

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

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|---|---|------------------------|
| Allegheny Electric Cooperative, Inc., <i>et al.</i> |) | |
| v. |) | Docket No. EL07-56-000 |
| PJM Interconnection, LLC |) | |
| Organization of PJM States, Inc. |) | |
| v. |) | Docket No. EL07-58-000 |
| PJM Interconnection, LLC |) | (Consolidated) |

**JOINT COMPLAINANTS'
MOTION FOR LEAVE TO FILE, ANSWER TO NEW ISSUES
AND CLARIFYING COMMENTS**

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”), the identified Joint Complainants¹ in Docket No. EL07-56-000 hereby file this Motion for Leave to File, Answer to New Issues and Clarifying Comments (“Clarifying Comments”) to address new issues and clarify incorrect statements by PJM in its Reply Comments filed September 4, 2007 (“PJM Reply” or “Reply”) in the above-captioned dockets.² While the Commission’s rules generally prohibit answers to answers, good cause exists for the Commission to grant waiver and accept this filing. Joint Complainants seek to correct the record with respect to PJM’s incorrect characterization of Joint Complainants’ position on settlement and processing of these proceedings, as well as to comment upon the new relief requested

¹ Allegheny Electric Cooperative, Inc.; Cities and Towns of Hagerstown, Thurmont, and Williamsport, Maryland; District of Columbia Office of the People’s Counsel; Illinois Citizens Utility Board; Indiana Office of Utility Consumer Counselor; Maryland Office of People’s Counsel; New Jersey Division of Rate Counsel; Office of the Attorney General of Virginia, Division of Consumer Counsel; Office of the Ohio Consumers’ Counsel; Old Dominion Electric Cooperative; Pennsylvania Office of Consumer Advocate; the PJM Industrial Customer Coalition; Southern Maryland Electric Cooperative, Inc.; and the State of Delaware, Division of the Public Advocate.

² The Joint Complainants’ Clarifying Comments here are in reply to the PJM’s Reply Comments. However, because the Commission’s rules regarding settlement comments do not provide for replies to reply comments, the Joint Complainants seek leave to file this reply as an answer to the PJM Reply.

by PJM in its Reply. As such, the Clarifying Comments are necessary in order to provide the Commission with a complete and accurate record for decision-making.³ For these reasons, Joint Complainants respectfully request that the Commission grant this motion and accept the Answer and Clarifying Comments.

I. INTRODUCTION

In response to Joint Complainants' Comments on PJM's unilateral offer of settlement filed in the above-captioned complaint proceedings, PJM filed a Reply that incorrectly characterized the Joint Complainants' settlement and litigation positions in these cases. Moreover, PJM in its Reply Comments for the first time requested that the Commission issue an initial "guidance" order in these cases prior to initiating settlement discussions among the parties in order to resolve purported "policy" issues. The purpose of this filing is to correct the record on these issues, especially with respect to the Joint Complainants' position on settlement discussions, and to respond to PJM's new request for relief.

First, Joint Complainants are surprised by the statement in PJM's Reply that Joint Complainants are requesting that "the Commission should reject the Settlement Offer and send these proceedings into extended adversarial proceedings."⁴ This statement ignores communications to the contrary from Joint Complainants to PJM's senior management and counsel, one of which was appended to Joint Complainants' Initial Comments. To be clear, the Joint Complainants remain willing to enter into meaningful settlement negotiations to try to resolve this matter. The Joint Complainants request, however, that the discovery process proceed simultaneously.

³ See Equitrans, L.P., 104 FERC ¶ 61,008 at P 12 (2003) (the Commission accepted an answer to reply comments on an offer of settlement because it "clarifie[d] the issues and aids us in our decision-making.")

⁴ PJM Reply at 6.

Second, Joint Complainants strongly oppose PJM’s request that the Commission issue a guidance order prior to the commencement of any settlement negotiations. The Commission has already issued extensive policy statements concerning market monitoring, and further “guidance” now as defined by PJM is not necessary. PJM’s Reply is simply an attempt to gain negotiating advantage in the settlement discussions in these cases. PJM’s external market monitoring proposal has little support among customer-focused stakeholders, and PJM simply seeks to limit discussions in the settlement process to the details of its entirely new structure for market monitoring. Instead, Joint Complainants, who represent a diverse cross-section of consumers within PJM who will be directly affected by decisions concerning market monitoring in PJM, urge the Commission to trust the parties to resolve this matter through collaborative settlement discussions. Joint Complainants hope that PJM will welcome – or at least be willing to listen to -- the consumer interests Joint Complainants represent in such a process.

II. PJM’S STATEMENT THAT JOINT COMPLAINANTS ARE UNWILLING TO ENGAGE IN SETTLEMENT DISCUSSIONS IS INCORRECT.

PJM’s Reply Comments seek to gain Commission acceptance of PJM’s requested relief, in part, by misstating the position of the Joint Complainants. Thus PJM states that Joint Complainants “make[] no alternative proposal, however, and seem[] for the present simply to prefer litigation to any attempt to settle this proceeding.” PJM Reply Comments at 6. PJM also claims that Joint Complainants seek only “extended adversarial proceedings”. *Id.* at 5, *see also id.* at 26. PJM’s Reply Comments ignore Joint Complainants’ repeated statements in support of properly structured settlement

discussions around these issues and Joint Complainants' clear interest in fast-track processing of this litigation.

It is not true that Joint Complainants expressed an unwillingness to engage in settlement discussions. In fact, Joint Complainants' Initial Comments (to which PJM was purportedly replying) explicitly state that

At this point, the Joint Complainants have reluctantly concluded based on this unilateral offer of settlement and PJM's suggestion of immediate Commission acceptance, that the Commission must proceed with the hearing process, particularly the commencement of discovery. The Joint Complainants are **willing to engage in meaningful settlement negotiations while the discovery process proceeds.**

Initial Comments of the Joint Complainants on Unilateral Offer of Settlement at 2.

Moreover, those same Initial Comments included a letter from the Joint Complainants to the PJM Board of Managers that, among other things, proposed settlement talks and requested the participation of PJM Board members. The letter stated that

Joint Complainants hereby indicate their willingness and desire to enter into discussions directly with the PJM to resolve the matters raised in their complaint. In this era of transition and change, we ask that a representative number of Board members participate in these discussions as well.

Id. at 29 (Attachment A). Instead of accepting Joint Complainants' invitation to engage in settlement discussions, PJM's Board (through its Chairman) responded with a message to Joint Complainants (attached hereto as Attachment B and which is posted on PJM's website at <http://www.pjm.com/documents/corp-public-disclosure.html>) rejecting the invitation to Board members to participate in negotiations, and stating "[w]e leave that in the capable hands of Management . . ." PJM's singling out of the Joint Complainants as being uniquely unwilling to discuss settlement is inaccurate.

Further, far from seeking “extended adversarial proceedings”, Joint Complainants have from the very first sought fast-track expedited handling of their Joint Complaint. Even above the caption, their Complaint states in all capital letters, bold and underlined type that it is a “**COMPLAINT FOR SHOW CAUSE ORDER, REQUESTING FAST-TRACK PROCEDURES.**” Complaint at 1. In addition, an entire section of the Complaint was dedicated to requesting fast-track processing and prompt action. Complaint at 29-31.

III. THE COMMISSION SHOULD NOT ISSUE A “GUIDANCE ORDER” FOR SETTLEMENT NEGOTIATIONS.

A. Going-Forward Market Monitor Protocols

The Commission should reject PJM’s request for the issuance of an initial order providing guidance on the policy issues raised in the comments on PJM’s unilateral offer of settlement in these proceedings.⁵ The Commission already has substantial policy guidelines governing market monitors in Regional Transmission Organizations.⁶ Granting PJM’s request would have the effect of predetermining significant issues raised by the Complaints in these dockets prior to providing the parties an opportunity to resolve these issues through settlement discussions or an opportunity to have their concerns heard in litigation. Providing guidance on PJM’s narrow list of issues would prejudice successful resolution of a host of issues that Joint Complainants and the Organization of PJM States, Inc. (“OPSI”) have identified in their pleadings. Such issues include (1) access to and control of data; (2) access to PJM facilities and personnel; (3) employment stability and continuity; (4) opportunity for MMU participation in all formative stages of

⁵ Reply Comments of PJM Interconnection, L.L.C. at 2, 7.

⁶ *Market Monitoring in Regional Transmission Organizations and Independent System Operators*, Policy Statement on Market Monitoring Units, 111 FERC ¶ 61,267 (2005)..

PJM market design development; (5) PJM stakeholder and working groups; and (6) oversight and accountability.

Given the absence of an opportunity at this juncture of the proceedings for the parties to conduct discovery into the issues surrounding PJM management's interaction with the Market Monitor in PJM, it is too early to conclude that all relevant information has come to light. It would therefore be unwise to narrow the Commission's and the parties' inquiry into these matters. It may well be that facts not yet identified will have to be addressed to ensure that the rules governing market monitoring functions in PJM are sufficient to ensure the independence and accountability of the PJM market monitor. Refraining from the issuance of a guidance order would enable the parties to continue exploring creative solutions to address the full range of issues presented in these proceedings.

Conversely, granting PJM the "guidance" it seeks would have the effect of limiting settlement discussions to the development of the details surrounding critical issues, rather than allowing the parties to discuss and negotiate the primary issues of concern raised in the Complaints: *i.e.*, the role PJM's management should play in overseeing the structure and function of the Market Monitor, if any. The ruling requested by PJM management would upset the balance of the settlement discussions clearly in favor of the structural overhaul proposed by PJM and against less intrusive modifications to the existing FERC-approved PJM Market Monitoring Plan. Premature "guidance" on PJM's list of issues would also deny Complainants the opportunity to be meaningfully heard on the concerns raised in their pleadings.

On August 28, 2007, representatives of the Joint Complainants participated in settlement discussions coordinated by OPSI. Further discussions are scheduled. The Commission should allow this structured settlement process to continue, while simultaneously allowing discovery to proceed. *See, e.g.*, Initial Comments of the Joint Complainants on Unilateral Offer of Settlement at 2.⁷ This parallel track process will serve three important purposes. **First**, it will promote a solution that has a broad base of support within the PJM community, as opposed to one imposed by PJM management. **Second**, it will allow participants to explore the full nature of the problems so that viable and stable long-term solutions may be crafted. **Third**, by allowing the discovery process to proceed, valuable time will not be lost in the unfortunate contingency that settlement talks are not successful (or are only partially successful).

B. The Problems Underlying the Existing Market Monitor Arrangement Must Be Understood before Any Changes Are Implemented

The serious concerns relating to PJM management's interaction with the PJM Market Monitor raised in the Complaints in these proceedings, and supported by the evidence that has been adduced thus far, do not necessarily involve flaws in the structural design of the market monitoring unit. This interaction must be investigated thoroughly in order to ensure sufficient independence and accountability for market monitoring in PJM going-forward.

Unfortunately, PJM insists that an entirely new Market Monitor structure be implemented immediately - without investigation by customers and state commissions into how and why Market Monitor independence became compromised as a result of the

⁷ To accomplish this, the Joint Complainants request that the Commission issue an order establishing hearing procedures and holding such procedures in abeyance pending the settlement talks discussed above. Such hearing order should provide the appointment of an Administrative Law Judge to rule on any discovery disputes.

interaction between PJM senior management and the Market Monitor. The Commission should reject this short-sighted approach. Any design changes should rest on an informed understanding of any flaws in the existing rules governing the protocol for communications between PJM management and the Market Monitor in order to ensure proper independence and accountability for that entity in the future. Parallel processes of discovery and the already-initiated OPSI-coordinated settlement discussions are the best approach for forging a creative and long-lasting solution to the problems that have been identified. *See*, OPSI Comments on Offer of Settlement at 23-24.

C. Internal versus External Market Monitor Structure

The Commission should also accord little weight to PJM's argument that Commission policy favors deference to the RTO's preference for a market monitor structure.⁸ While the Commission has generally deferred to the RTO's proposed structure for market monitoring in orders approving RTO structures, those structures were developed through collaborative stakeholder processes and enjoyed broad consensus within those RTOs. The same cannot be said of PJM's unilateral Offer of Settlement here. PJM proposes to switch from the internal market monitor structure developed by PJM in collaboration with its stakeholders, and approved by this Commission as just and reasonable, to an external market monitoring structure that PJM management alone designed. More importantly, PJM's allegation that Commission policy favors some form of external structure for most other RTOs⁹ is inaccurate. In fact, all but one RTO (the Midwest Independent Transmission System Operator, Inc.) have

⁸ PJM Reply Comments at 9 ("PJM designed the Settlement Offer with an eye to ensuring its close conformity with Commission policy and precedent") and 23 ("the structure it elects to meet this obligation is not a matter dictated to an RTO by the Commission").

⁹ PJM Reply Comments at 9 - 10.

either an internal or a hybrid internal / external market monitor structure.¹⁰ And even the MISO Market Monitor is not completely external. *Two members of the Market Monitor's staff are physically resident in and internal to MISO.* There is no Commission policy favoring external as opposed to internal monitoring structures. Indeed, in its Advanced Notice of Proposed Rulemaking on Wholesale Competition in Regions with Organized Electric Markets, the Commission clearly states that it “has never required that MMUs conform to any standardized organizational structure” and “declines to impose a ‘one size fits all’ approach toward the structure of MMUs.”¹¹

Additionally, the principle cited in the PJM Reply at page 9 -- those seeking a change from explicit Commission policy must offer convincing reasons for such a change -- actually works against PJM's requested relief. It is PJM that seeks the abrupt and summary change in the internal market monitoring structure that has been in place for nearly a decade in PJM. PJM conveniently forgets that the Commission has approved PJM's existing internal market monitor structure, that the internal structure received broad support from stakeholders in PJM and that this Commission-approved internal structure worked without incident until recently. It is PJM that bears the burden to demonstrate why it is necessary to switch from a Commission-approved structure for market monitoring in PJM, not Joint Complainants. PJM has failed to satisfy that burden here.

¹⁰ RTO-ISO Handbook, <http://www.ferc.gov/industries/electric/indus-act/rto/handbook.asp>. The Handbook identifies the California ISO (Section 38 of CAISO OATT), as well as PJM, as having an internal market monitor, and further identifies the New York ISO (Attachment H to the NY ISO Market Services Tariff, *New York Independent System Operator, Inc.*, 89 FERC ¶ 61,196 at 2 (1999)), ISO-New England (Section 9.4.2 of the ISO-NE and NEPOOL Participants Agreement) and the Southwest Power Pool (Attachment AJ, Exhibit A to SPP OATT) as having both internal and external market monitors.

¹¹ *Wholesale Competition in Regions with Organized Electric Markets*, Docket Nos. RM07-19-000, et al., ANOPR issued June 22, 2007 at PP 109-110.

For these reasons, this Commission should reject PJM's request for a guidance order, and the question of what "went wrong" in PJM's interactions with the Market Monitor must be considered so that any necessary changes to the existing Market Monitoring Plan can be drafted to avoid the same mistakes going-forward.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the Joint Complainants respectfully request that the Commission (1) deny PJM's request for a guidance order; (2) allow ongoing settlement discussions to continue; and (3) direct the commencement of discovery procedures, with the appointment of an Administrative Law Judge to resolve any discovery disputes.

Respectfully submitted,

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September 12, 2007

ATTACHMENT A

August 22, 2007

Via Electronic Delivery

PJM Interconnection, LLC Board of Managers
Attn: Mr. Howard Schneider, Esq., Chair
955 Jefferson Avenue
Norristown, PA 19428

**re: Discussions Regarding the Going-Forward Structure of Market
Monitoring Unit**

Dear Mr. Schneider:

The undersigned¹ are the parties that comprise the "Joint Complainants" in the ongoing complaint proceedings before the Federal Energy Regulatory Commission at Docket Nos. EL07-56-000 and EL07-58-000 (consolidated). Joint Complainants, many of whom were in attendance at the August 2, 2007 PJM Members Committee meeting, either heard or have since read the remarks you delivered at that meeting. Joint Complainants have also received and carefully reviewed the unilateral Offer of Settlement that PJM filed in the dockets above on the same day. This letter provides a cursory response to the Offer and, more importantly, requests a process to resolve the pending complaints.

Joint Complainants were heartened by your remarks to the Members Committee on August 2. We appreciate your commitment to Board access and strongly support the Board's recommitment to grid reliability, competitive wholesale markets and the core bedrock principle of unassailable integrity throughout the organization.

Joint Complainants were however, equally disheartened by the Offer of Settlement. Over the past 6 months, most of the parties comprising the Joint Complainants have communicated, either directly to the PJM Board or PJM management or both, their strong desire for a truly independent and fully functional Market Monitoring Unit ("MMU").

- In letters dated March 28, 2007, and April 4, 2007, the Consumer Advocates stated to PJM management and the PJM Board the Consumer Advocates' objectives for an MMU structure. Copies of those letters are attached.

¹ Allegheny Electric Cooperative, Inc; Borough of Chambersburg, Pennsylvania; Cities and Towns of Hagerstown, Thurmont, and Williamsport, Maryland; District of Columbia Office of the People's Counsel; Illinois Citizens Utility Board; Indiana Office of Utility Consumer Counselor; Maryland Office of People's Counsel; New Jersey Division of Rate Counsel; Office of the Attorney General of Virginia, Division of Consumer Counsel; Office of the Ohio Consumers' Counsel; Old Dominion Electric Cooperative; Pennsylvania Office of Consumer Advocate; the PJM Industrial Customer Coalition; Southern Maryland Electric Cooperative, Inc.; and the State of Delaware, Division of the Public Advocate.

- In connection with the April 5 Technical Conference on Market Monitoring, most of the parties that now comprise the Joint Complainants provided a Statement of Principles to identify public interest-oriented characteristics of an MMU. A list of those principles is attached.
- During the May 1, 2007 meeting between the Board and PIEOUG, PIEOUG reiterated its strong belief that MMU independence and effectiveness can best be met by having the *market monitor report to the Board* and that is critical to *continue the practice* of the MMU interactions within the RTO and the electric markets.
- At the Annual Meeting, a representative from one of the Joint Complainants delivered oral remarks to the PJM Board conveying thoughts on an appropriate MMU structure.
- In written comments prior to the issuance of the draft Strategic Report, several of the Joint Complainants voiced strong (and consistent) positions on an appropriate MMU structure. Many parties reiterated those positions after the draft Strategic Report was released.

The unilateral Offer of Settlement is, in most respects, non-responsive to the positions that have been consistently voiced by the Joint Complainants. From all appearances, the Offer of Settlement suggests an attempt by PJM to obtain Commission approval of the outcomes adopted in the PJM Strategic Report process, with little acknowledgement of Joint Complainants' positions. Regretfully, Joint Complainants have no choice but to reject the Offer of Settlement and will be voicing that position in written comments filed with the Commission today.

Additionally, Joint Complainants are concerned with PJM's communication with only one set of litigants, the Organization of PJM States, Inc. ("OPSI") before making its Offer public. While we have the utmost respect for OPSI's unique position and role in PJM, we agree with OPSI's concern expressed in their June 8 Letter to Ms Zibelman that other parties to this proceeding not be neglected as discussions proceed.

Joint Complainants realize that PJM is going through significant cultural change, and we share the Board's view that such change will take place over time via daily reinforcement.² Joint Complainants remain hopeful that the PJM Board will endeavor to reach consensus with Joint Complainants and members of OPSI – the two groups that filed Section 206 complaints with the Commission – and ultimately with other PJM stakeholders. Joint Complainants also remain hopeful of the PJM Board's and the complainants' ability "to come to a resolution of the controversy with an institutional solution" To that end, Joint Complainants hereby indicate their willingness and desire to enter into discussions directly with the PJM to resolve the matters raised in their complaint. In this era of transition and change, we ask that a representative number of Board members participate in these discussions as well. Joint Complainants believe that

² "The word from the top down and the bottom up has been and will continue to be "integrity." Without it we are nothing and with it we are everything. This message will be reinforced day in and day out throughout the organization."

involvement in those discussions by OPSI and Dr. Bowring would facilitate consensus resolution of both pending complaints.

We look forward to working with you on resolving these matters.

Very truly yours,

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ATTACHMENT B

Sent via email

From: Howard Schneider, Chairman, PJM Board of Managers
To: Joint Complainants in Docket Nos. EL07-56-000 and EL07-58-000 (consolidated)
Sent: Tuesday, August 28, 2007 3:49 PM
Subject: Response to Joint Complainant's letter dated August 22, 2007

Dear All,

I was distressed, particularly after our phone conversation last Tuesday, to receive your letter to me stating that you were "disheartened" by PJM's Offer of Settlement. The Offer of Settlement:

- was intended, in all good faith, to find an acceptable solution for everyone to the MMU crisis;
- put forth major assurances of the MMU's independence – a clear and unequivocal change of direction for PJM;
- open the process, through a FERC filing, to anyone who wished to be involved; and
- was truly unilateral – PJM did not discuss this proposal with anyone before it was filed at FERC.

It is not that PJM has not heard your statements about the MMU; rather, it is that your statements are some of the myriad considerations PJM factored into its Offer of Settlement. And, the Offer of Settlement is most assuredly not non-responsive – it may take a different tact than you wish; however PJM is prepared to make reasonable compromises. Compromise is a two-way street and PJM hopes you have heard our concerns as well.

As stated by me in our phone call on Tuesday, the Board is a policy-making body and will not engage in the day-to-day negotiation of the terms of the Offer of Settlement. We leave that in the capable hands of Management, in whom we have every confidence and who will carry out our policy directives.

Sincerely,

Howard Schneider, Chairman of the PJM Board

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in these proceedings.

Dated at Washington, D.C. this 12th day of September 2007.

/s/ Adrienne E. Clair
Adrienne E. Clair