys. Operators*, Order No. 2222, 172 FERC ¶ 61,247, at P 42 (2020) (explaining that an aggregator of distributed energy

No. 2222, the Commission allowed for netting in front of the meter by permitting resources located at different pricing nodes to aggregate their output and consumption. According to Lawrenceburg Power, this is inconsistent with the Commission's action in this proceeding.²⁶

13. Lawrenceburg Power's arguments are unpersuasive. First, Lawrenceburg's contention that Permitted Netting and the self-supply monthly netting at issue here are comparable for purposes of determining jurisdiction is without merit. As stated in the September 2020 Order, with Permitted Netting, a generating facility is using its own real-time electric generation to supply its station power behind-the-meter—it is not receiving station power supply from the interconnected grid.²⁷ Self-supply monthly netting, on the other hand, concerns the ability of a generating facility to net the electric energy it consumes from the interconnected grid when it is *offline* and *not producing* against its wholesale sales. When a generating facility is offline and not producing energy and seeks to acquire power from the interconnected grid for its station power, *this* is a retail sale of electric energy for end use.²⁸ There is no such sale with Permitted Netting.

14. And it is these very differences that require different jurisdictional treatment for the self-supply of station power at issue here. The Commission has rejected the argument that the provision of station power is a practice directly affecting rates for wholesale sales

resources would not be a public utility under FERC's jurisdiction if it aggregates only customers in a net metering program that are not net sellers); *Elec. Storage Participation in Mkts. Operated by Reg'l Transmission Orgs. and Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127, at n.49 (2018) (noting that, due to the possible use of netting, "injections of electric energy back to the grid do not necessarily trigger the Commission's jurisdiction"); *Sun Edison LLC*, 129 FERC ¶ 61,146 (2009), *reh'g granted on other grounds*, 131 FERC ¶ 61,213 (2010) (explaining that the Commission's jurisdiction would arise only when a facility operating under a state net metering program produces more power than it consumes over the relevant netting period); *MidAmerican Energy Co.*, 94 FERC ¶ 61,340, at 62,263 (2001) (approving the use of netting small generators' output and consumption and rejecting the argument that "every flow of power constitutes a sale").

²⁶ Lawrenceburg Power Rehearing Request at 22-23 (citing Order No. 2222, 172 FERC ¶ 61,247 at PP 40-42, 206).

²⁷ September 2020 Order, 172 FERC ¶ 61,243 at P 100.

²⁸ As explained in the September 2020 Order, "the determination of whether a retail sale has occurred, and therefore the authority to establish a netting interval to determine whether a retail sale has occurred, is appropriately within the jurisdiction of the states." *Id.* P 94.

subject to the Commission’s jurisdiction, explaining that station power is a sale for end use and the Commission has no jurisdiction over sales for end use.²⁹ This finding is consistent with the holdings in *EPSA*, wherein the Court made clear that the FPA reserves authority over retail sales to the states, and the Commission “cannot take action transgressing that limit no matter how direct, or dramatic, its impact on wholesale rates.”³⁰ Lawrenceburg’s arguments regarding Permitted Netting do not warrant a different result.

15. While Lawrenceburg Power argues that the Commission has used netting in other contexts as a valid basis for determining whether a wholesale transaction has taken place,³¹ we do not find the cases Lawrenceburg Power cites to be persuasive; these cases do not involve the self-supply of station power at issue here. Lawrenceburg Power specifically cites Order No. 2222 to argue that “the Commission expressly allowed for netting in front of meter” and therefore the Commission should find that a generator’s netting of self-supplied station power is a practice directly affecting wholesale rates subject to the Commission’s jurisdiction.³² We do not find that Order No. 2222 dictates such a result. As an initial matter, Lawrenceburg Power does not identify or explain the claimed similarities between the wholesale market rules at issue in Order No. 2222 and the self-supply monthly netting at issue here. In Order No. 2222, the Commission found that the sales of electric energy by distributed energy resource aggregators for purposes of participating in an RTO/ISO market are wholesale sales subject to the Commission’s jurisdiction.³³ The Commission further found that the rules governing the sales in RTO/ISO markets by distributed energy resource aggregators from demand resources are practices affecting wholesale rates subject to the Commission’s jurisdiction and that such rules do not regulate retail sales in violation of FPA section 201(b).³⁴ As such, while Order No. 2222 concerns both wholesale sales of electricity and practices affecting

²⁹ *PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251, at 61,894-96 (2001).

³⁰ *FERC v. Elec. Power Supply Ass’n*, 136 S.Ct.760, 775 (2016) (*EPSA*).

³¹ Lawrenceburg Power Rehearing Request at 22.

³² *Id.* at 22-23.

³³ Order No. 2222, 172 FERC ¶ 61,247 at P 40.

³⁴ *See id.* P 41 (citing *EPSA*, 136 S.Ct. at 774, 784); *see also id.* P 58 (“Like the Commission’s rules governing demand response and electric storage resource participation in RTO/ISO markets, this final rule ‘addresses—and addresses only—transactions occurring on the wholesale market.’”) (quoting *EPSA*, 136 S.Ct. at 776).

wholesale rates,³⁵ the same cannot be said for PJM's station power monthly netting provision at issue here. The Commission appropriately determined, based on controlling precedent, that this case concerns a retail sale over which the Commission does not have jurisdiction.³⁶

16. Lawrenceburg Power's other arguments raised on rehearing are unpersuasive and have already been addressed in the September 2020 Order. In brief, the Commission did not err in the September 2020 Order by not addressing LMU's and IMPA's jurisdictional status under the FPA. The September 2020 Order affirms that when a generating facility is offline and not producing energy and seeks to acquire power from the interconnected grid for its station power, that is a retail sale of electric energy for end use,³⁷ and the Commission "does not have the authority to determine when, and on what terms, a retail sale of station power is made."³⁸ These firmly-established principles obviate the need for any further analysis of the jurisdictional status of LMU or of IMPA, of which LMU is a member, and which, as a political subdivision of the State of Indiana, is explicitly exempted from the FPA.³⁹

17. Nor do we agree with Lawrenceburg Power that the September 2020 Order impermissibly forces it to engage in retail transactions.⁴⁰ As noted above, when Lawrenceburg Power's Plant is offline and not producing energy, and Lawrenceburg Power seeks to acquire power from the interconnected grid for its station power, this is, by definition, a retail sale of electric energy for end use. It is a retail transaction that Lawrenceburg Power has initiated, and it is no way a consequence of anything stated in the September 2020 Order. These jurisdictional boundaries are based in the statute. Contrary to Lawrenceburg Power's contention, they are not the product of an "erroneous

³⁵ *Id.* PP 39-41.

³⁶ *See* September 2020 Order, 172 FERC ¶ 61,243 at PP 94-96 (citing *S. Cal. Edison Co. v. FERC*, 603 F.3d 996 (D.C. Cir. 2010) (*Edison*); *Calpine Corp. v. FERC*, 702 F.3d 41 (D.C. Cir. 2012)).

³⁷ *Id.* P 100.

³⁸ *Id.* P 102.

³⁹ 16 U.S.C. § 824(f).

⁴⁰ Lawrenceburg Power Rehearing Request at 9, 23-26.

jurisdictional theory,” nor are they overridden by consequences for Lawrenceburg that it characterizes as “anticompetitive.”⁴¹

18. Finally, in their clarification request, IMPA and the City state that line 7 of paragraph 113 of the September 2020 Order identifies IMPA as the utility entitled to charge Lawrenceburg Power at retail for station power. IMPA and the City state that the September 2020 Order otherwise correctly describes the service arrangement between IMPA, the City, and Lawrenceburg Power as one where IMPA charges the City at wholesale and the City charges Lawrenceburg Power at retail for the station power supplied. IMPA and the City request that paragraph 113, line 7 be clarified by replacing “the City” for “IMPA” in that line so that the text reads in lines 7 and 8: “nothing about the election of self-supply pursuant to the Tariff prevents *the City* from asserting its right to charge Lawrenceburg Power at retail for the station power received.”⁴² We agree with IMPA and the City’s explanation and clarify that lines 7 and 8 of paragraph 113 of the September 2020 Order should read as they have suggested.

⁴¹ We note that the Commission’s statement, in instituting the FPA section 206 proceeding, that reliance on section 1.7.10(d) of PJM’s Tariff to assert the right to choose to self-supply station power pursuant to the PJM Tariff conflicts with the finding that the Commission lacks jurisdiction to determine whether a retail sale has occurred, applies not only to Lawrenceburg Power, but to other generators as well. *See* September 2020 Order, 172 FERC ¶ 61,243 at P 106 (explaining that “[t]he record in this proceeding shows that Lawrenceburg Power, and others, have” engaged in this practice). *See also* *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,113, at P 25 (2012) (“By contrast, any competitive advantages or disadvantages under MISO’s proposed revisions would be due to different state practices for measuring retail sales of station power, which, under *Edison*, are outside the Commission’s jurisdiction.”).

⁴² IMPA and City Limited Clarification or Rehearing Request at 2-3 (emphasis by IMPA and the City).

The Commission orders:

(A) In response to Lawrenceburg Power's request for rehearing, the September 2020 Order is hereby modified and the result sustained, as discussed in the body of this order.

(B) In response to IMPA and the City's request for clarification or rehearing, paragraph 113 of the September 2020 Order is hereby clarified, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.