

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

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)

**SUPPLEMENTAL COMMENTS OF
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 COUNSEL;
MARYLAND OFFICE OF THE 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;
PJM INDUSTRIAL CUSTOMER COALITION;
SOUTHERN MARYLAND ELECTRIC COOPERATIVE, INC.;
STATE OF DELAWARE, DIVISION OF THE PUBLIC ADVOCATE**

Pursuant to Rule 215(a) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”), Joint Complainants¹ hereby submit these supplemental comments to address the additional information presented in the evidentiary submissions to the Commission by the PJM Market Monitor,

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 Counsel; 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.

Dr. Joseph E. Bowring, and by PJM Interconnection, LLC (“PJM”) on June 12, 2007.²

Joint Complainants also briefly address (1) PJM’s letter of July 2, 2007 (“PJM Letter”) and (2) the July 17, 2007 “Answer of the Organization Of PJM States, Inc. to PJM’s July 2, 2007 Letter/Motion to Dismiss” (“OPSI Answer”).

I. Additional Evidence Filed On June 12, 2007

On April 27, 2007, Joint Complainants presented all the evidence available at the time in support of their Complaint. Joint Complainants relied primarily on Dr. Bowring’s Prepared Statement at the Commission’s April 5, 2007 Technical Conference on Market Monitors. Dr. Bowring’s Statement was appended to the Joint Complaint as Attachment A. Of particular relevance, Dr. Bowring stated succinctly at that time that:

Very recently, the issue of independence and, in fact, the viability of the PJM MMU, has reached very significant proportions at PJM. Last week, Mr. Harris, CEO of PJM, informed the MMU staff that it was PJM management’s view that, in order to ensure independence, the MMU function would be best provided by an external consultant rather than the current MMU. At that meeting, Mr. Harris informed MMU staff that there were lots of open positions in other divisions at PJM for which they were qualified and that they could apply for. Mr. Harris stated that PJM would be **removing the MMU’s database from the MMU** and transferring it elsewhere in PJM....³

Dr. Bowring’s written statement raised additional concerns about management infringement on the role of the MMU in the RTO when Dr. Bowring stated:

PJM management has taken a series of actions towards the MMU which I believe are inconsistent with independence and with the objectives of the MMU as stated in the tariff. As examples, these include ordering me to

² Rule 215(a)(1) and (a)(3)(i) permit the filing and effectiveness of this supplement to a pleading as a matter of right to supplement the Joint Complaint. 18 C.F.R. §§ 385.215(a)(1) and (a)(3)(i) (2007); *see also* Brief of Respondent Federal Energy Regulatory Commission in *Cajun Electric Power Cooperative, Inc. v. FERC*, D.C. Cir. No. 92-1461 *et al.*, Final Brief, dated February 18, 1994, at 33-34 (a copy of the relevant pages of the Commission’s Brief is attached hereto as Attachment 1).

³ Attachment A to the Joint Complaint, Prepared Statement of Joseph E. Bowring PJM Market Monitor, page 3, paragraph 12 (emphasis added).

modify the State of the Market Report, preventing me from making a presentation to a membership committee on the exemption of certain interfaces from mitigation when PJM management disagreed with my analysis and delaying the release of an MMU report regarding the regulation market based on management disagreements with our conclusions.⁴

In its order issued May 18, 2007, the Commission directed PJM and Dr. Bowring to respond to data requests regarding the issues raised in the Joint Complainants' Complaint and the complaint filed by the Organization of PJM States, Inc. ("OPSI") in Docket No. EL07-58-000.⁵ In this regard, the Commission observed that the allegations in the two complaints "turn primarily on factual disputes."⁶ PJM and Dr. Bowring provided their respective responses to the Commission's data requests on June 12, 2007.

Based on the additional factual information presented on June 12, it is apparent that the evidence submitted by Joint Complainants comprised the tip of the iceberg that PJM management had in fact infringed on the role of the MMU. The information in the June 12 submissions provides compelling confirmation of the Joint Complainants' concerns that PJM management was impinging upon the MMU's independence in violation of the PJM Open Access Transmission Tariff ("PJM OATT" or "Tariff").

The most prominent example of PJM's tariff violations is its interference with the publication of the MMU's independent conclusions and analysis in the State of the Market Report. The PJM OATT states:

The Market Monitoring Unit shall prepare and submit to the PJM Board and the PJM Members Committee, annual state-of-the-market reports on the state of competition, and

⁴ *Id.* at p. 2, paragraph 10.

⁵ *Allegheny Electric Coop.*, 119 FERC ¶ 61,165 (2007).

⁶ *Id.* at P 13.

the efficiency of, the PJM Market. In such reports, the **Market Monitoring Unit** may make recommendations regarding any matter within its purview.⁷

As succinctly summarized in the July 17 OPSI Answer, the factual material submitted subsequent to the filing of Joint Complainants' Complaint indicates that, contrary to PJM's attempts to explain away its actions as part of its management responsibilities, PJM has violated its Tariff by interfering with this responsibility of the Market Monitor.⁸ It is fundamental to the role of the Market Monitor, and the reliance that is placed on that role, that the State of the Market report reflect the Market Monitor's independent assessment of the market without interference from PJM management.

What is becoming clearer as a result of this additional evidence is that PJM management, through a series of steps, made the MMU responsible to it. What is also becoming clearer is that PJM management has operated from a premise that market implementation should take precedence over customer protection and that, in the opinion of PJM management, it is better to err on the side of under-mitigation than it is to risk over-mitigation. If the Federal Power Act did not exist, or if it were worded differently, such a position might take on some semblance of legitimacy. But the Federal Power Act does exist, and it exists to "guard the consumer from exploitation by non-competitive electric power companies."⁹ Whether the issue is exempt interfaces, or avoidable cost calculations in Reliability Pricing Model auctions, or offer-capping in the regulation market, or complete analysis of the largest utility merger in U.S. history, the Commission

⁷ PJM Open Access Transmission Tariff, Attachment M, Section VII.A (emphasis added).

⁸ See OPSI Answer, pp. 9-13.

⁹ *NAACP v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976); see also *Electrical District No. 1 v. FERC*, 774 F.2d 490, 492-493 (D.C. Cir. 1985) (stating that customer protection is the FERC's primary purpose under the FPA); *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1017 (9th Cir. 2004), *cert denied*, ___ U.S. ____ (2007).

must ensure that the Market Monitoring Unit is analyzing issues with the necessary expertise and tools, and independently of PJM management's views on the issues.

II. Next Steps And Request For Relief

Based on the evidence presented by Joint Complainants in their April 17, 2007 Complaint, as augmented by the evidentiary submissions on June 12, the Commission now has sufficient substantial evidence of the need to act quickly to ensure the ongoing independence and adequacy of the Market Monitoring Unit by granting the relief requested by Joint Complaints in their April 17, 2007 Complaint. Specifically, Joint Complainants request that the Commission:

- Find and conclude that PJM management has unduly interfered with the Market Monitoring Unit's functionality and performance;
- Find and conclude that PJM has violated or, if left unchecked, will violate Attachment M to its Tariff requiring that it provide the Market Monitoring Unit adequate resources and access to data necessary to effectively monitor PJM's markets;
- Ensure going-forward compliance with the requirements in Attachment M of its Tariff by requiring PJM to
 - provide the Market Monitoring Unit with full access to, and control of, all data the Market Monitor determines is necessary to effectively monitor the markets;
 - staff the Market Monitoring Unit at least at the 2006 staff levels with full-time employees;
 - ensure that the Market Monitoring Unit has sufficient independence to present any and all reports, including the State of the Market Report and recommendations on market rule changes directly to PJM committees, task forces and working groups, the PJM Board of Managers, relevant state commissions and agencies and this Commission; and
 - ensure that the Market Monitoring Unit has sufficient independence to meet all its obligations under the Tariff; and
- Direct the PJM Market Monitoring Unit to file reports every two weeks on the sufficiency of its resources and staff, adequacy of access to data needed to effectively monitor the PJM markets, and its independence from PJM management.

These actions are necessary for the Commission to be able to satisfy its statutory obligation to actively monitor the wholesale markets and sellers with market-based rate authority, to ensure just and reasonable rates, and to ensure that the public confidence in wholesale electricity markets is not further diminished. The legal bases for granting this relief were explained in detail in Sections B and C of the Joint Complaint, and will not be repeated here.

Although Joint Complainants believe that the record developed to date supports immediately granting the relief requested by Joint Complainants, the prompt granting of such relief should complement, not preclude, further investigation through a hearing process, including consideration of the pending PJM internal investigation. The hearing is necessary to fully evaluate what went wrong and to provide an evidentiary basis for longer-term structural relief and other relief in this proceeding as requested by OPSI. Accordingly, the Commission should set the matter for hearing and allow full discovery to commence immediately.

III. Response To PJM Letter And OPSI Answer

Although the July 2 PJM Letter is not styled as such, OPSI correctly observes that the PJM Letter is essentially a motion to dismiss the complaints in this proceeding. As discussed above, despite PJM's rhetorical attempts to explain away its actions, the record now contains ample evidence, much of which is not contradicted, supporting a finding that PJM has violated its Tariff provisions calling for the MMU to operate independently and without interference. Thus, to the extent that the Commission treats the July 2 PJM Letter as a motion to dismiss, the Joint Complainants fully support the OPSI Answer opposing such dismissal.

CONCLUSION

The record in this case, as supplemented by the June 12 data responses of PJM and Dr. Bowring, supports immediately granting the relief requested by the Joint Complaints herein. Such relief will help ensure that the PJM Market Monitoring Unit is able to monitor the PJM markets effectively. The Commission should also establish an evidentiary hearing to consider the broader issue of the most appropriate monitoring structure and other issues. Finally, to the extent that the Commission treats the PJM Letter as a motion to dismiss the complaints, such motion should be denied for the reasons set out in the July 17 Answer of the Organization of PJM States, Inc.

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ATTACHMENT A

SCHEDULED FOR ORAL ARGUMENT ON MARCH 22, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1461 et al.

CAJUN ELECTRIC POWER COOPERATIVE, INC.,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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DECEMBER 30, 1993

FINAL BRIEF (FEBRUARY 18, 1994)

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As noted above, it is well-established that a party requesting the Commission to hold an evidentiary hearing must allege specific disputed issues of material fact and must support its allegation by an adequate proffer of supporting evidence, see supra p. 16-17. The customers suggest five reasons why they should be excused from this requirement, none of which withstands analysis.

1. The Commission afforded the Customers adequate time to show that an evidentiary hearing was necessary.

First, petitioners' contention that the Notice of Filing did not give intervenors sufficient time to make such allegations and proffer such evidence is not well-taken. Far from having only six days to request a hearing, they could have done so at any time in the six months after Entergy filed its rates before the Commission's Order on Rate Filing. As the Commission noted, see Order on Rehearing, 60 FERC ¶ 61,168, at 61,617, the parties had enough time to intervene and protest, and they could have requested additional time to file supplements to their notices of intervention and protests if they felt it necessary. Indeed, the Commission's regulations provide that a protest, see 18 C.F.R. § 385.211, is a "pleading," 18 C.F.R. § 385.203, and thus could have been amended as a matter of right at any time in this proceeding, see id. § 385.215(a)(3)(i). Moreover, any customer could have requested the Commission to set the case for hearing by simply filing a motion to that effect, wholly separate from

its intervention or protest, since under FERC's rules, a motion may be filed at "any time," 18 C.F.R. § 385.212(a).

Despite these procedural vehicles, no party except the American Paper Institute (J.A. 569-578) and the Arkansas Cities (J.A. 626-635) attempted to supplement their initial comments; and, as the Commission noted in its Order on Rehearing, "[n]o intervenors requested any additional time to develop a case." 60 FERC ¶ 61,168, at 61,617. Moreover, as the Commission further noted, no party had shown that the six months between the filing and the Commission's Order on Rate Filing was inadequate time to prepare a case. *Id.* at 61,617 n. 11. In these circumstances, the parties clearly were accorded sufficient time to present their contentions to the Commission.

2. The Customers were obligated to proffer evidence to support their request for a hearing.

The customers argue (W. Br. 13-14; R. Br. 11) that they had no obligation to submit any evidence at this stage of the proceeding, when they were filing interventions and protests. They insist (W. Br. 13-14; R. Br. 13) that the Commission's "usual" practice is to order a trial-type hearing or at least provide for a "paper hearing," and that is when evidence is to be presented. Yet they concede that those procedures are unnecessary if there are no disputed issues of fact. It follows, then, that any party desiring a hearing must raise disputed factual issues and proffer supporting evidence before the Commission decides whether to hold a hearing, and whether or not

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 27th day of July, 2007.

/s/ John E. McCaffrey

John E. McCaffrey