



## I. COMMENTS

### A. PJM Requests Excessive Discretion in Addressing FTR Defaults.

PJM is understandably concerned with the tariff provisions governing the disposition of defaulted FTR positions. PJM added provisions after the Tower default that required PJM to immediately liquidate defaulted positions.<sup>3</sup> When faced with the GreenHat default, PJM decided that immediate liquidation would not be prudent and requested a waiver from the Commission.<sup>4</sup> After a settlement eventually resolved the matter, PJM implemented a strategy of allowing the GreenHat positions to default as they come due. The settlement included payments to some participants who asserted harm based on PJM's treatment of the liquidation process.<sup>5</sup>

In the November 30<sup>th</sup> Filing, PJM goes to the opposite extreme, eliminating all specific rules and providing for absolute and unlimited PJM discretion to take any actions to address FTR defaults, including actions not previously contemplated, e.g. entering into negotiations with a bilateral counterparty that offers to acquire some or all of the defaulting Member's FTR positions.

The Market Monitor agrees that the rule in place at the time of the GreenHat default was unduly restrictive. The Market Monitor agrees that more options and more flexibility to address changing circumstances are appropriate. But the Market Monitor believes that clear rules, a clearly defined decision making process, clear metrics, and clear reporting requirements are needed here in order to protect Members and PJM and ultimately the customers who pay for defaults.

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<sup>3</sup> See *PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,279 (2008).

<sup>4</sup> See *PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,209 (2019).

<sup>5</sup> See *PJM Interconnection, L.L.C.*, Submission of Settlement Agreement and Offer of Settlement, Docket Nos. ER18-2068-000 and ER18-2068-001 (October 9, 2019).

The Market Monitor also recognizes that PJM Members approved the approach defined in the November 30<sup>th</sup> Filing. While it is the Members' money at risk, by voting for this approach, current Members are also binding future Members to its terms and imposing costs on present and future customers.

While the standard for a Section 205 filing made with Members' approval is lower than for a Section 206 filing, this filing does not meet the Section 205 standard.

The November 30<sup>th</sup> Filing requests Tariff revisions to provide PJM with "flexibility, within certain parameters, to discern and implement an appropriate approach to resolve a defaulting Member's FTR portfolio based on the facts specific to that Member's default and the market conditions at that time." The November 30<sup>th</sup> Filing includes at the end of a list of possible actions, a statement of PJM's discretion in addition to the possible list of actions to take: "or (4) another course of action the Office of the Interconnection determines to be appropriate under the circumstances that is designed to minimize potential losses to PJM and its Members."

PJM does not explain or define the process by which it will "discern" an appropriate approach. There are not any actual defined and binding parameters. The only guidance is that PJM's actions must be designed to minimize potential losses to PJM and its Members. PJM does not define what it means by losses to PJM. PJM should be required to define exactly what losses to PJM mean and whether that definition creates any conflict between the interests of PJM and its Members. Minimizing potential losses to Members is an appropriate goal, but not adequately defined or detailed. Minimizing potential losses to Members in aggregate is different, for example, than minimizing potential losses to each Member. PJM does not address the definition of discriminatory treatment or define rules to prevent such discriminatory treatment, including decisions about who should be permitted to acquire some or all of the defaulting Member's FTR positions in a bilateral transaction and the price and terms of that acquisition.

PJM does not explain or define its fiduciary duties to Members in addressing defaults. When the FTR Default Proposal affords so much discretion to PJM, there is

enhanced need to specify the associated fiduciary duties associated with and potential liability for the exercise of such discretion. It is not clear that PJM has comparable discretion anywhere else in the tariff.

The defined process is not transparent. PJM's options are not limited to the set of illustrative options listed in the November 30<sup>th</sup> Filing. There can be no transparency into an undefined process. PJM has not defined its reporting requirements, even after the fact, to explain in detail the nature and impact of its decisions.

The proposal does not provide adequate notice of the process PJM will use or is using to address specific defaults. The only provisions for notice address the timing of any special auction and state only that advance notice will be reasonable.

#### **B. PJM Provides No Rules Defining the Appropriate Approach to Defaults.**

PJM does not provide a defined basis, rules or analytical metrics by which PJM would determine the approach that would minimize potential losses or define success after the fact. The November 30<sup>th</sup> Filing states that the proposed flexibility in the tariff language will allow PJM to minimize the cost of liquidating a portfolio because PJM will take into account: degree of protection to the financial integrity of the PJM markets; the size of the defaulting Member's Financial Transmission Rights portfolio, both in absolute terms and relative to overall market volume; the term of the Financial Transmission Rights positions held by the defaulting Member as considered for a single position or on a portfolio basis; whether liquidation is feasible or not, and on what timeline, due to the cessation or curtailment of trading at PJM for all Financial Transmission Rights or a subset of Financial Transmission Rights positions; prevailing market conditions, such as but not limited to market liquidity and volatility; timing of the default and actions taken to address the default market liquidity and the potential for excessive price volatility, neither of which are defined.

This is a good list of broad considerations. But the actual basis for choosing the most appropriate approach for minimizing losses is undefined. There are no relative weights

assigned, there are no defined metrics of any kind, there is no defined way to evaluate the interactions among the many considerations listed, and there is no way to translate this list into an operational set of guidelines.

The FTR Default Proposal is not verifiable or systematic. There are no clear parameters for making decisions and there are no clear metrics for evaluating decisions. PJM needs to provide a defined set of options and a clearly defined set of rules for when the options will be used. Absent clearly defined and verifiable rules, the Commission should reject the FTR Default Proposal.

Due to a lack of clear and verifiable rules, the results of PJM's decisions could expose PJM to potential legal challenges, including complaints at the Commission and in courts. Any costs of such litigation and any associated payments would increase the costs of default to Members.

### **C. PJM's Proposal Does Not Provide Transparency.**

The November 30<sup>th</sup> Filing claims (at 10) that its proposed rule provides transparency "by requiring reasonable advance notice of the approach or course of action chosen for resolving a defaulting Member's FTR positions prior to implementing that approach or course of action, as well as advance notice of any special rules being adopted for any Special Auction being held for the liquidation of a defaulting Member's FTR positions."

Simply informing participants of the approach chosen, at its discretion, by PJM, is not transparency. Simply informing participants of a list of factors that PJM may or may not take into consideration is not transparency. Transparency cannot exist without a defined verifiable and systematic method to arrive at that decision, a defined set of metrics to determine whether the decision minimized potential losses, or was effective, fair and nondiscriminatory, and defined reporting requirements so that Members and the Commission can understand the process and decisions in detail.

**D. The FTR Default Proposal Should Be Rejected as an Improper Subdelegation of the Commission’s Authority.**

The November 30<sup>th</sup> Filing is not proposing rules or methods for dealing with FTR defaults. The November 30<sup>th</sup> Filing is proposing (at 5–6) to replace Commission authority to determine the rules for addressing FTR defaults with Commission approved authority for PJM to exercise its judgment on a case by case basis, with no Commission oversight. The Commission has rejected proposed rules that afford excessive discretion to the RTO administering them.<sup>6</sup>

The November 30<sup>th</sup> Filing asserts (at 6) that PJM should have discretion that is “consistent with the practices other operators of financial markets are permitted to exercise upon events of default.” PJM is not the operator of a financial market comparable to ICE Clear U.S. The markets operated by ICE Clear U.S., et al., that include voluntary participants, that include only financially sophisticated participants, that permit exclusion of participants, that assign risk to clearing parties, that assign risk in the last instance only to participants in the financial market, that are regulated by the CFTC, and in which ICE Clear U.S. has a financial position, are not comparable to PJM markets. The PJM FTR Market is regulated by the Commission as part of the Commission’s approach to providing just and reasonable rates for wholesale power through competition. The PJM FTR Market is not regulated directly by the CFTC.

The FTR Default Proposal, if accepted, would result in an improper subdelegation of the Commission’s authority.<sup>7</sup> Federal agencies are not permitted to subdelegate their

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<sup>6</sup> See *PJM Interconnection, L.L.C.*, 173 FERC ¶ 61,244 at P 26 (2021).

<sup>7</sup> See, e.g., *City of Tacoma, Washington v. FERC*, 331 F.3d 106, 115 (D.C. Cir. 2003) (“By delegating to other federal agencies the responsibility of ensuring that their cost reports are reasonable and within the scope of the Act, the Commission fails to discharge both duties.”); *Perot v. FEC*, 97 F.3d 553 (D.C. Cir. 1996). The Commission includes in its Rules and Regulations concerning RTO Tariff provisions regarding credit practices. 18 CFR § 35.47. The Commission continues to evaluate the

authority to administer their statutes to other entities, including other government agencies, without clear and objective rules.<sup>8</sup> The courts allow for the subdelegation of some authority, including authority that involves some exercise of discretion, but a proper subdelegation must establish objective criteria for implementation of and review of the exercise of such authority.<sup>9</sup> The standard does allow for some discretion. The FTR Default Proposal fails the standard because it does not establish objective criteria for implementation of and review of the exercise of the subdelegated authority.

The responsibility to determine whether rates are just, reasonable and nondiscriminatory is a core responsibility of the Commission and cannot properly be transferred to an RTO.<sup>10</sup> The rules for the treatment of defaults must be determined in advance, in sufficient objective detail that the Commission can understand and approve of PJM's approach, and review PJM's actions under the defined rules. The November 30<sup>th</sup> Filing should be rejected without prejudice to PJM submitting a proposal that limits its discretion by providing, *inter alia*, clear rules, metrics and reporting requirements, and is consistent with the subdelegation doctrine.

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need for additional enhancements to those rules. *See RTO/ISO Credit Principles and Practices*, Docket No. AD21-6-000.

<sup>8</sup> *See, e.g.*, 331 F.3d 106. The Commission includes in its Rules and Regulations concerning RTO Tariff provisions regarding credit practices. 18 CFR § 35.47. The Commission continues to evaluate the need for additional enhancements to those rules. *See RTO/ISO Credit Principles and Practices*, Docket No. AD21-6-000.

<sup>9</sup> *See* 97 F.3d 553, 559.

<sup>10</sup> *Id.*

## II. CONCLUSION

The Market Monitor respectfully requests that the Commission afford due consideration to these comments and reject the FTR Default Proposal.

Respectfully submitted,



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Dated: December 21, 2020

## CERTIFICATE OF SERVICE

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

Dated at Eagleville, Pennsylvania,  
this 21<sup>st</sup> day of December, 2020.



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