

122 FERC ¶ 61,257  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellingshoff.

Allegheny Electric Cooperative, Inc., *et al.* Docket Nos. EL07-56-000  
EL07-56-001  
v. EL07-56-002

PJM Interconnection, L.L.C.

Organization of PJM States, Inc., *et al.* Docket Nos. EL07-58-000  
EL07-58-001  
v. EL07-58-002

PJM Interconnection, L.L.C. (consolidated)

ORDER APPROVING UNCONTESTED SETTLEMENT AND DENYING  
REHEARING

(Issued March 21,2008)

1. In this order, the Commission accepts an uncontested settlement filed by PJM Interconnection, L.L.C. (PJM) on December 19, 2007, on behalf of itself and the parties listed in the Settlement Agreement (Settlement Agreement) proposing Open Access Transmission Tariff (Tariff) and Operating Agreement provisions related to its market monitoring unit (MMU). The Settlement Agreement further provides for an external market monitor with an initial term of six years, and includes contracts with Monitoring Analytics, LLC (Monitoring Analytics) to provide these services.<sup>1</sup> The Settlement Agreement resolves the issues in these consolidated proceedings set for settlement by the Commission in its order on September 20, 2007.<sup>2</sup> In addition, the Commission denies the requests for rehearing of the September 20, 2007 Order.

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<sup>1</sup> These agreements are entered into between PJM and Monitoring Analytics, LLC, a company formed by the current market monitor, Dr. Joseph E. Bowring.

<sup>2</sup> *Allegheny Electric Cooperative*, 120 FERC ¶ 61,254 (2007) (September 20, 2007 Order).

2. The comprehensive revisions to the Tariff, Operating Agreement, as well as new agreements for external market monitoring services that are filed as part of this Settlement Agreement, define the roles and authorities for market monitoring among the MMU, the PJM Board, and PJM management with greater specificity than currently defined in Attachment M of the Tariff. Identification and specification of relationships and roles defined by these revisions should help ensure that the analyses performed by the MMU remain independent and objective. Maintaining the objectivity of the PJM MMU and defining its relationship with PJM and stakeholders are key to ensuring a well functioning electricity market.

### **I. Background**

3. On April 17, 2007, the District of Columbia Office of the People's Counsel, on behalf of Joint Complainants,<sup>3</sup> filed a complaint alleging that PJM Interconnection, L.L.C violated Tariff obligations with respect to the independence of the MMU. The Joint Complainant's filing was assigned Docket No. EL07-56-000. On April 23, 2007, the Organization of PJM States, Inc. (OPSI), on behalf of itself and several individual state commissions,<sup>4</sup> filed a complaint against PJM alleging similar Tariff violations by PJM. OPSI's complaint was assigned Docket No. EL07-58-000. PJM filed answers in both dockets, denying the allegations made in the complaints.

4. On May 18, 2007 the Commission issued an order consolidating the proceedings.<sup>5</sup> The Commission stated the allegations of Tariff violations turn primarily on factual disputes, and served data requests upon both PJM and Dr. Bowring to obtain the factual information necessary to resolve the complaints.

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<sup>3</sup> 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.

<sup>4</sup> Delaware Public Service Commission; District of Columbia Public Service Commission; Indiana Utility Regulatory Commission; Kentucky Public Service Commission; Maryland Public Service Commission; New Jersey Board of Public Utilities; North Carolina Utilities Commission; Public Utility Commission of Ohio; Pennsylvania Public Utility Commission; Virginia State Corporation Commission.

<sup>5</sup> *Allegheny Electric Cooperative*, 119 FERC ¶ 61,165 (2007).

5. On August 2, 2007, PJM submitted a unilateral offer of settlement (Unilateral Offer) intended to resolve market monitoring structural issues raised by the complaints. The Unilateral Offer proposed to establish an external market monitor reporting to the PJM Board, obtained through a services contract administered by the PJM Board. PJM intended that the settlement would define the role of the external market monitor, ensure that it would be independent from PJM management, and preserve the role of PJM and its membership in designing and implementing the market rules that are filed with the Commission. The Unilateral Offer proposed to retain the existing market monitor for an initial term of two years, and provided for Commission approval of future changes to the market monitor. The Unilateral Offer also addressed the transition of current internal MMU employees from PJM to the external MMU. Finally, the external MMU would be funded through charges to PJM customers pursuant to a separate schedule in the PJM Tariff.<sup>6</sup>

6. In the September 20, 2007 Order, the Commission addressed PJM's Unilateral Offer and the consolidated complaints. The Commission found that PJM had not violated its Tariff. However, the Commission also found that the evidence raised questions as to whether the tension between PJM's management and the market monitor prevented a workable relationship that could compromise the MMU's ability to perform its Tariff-defined functions.

7. The Commission further found that it would be desirable for the parties themselves to work out the details of the relationship between PJM and its market monitor. Consequently, the Commission did not accept the PJM Unilateral Offer and instead established settlement procedures.<sup>7</sup> On October 5, 2007, the Commission accepted the consensus proposal to appoint John S. Moot (Commission Chief of Staff) as facilitator in the settlement proceedings and declared Mr. Moot as non-decisional in this matter.<sup>8</sup> Requests for rehearing of the September 20, 2007 Order were filed by the Joint Complainants<sup>9</sup> and OPSI.

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<sup>6</sup> Both Joint Complainants and OPSI opposed the PJM Unilateral Offer.

<sup>7</sup> On September 24, 2007, Edison Mission Marketing & Trading, Inc. filed a motion to intervene out-of-time. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), the Commission will grant Edison Mission's late-filed motion to intervene given its interest in the proceeding, the early stage of the settlement proceeding, and the absence of undue prejudice or delay.

<sup>8</sup> *Allegheny Electric Cooperative*, 121 FERC ¶ 61,021 (2007).

<sup>9</sup> The Joint Complainants have been joined by the American Public Power Association on rehearing.

8. On December 19, 2007, PJM, on behalf of itself and the settling parties, submitted the Settlement Agreement and attached documents pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.<sup>10</sup> The settling parties state that the Settlement Agreement resolves all issues that were designated for settlement discussions by the September 20, 2007 Order. The Settlement Agreement, however, specifically reserves and does not resolve the pending rehearings of the September 20, 2007 Order. The settling parties request that the Commission approve the Settlement Agreement by March 21, 2008. On December 19, 2007, the facilitator filed a report recommending approval of the Settlement Agreement without change, modification or condition.

9. No parties filed to contest the Settlement Agreement.<sup>11</sup>

## **II. Settlement Agreement**

### **A. Overview**

10. The Settlement Agreement includes revisions to the PJM Market Monitoring Plan (Attachment M to the PJM Tariff), revisions to section 18 of the PJM Operating Agreement (concerning certain procedures for release of confidential information), and revisions to Schedule 9 of the PJM Tariff (establishing charges for the recovery of MMU costs). Additionally, PJM filed a Market Monitoring Services Agreement and a Service Level Agreement between PJM and the new MMU that implement detailed rules and procedures for MMU access to PJM data. The Settlement Agreement proposes an effective date of June 1, 2008 for these agreements, and Tariff and Operating Agreement provisions.

### **B. Revision to Attachment M of the PJM Tariff**

11. The Settlement Agreement includes revisions to the Market Monitoring Plan, Attachment M to the PJM Tariff, and establishes that the MMU shall be independent from any person or entity, except for the PJM Board as specified by the Settlement Agreement (as discussed below, P14), and the Commission. Revised Attachment M further provides that no person or entity shall have the right to preview, screen, alter, delete, or otherwise exercise editorial control over or delay MMU actions, investigations, conclusions, or recommendations.

12. The revised Market Monitoring Plan further defines the functions and responsibilities of the MMU. The MMU shall objectively monitor the competitiveness of the PJM markets, investigate violations of market rules, recommend changes to market

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<sup>10</sup> 18 C.F.R. § 385.602 (2007).

<sup>11</sup> Comments in support were filed by the PSEG Companies.

rules, and prepare reports. The revised Market Monitoring Plan clarifies that the MMU shall investigate actual or potential exercises of market power or rule violations, shall monitor implementation of market rules or operation, and monitor other matters as necessary to prepare reports contemplated by the revised Market Monitoring Plan.<sup>12</sup>

13. While the revised Market Monitoring Plan provides that the MMU may advise PJM of any disagreement with implementation of market rules or operation,<sup>13</sup> the MMU will have no authority to direct PJM to modify its implementation of market rules or operation. However, the MMU may initiate and propose, through the stakeholder processes, changes to the design of PJM markets when market flaws are detected and may participate (consistent with the rules applicable to all PJM stakeholders) in stakeholder bodies. The MMU also may recommend that PJM take specific mitigation action that is authorized under the PJM rules, but shall not have authority to modify PJM operational decisions. The MMU may make reports on such recommendations to the Commission or other governmental agencies or the PJM membership and may, at its discretion, provide studies or reports on wholesale market issues upon written request of the OPSI Advisory Committee.

14. With respect to the PJM Board, the Settlement Agreement provides that the PJM Board shall have authority and responsibility (1) to review the budget of the MMU consistent with the requirements of section III. E.,<sup>14</sup> and (2) to propose to terminate, retain by contract renewal, or replace the MMU consistent with the requirements of section III. F. The Settlement Agreement also provides that the PJM Board and the MMU shall meet periodically on matters relevant to the discharge of duties under the Market Monitoring Plan.

15. Revised Attachment M provides that the MMU shall prepare a budget sufficient to cover the anticipated actual cost to perform the services under Attachment M. Revised Attachment M also contains provisions for revisions, disputes, and amendments to the MMU budget, and a funding mechanism, as discussed below.

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<sup>12</sup> The revised Market Monitoring Plan states that the MMU will submit its annual state-of-the-market report contemporaneously to the Commission, state commissions, PJM Board, PJM management, and the PJM Members Committee and may prepare additional reports in the same manner.

<sup>13</sup> Except for matters governed by the corrective action provisions of the Settlement Agreement, if the disagreement can not be resolved informally, the MMU may inform the Commission, other governmental agencies, or the PJM membership.

<sup>14</sup> Review of the MMU budget is coordinated with the PJM Finance Committee and the OPSI Advisory Committee.

16. The Market Monitoring Plan provides that upon the effective date of the revised Attachment M, there shall be a contract between PJM and the MMU. Revised Attachment M specifies the terms of the contract, and the standards and process for proposed termination of the contract. Revised Attachment M provides for an initial contract term of six years with subsequent terms of three years with agreement of the parties.

17. Revised Attachment M states that the contract with the MMU shall not be terminated until: (1) the Commission has reviewed the PJM Board's termination proposal; (2) the Commission finds that the PJM Board has demonstrated that termination is justified; (3) the Commission has approved a process for selecting a new MMU; and (4) a new MMU has been selected pursuant to the Commission-approved process.

18. Revised Attachment M establishes and specifies the composition and function of an OPSI Advisory Committee,<sup>15</sup> a MMU Advisory Committee to serve as a liaison between the MMU and PJM stakeholders,<sup>16</sup> and a PJM liaison to facilitate communications between PJM employees and the MMU.

### **C. Revision to Section 18 of the PJM Operating Agreement**

19. The Settlement Agreement includes revision to section 18.17 of the PJM Operating Agreement<sup>17</sup> concerning procedures for the treatment of confidential information in the custody of PJM and the MMU.<sup>18</sup> These revisions address the provision and control of confidential information and remedies in the event of a breach of the established protocols. The revisions ensure that the confidentiality rules apply to the

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<sup>15</sup> The OPSI Advisory Committee is proposed to be comprised of five representatives selected by OPSI to provide advice to the Commission, MMU, PJM Board and PJM stakeholders regarding any matter concerning the MMU, market monitor, or the Market Monitoring Plan.

<sup>16</sup> Revised Attachment M states that the MMU Advisory Committee will not have authority to direct, review, supervise, or otherwise interfere with the MMU's functions.

<sup>17</sup> The revisions include changes to the Schedule 10 (Form of Non-Disclosure), and the Schedule 10A (Form of Certification) for the provision and control of information provided by either PJM or the MMU.

<sup>18</sup> The Settlement Agreement includes changes to sections 18.17.2 and 18.17.3 to make clear that the existing special rules on disclosure of information requested by the Commission or its staff do not apply to requests for production of information under Subpart D of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385, Subpart D (2007).

MMU. They also provide for access to confidential information by state commissions through a certification agreement that ensures the state commission will protect the information, and for access by authorized persons required to execute non-disclosure agreements.

#### **D. Revision to Schedule 9 of the PJM Tariff**

20. The Settlement Agreement includes a new Schedule 9-MMU to the PJM Tariff as a means for PJM to collect from customers the amounts that PJM pays to the MMU. While Schedule 9-MMU uses the same billing determinants as the existing schedule, it assesses the charges based on the MMU's approved annual budget,<sup>19</sup> rather than using a stated rate. PJM will recover the costs for market monitoring services from the same customers that currently bear the costs.

#### **E. Other Provisions**

21. The Settlement Agreement includes two agreements. The first is the Market Monitoring Services Agreement under which PJM will obtain services from Monitoring Analytics. This agreement governs the relationship between PJM and Monitoring Analytics including, among other things, access to data, payment, staffing, dispute resolution, and conflict of interest. The second is the Service Level Agreement, also between PJM and Monitoring Analytics, which provides procedures and protocols for the provision of information to the MMU.

### **III. Commission Determination**

#### **A. Settlement Agreement**

22. The Commission commends the parties for working together and building a genuine consensus to resolve these contentious issues. The Settlement Agreement provides comprehensive revisions to the current structure of the PJM market monitoring unit's relationship with PJM and also adds specificity to the role of the market monitor. The Settlement Agreement also provides that the MMU will operate external to PJM under an initial contract term of six years. Under the proposed arrangement, the MMU will operate independently from PJM management, can participate in the stakeholder process with other PJM stakeholder groups, will be able to bring concerns to PJM stakeholders and the Commission through defined processes, and will issue reports contemporaneously to PJM members, management, state commissions, and the Commission.

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<sup>19</sup> The initial budget is established by the Settlement Agreement at \$9,276,712, with subsequent budgets established pursuant to the provisions of Attachment M.

23. The Settlement Agreement is fair and reasonable and in the public interest and is hereby approved. The Commission's approval of the Settlement Agreement does not constitute approval of, or precedent regarding, any principle or interest in this proceeding.

24. With respect to any future modifications, the Settlement Agreement states that:

Except as expressly provided in Article III or in connection with a modification to the second paragraph of section II. E of this Settlement Agreement, the Commission's review of any proposed modifications to the Settlement Agreement shall be based on a just and reasonable standard and not the public interest standard.<sup>20</sup>

Section III of the Settlement Agreement provides that:

Except as expressly set forth in the following paragraph, nothing contained in this Settlement Agreement shall be construed as:  
(a) affecting in any way PJM's right unilaterally to make application to the FERC for a change in rates, term and conditions under section 205 of the Federal Power Act; or (b) restricting any rights of the other parties under the Federal Power Act, including rights under section 206.

For a period of six (6) years from the effective date of the attached revisions to Attachment M, if any party to the Commission proceedings in Docket Nos. EL07-56 or EL07-58, Dr. Bowring or the company established by Dr. Bowring petitions the Commission for a change to Attachment M or section 18.17.4 of the PJM Operating Agreement (including Schedules 10 and 10A), such change shall, in the absence of agreement of all such entities, be governed by the "public interest" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The foregoing protections shall include the standards and processes set forth in sections III. F of Attachment M at the end of the initial contract term. Notwithstanding the foregoing, if the Commission issues a final rule in Docket No. RM07-19 (or in any other rulemaking proceeding affecting market monitoring) that requires a change to Attachment M or section 18.17.4 of the PJM Operating Agreement, PJM shall not be precluded by this Settlement

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<sup>20</sup> Settlement Agreement, section V. B. The second paragraph of section II. E addresses successor agreements.



Agreement from submitting a compliance filing effecting such change, provided, however that any such filing shall be limited solely to changes required by the Commission, not discretionary changes made on behalf of PJM or an other person or entity.<sup>21</sup>

25. In this case, the Commission accepts the standard of review for modifications, as provided by the Settlement Agreement.

26. The settling parties have filed the Market Monitoring Services Agreement and the Service Level Agreement. Consistent with the Commission determination in *Midwest Independent Transmission System Operator, Inc.*,<sup>22</sup> PJM is required to refile these agreements either as part of its Tariff or as rate schedules consistent with the requirements of Order No. 614.<sup>23</sup>

## **B. Rehearing**

### **1. Requests for Rehearing**

27. Requests for rehearing were filed by the Joint Complainants and OPSI. The Joint Complainants contend that the Commission erred in not setting the issues that had been raised in its complaint for evidentiary hearing and discovery procedures.<sup>24</sup> Joint Complainants contend that the Commission's September 20, 2007 Order did not follow proper procedures in issuing an order that was the functional equivalent of a summary disposition. The Joint Complainants also contend that the Commission erred in determining that no Tariff violation had occurred. The Joint Complainants state that the September 20, 2007 Order failed to find that PJM had violated the Tariff requirement to ensure the cooperation of PJM for the effective functioning of the MMU.

28. OPSI contends that the Commission erred by failing to provide the parties with the opportunity to investigate the allegations raised in the complaints. OPSI also contends that the Commission erred in finding that PJM had not violated the provisions of its Tariff. OPSI states that the record supports that PJM had engaged in a pattern of conduct

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<sup>21</sup> Settlement Agreement, section III.

<sup>22</sup> 97 FERC ¶ 61,326, at 62,518 (2001); 99 FERC ¶ 61,237 (2002) (accepting compliance filing).

<sup>23</sup> *Designation of Electric Rate Schedule Sheets*, Order No. 614, 65 Fed. Reg. 18,221 (Apr. 7, 2000), FERC Stats. & Regs. ¶ 31,096 (2000).

<sup>24</sup> The Joint Complainants do not object to holding the hearing procedures in abeyance pending the settlement procedures established in the September 20, 2007 Order.

with the express intention of interfering with the independent operation of the MMU. In addition, OPSI contends that the Commission erred in granting undue deference to the opinion of Dr. Bowring regarding whether PJM had violated its Tariff.

## 2. Commission Determination

29. The Commission denies the requests for rehearing and reaffirms the finding that PJM did not violate its Tariff. At the outset, we note that no purpose would be served by requiring the parties to litigate whether PJM violated its Tariff when the remedies requested in the complaint have been satisfied by the uncontested settlement.

### a. The Remedies Requested in the Complaint are Addressed by the Uncontested Settlement

30. In their original complaint, the Joint Complainants requested the Commission to:

- Direct PJM to comply with Attachment M by requiring it to:
  - provide the Market Monitor with access to data,
  - fully staff the Market Monitor to 2006 levels,
  - ensure the Market Monitor independence regarding reports and recommendations,
  - ensure the Market Monitor independence to meet its Tariff obligations,
  - direct the Market Monitor to file reports every two weeks on sufficiency of resources, staff and access to data as well as its independence.

31. In its original complaint, OPSI similarly requested the Commission to:

- Direct PJM to remedy its Tariff violations and refrain from them in the future;
- Direct PJM to modify its Market Monitoring Plan to convene a joint federal and state board under section 209 of the FPA, or amend its Tariff to remove the MMU and its personnel from supervision by any officer or employee of PJM and have it supervised by the PJM Board of Managers, and to mandate that any action by the Board regarding discipline or discharge of MMU personnel be subject to formal notice to and review by the Commission.

32. The remedial issues raised by the complaints are all addressed by the uncontested Settlement Agreement. The Settlement Agreement includes revisions to the Market Monitoring Plan, and establishes that the MMU shall be independent from any person or entity, except for the PJM Board as specified by the Settlement Agreement (discussed above), and the Commission. Revised Attachment M further provides that no person shall have the right to preview, screen, alter, delete, or otherwise exercise editorial control over or delay MMU actions, investigations, conclusions, or recommendations.

The revised Market Monitoring Plan further provides that the MMU shall monitor the competitiveness of the PJM markets, investigate violations of market rules of the MMU and provides that the MMU shall prepare reports as it deems appropriate in the discharge of its responsibilities under the revised Market Monitoring Plan. It also provides for the MMU's access to data for an MMU budget sufficient to cover the costs of providing the services required by the revised Market Monitoring Plan.

33. Given that the Settlement addresses the remedies requested by the complaint and establishes a market monitoring plan that the rehearing requesters support, there is no reason to expend the time and expense of litigating whether PJM may be deemed to have violated its Tariff in the past. Establishing an historic violation only has meaning if it would lead to prospective relief; here the rehearing requesters and the other parties already have agreed to prospective relief.

**b. Need for an Evidentiary Hearing**

34. The principal argument raised on rehearing by the Joint Complainants and OPSI is that the September 20, 2007 Order erred in denying the request for an evidentiary hearing. After reviewing the complaints, the Commission determined that additional information was necessary, and as a result issued data requests to both PJM and Dr. Bowring. Specifically, the Commission sought and received information regarding the current and historic staffing levels, employee transfer and retention policies, resources available to the MMU, and employee access to data required by the MMU to perform its Tariff-defined functions. In addition, the Commission sought and received detailed information regarding the interactions of Dr. Bowring and PJM management, and the protocols for communications and transfer of documents between the MMU and PJM management, and the PJM Board. The Commission also reviewed the prepared and oral statements made by Dr. Bowring at the April 5, 2007 technical conference. In total, the Commission reviewed over 2,700 pages of documents received in response to the data requests. After reviewing the additional evidence provided in response to the data requests, the Commission explicitly found that the factual predicate necessary to determine whether Tariff violations had occurred had been satisfied. This process is consistent with the broad discretion afforded the Commission in managing its proceedings.

35. We find that the extensive paper record described above is sufficient, without the need for a trial-type hearing, for the Commission to have evaluated whether PJM violated its Tariff. The use of a paper hearing procedure is reasonable where forward-looking industry-wide regulation is at issue and any genuine issues of material fact can be adequately resolved on the written record.<sup>25</sup> Courts have found that an agency has broad

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<sup>25</sup> See *Central Maine Power Co. v. FERC.*, 252 F.3d 34, 46 (1st Cir. 2001).

discretion to determine its procedure.<sup>26</sup> As we discuss below, while the rehearing requests raise certain questions about witness credibility, we do not find that resolving the credibility issues is necessary for us to determine whether the Tariff was violated or whether prospective action was needed to resolve the tensions that had developed with respect to the MMU.

**c. Alleged Tariff Violations**

36. We also reaffirm our finding that PJM has not violated its Tariff. PJM's Tariff with respect to market monitoring did not specify the exact roles of the MMU and the PJM Board and Management. Attachment M<sup>27</sup> requires PJM "to establish and provide appropriate staffing and resources to the Market Monitoring Unit," specifying that the MMU "shall be comprised of full-time employees of PJM having the experience and qualifications necessary to implement the Market Monitoring Plan" and that the MMU is permitted to "retain such consultants and experts as it deems necessary, subject to the oversight of the President and the PJM Board." Attachment M also provides that the President is to ensure that the MMU has adequate resources and access to required information.

37. But the Tariff does not provide the MMU with unfettered discretion to issue reports without review and oversight from PJM. It provides that "the Market Monitoring Unit shall be responsible to the President and the PJM Board regarding implementation of this Plan."<sup>28</sup> Attachment M further provides that the president and the MMU shall each have independent authority to refer any matters governed by the Market Monitoring Plan to the PJM Board for review and approval.

38. The issue raised in the complaints was whether PJM's actions had gone beyond proper monitoring and review of the MMU to interference. Given the lack of specificity in the Tariff itself, we reaffirm our conclusion that the actions of PJM, while contributing to undesirable tension with the MMU, did not amount to a Tariff violation.

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<sup>26</sup> See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524-25 (1978) (agencies have broad discretion over the formulation of their procedures); *Michigan Public Power Agency v. FERC*, 963 F.2d 1574, 1578-79 (DC. Cir. 1992) (the Commission has discretion to mold its procedures to the exigencies of the particular case).

<sup>27</sup> Unless referring to revisions to the Market Monitoring Plan in the Settlement Agreement, references to Attachment M are as included in the Tariff, Sixth Revised Volume No. 1, Fifth Revised Sheet No. 450, section V.

<sup>28</sup> *Id.* at section V.D.

39. Although Dr. Bowring objected to a variety of PJM's practices, he did not claim that these practices rose to the level of a Tariff violation in either his remarks at the technical conference or in response to the Commission's data requests. In response to the Commission's data requests, Dr. Bowring stated "I am concerned that if left unchecked, such PJM actions will escalate to the point where PJM would violate the Tariff."<sup>29</sup>

40. OPSI maintains that we should not have placed weight on the MMU's view of a Tariff violation because it is the province of the Commission to determine whether the Tariff has been violated. While the September 20, 2007 Order noted that Dr. Bowring stated that there was no tariff violation, the Commission made its own determination, as discussed fully in the September 20, 2007 Order and herein, that PJM's actions did not violate its Tariff. As we found in the September 20, 2007 Order, while the allegations here indicate that serious friction existed between PJM and the MMU that we needed to resolve, we cannot find that PJM intentionally or willfully violated its Tariff and compromised the independence of the MMU.

**i. Internal Procedures**

41. OPSI maintains that PJM improperly established internal procedures that go beyond Attachment M that were intended to inappropriately restrict the MMU by subjecting the MMU to supervision, oversight and review not only by PJM Senior Management, but by the manager in charge of the markets division. It objects to provisions that it states deprive the MMU of access to information that is in the possession of PJM and provisions that provide that the MMU shall "shall notify," "shall consult with," "shall inform," "shall submit," and "shall provide in advance" to the PJM President nearly all contemplated reports and intended activities prior to publishing the same.

42. While we note that the settlement does not clarify whether the internal procedures will continue in effect or not, their adoption did not violate the PJM Tariff. As stated above, Attachment M provides only a general blueprint of the MMU structure and responsibility. Under Attachment M, the MMU is responsible to the PJM Board and the PJM Board has oversight over the MMU activities. Nothing in Attachment M provided that the MMU would be able to publish reports or take action without reasonable supervision by the PJM Board or those to whom the PJM Board delegated responsibility. The PJM Board implemented these procedures based on its review of the MMU.<sup>30</sup> As we noted in the September 20, 2007 Order, these procedures do not modify Attachment M; to the contrary, they specifically state that nothing in the plan should be interpreted to

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<sup>29</sup> Bowring June 12, 2007 Data Response at 7, 18-19, 35.

<sup>30</sup> SMM-00291.

require the MMU to “take or refrain from any action inconsistent with the provisions of the Plan or Operating Agreement or otherwise compromise the independence of the Market Monitoring Unit.”<sup>31</sup>

43. These procedures require the MMU to provide PJM management with a drafting and review schedule for materials to be distributed to the PJM Board. These procedures also require the MMU to provide an advance copy of MMU reports to the Commission, state agencies or the public. These procedures stress timing, an important criteria given the PJM Board’s concerns with delays in publications of previous reports. These procedures are a reasonable approach to control the flow of information to the PJM Board. Establishment of general procedures for coordination and review of the MMU’s activities is consistent with Attachment M as well as Commission policy.

## ii. Interference with Reports

44. OPSI maintains that PJM used its editorial control in inappropriate ways by editing various reports prepared by the MMU. Joint Complainants similarly maintain that the record was not sufficiently developed with respect to allegations that PJM interfered with the MMU’s reports, arguing that the Commission did not determine whether the MMU was ordered to remove a section of the report and what the motivations for issuing such an order were. Joint Complainants also maintain that further inquiry into such interference is necessary because the September 20, 2007 Order, in responding to a complaint that PJM may have interfered with an MMU presentation to the Market Interpretations Committee, stated that the MMU’s claim “seems to be contradicted by an email.”

45. As discussed above, it is reasonable for the PJM Board to review the MMUs reports. Our review of the internal memorandum indicated that PJM management had concerns with the analytic approach used by the MMU and suggested that he work with other employees to ensure his analysis was complete.<sup>32</sup> However, as we found in the September 20, 2007 Order, it is uncontroverted on the record that the MMU’s analysis was retained in the final draft, with only a change to his conclusion indicating that the MMU would make a recommendation in the future on the issue of competitiveness.<sup>33</sup>

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<sup>31</sup> The Settlement Agreement does not address these procedures.

<sup>32</sup> PJM June 12, 2007 Data Response 6; SMM 01121-01133.

<sup>33</sup> September 20, 2007 Order at P 38.

The MMU also availed himself of the opportunity to raise his concerns to the PJM Board, and the PJM Board established a regular MMU reporting protocol, without the presence of PJM management.<sup>34</sup>

46. We do not find that further inquiry into whether an order to remove a section of the report was issued or the motivations for doing so is necessary or productive when the editorial and other actions of PJM were not inconsistent with the Tariff, the final analysis of the MMU is retained in the report, the PJM Board established a new reporting protocol, and the parties have reached a prospective settlement outlining the ongoing relationship between PJM and the MMU. Even if there were personal and professional differences that should have been handled better, these differences did not affect the substance of the final product produced by the MMU, and we see no need for a further inquiry into such disputes.

47. As to the issue regarding the presentation to the Markets Implementation Committee, resolution of whether Dr. Bowring was permitted to post his slides does not warrant further trial-type or other procedures. Dr. Bowring conceded that timing problems with the exchange of analysis did exist, and, in any event, he did address the committee and was fully able to express his views.<sup>35</sup>

**iii. Removing the MMU's Chairmanship of the Cost Development Task Force**

48. OPSI maintains that removing the MMU's chairmanship of the Cost Development Task Force (CDTF) is another impermissible infringement on the MMU. The CDTF is charged in part with the development and constitution of the cost-based offers that apply when there is a determination of market power. The MMU is responsible for determining the presence of market power in the PJM market and for determining whether price offers from market participants are competitive.

49. As we found in the September 20, 2007 Order, Attachment M does not provide that the MMU necessarily chair the CDTF and, therefore, changing the chairman of the CDTF cannot amount to a Tariff violation. Indeed, prior to Dr. Bowring chairing the committee, it was chaired by a non-MMU member.

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<sup>34</sup> Affidavit of John T. Coughlin, Howard Schneider, and Jean D. Kinsey, Ph.D. (members of the PJM Board CMC), June 12, 2007.

<sup>35</sup> Bowring June 12, 2007 Data Response at 28-29; PJM June 12, 2007 Data Response 7; PJM July 2, 2007 Supplemental Response at 24.

iv. **Transfer of Employees**

50. Joint Complainants maintain that PJM violated its Tariff by targeting two employees for transfer. They claim that issues related to these circumstances should have been more fully explored at a hearing.

51. Attachment M provides only that the President shall ensure that the MMU have adequate resources. Joint Complainants have not shown that the removal of two employees would leave the MMU with inadequate resources. Review of the current and historic staffing levels provided in response to the Commission's data request showed that staffing levels have varied over time, ranging from 13 to 17 employees for the years 2004 through 2007.<sup>36</sup> PJM also responded to the MMU's request by posting for two additional positions as well as putting in place a retention plan for employees.

52. OPSI maintains that the Commission should not take at face value the uncorroborated assertion of the PJM human resources employee who stated that the employees transferred did not believe themselves to have been coerced or intimidated. But OPSI provides no basis for us to undertake further investigation into the details of motivation regarding an internal employee issue when there is no basis to find that the level of staffing for the MMU was so inadequate that it violated Attachment M. While tension obviously existed between PJM and the MMU, which we did address and which the settlement has resolved, such tension does not amount to a Tariff violation that requires further examination through a trial-type hearing.

The Commission orders:

- (A) The Settlement Agreement filed on December 19, 2007 is approved.
- (B) The revisions to the PJM Tariff and the PJM Operating Agreement, as discussed in the body of this order, are accepted to be effective on June 1, 2008.
- (C) The Commission directs PJM to file the Market Monitoring Services Agreement and the Service Level Agreement, as discussed in the body of the order.

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<sup>36</sup> PJM June 12, 2007 Data Response 4.



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(D) The requests for rehearing of the Joint Complaints and OPSI are denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

Document Content(s)

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