

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Allegheny Electric Cooperative, Inc., <u>et al.</u> ,	)	
	)	
v.	)	Docket No. EL07-56-000
	)	
PJM Interconnection, L.L.C.	)	
	)	
	)	
Organization of PJM States, Inc., <u>et al.</u> ,	)	
	)	
v.	)	Docket No. EL07-58-000
	)	
PJM Interconnection, L.L.C.	)	

**MOTION FOR LEAVE TO ANSWER AND ANSWER OF  
ORGANIZATION OF PJM STATES, INC.  
TO PJM INTERCONNECTION, L.L.C.’S  
REPLY COMMENTS ON OFFER OF SETTLEMENT**

Pursuant to Rules 212 and 602 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”)<sup>1</sup>, the Organization of PJM States, Inc., 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 Utilities Commission of Ohio, Pennsylvania Public Utility Commission and Virginia State Corporation Commission (collectively, “OPSI”) hereby moves for leave to file an answer and submits the following answer in response to the Reply

<sup>1</sup> 18 C.F.R. § 385.212 and 385.213 (2007).

Comments (“PJM Reply Comments”) of PJM Interconnection, LLC (“PJM”) submitted on September 4, 2007, in these consolidated proceedings.

## I. BACKGROUND

On August 2, 2007, PJM, pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure<sup>2</sup>, filed a contested unilateral Offer of Settlement, purporting to resolve outstanding issues in these two consolidated complaints, which arise from allegations that PJM has engaged in an ongoing pattern of interference with the activities of its internal Market Monitoring Unit. On August 22, 2007, pursuant to Rule 602, OPSI submitted Comments opposing the proposed settlement as filed.<sup>3</sup> A number of additional parties to these proceedings likewise submitted comments on August 22, 2007.

On September 4, 2007, PJM submitted Reply Comments responding to the initial comments of OPSI and the other parties and reiterating its initial position that the Commission should approve the proposed Offer of Settlement without additional hearings or opportunity for discovery.<sup>4</sup> In the alternative, PJM proposes that the Commission refer this matter to a Settlement Judge for additional proceedings pursuant to Rule 603.<sup>5</sup> PJM further proposes that the Commission issue “an initial order providing guidance on the policy issues raised in the

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<sup>2</sup> 18 C.F.R. § 385.602.

<sup>3</sup> The Illinois Commerce Commission, the Michigan Public Service Commission and the West Virginia Public Service Commission, each a member of OPSI but not an individually-named complainant in OPSI’s original complaint, also supported OPSI’s initial comments opposing the PJM Offer of Settlement.

<sup>4</sup> PJM Reply Comments at 1.

<sup>5</sup> *Id.* at 3.

settlement comments,” which would serve to strictly limit the confines of any settlement negotiations.<sup>6</sup>

For the reasons set forth below and in OPSI’s initial comments on the Offer of Settlement, OPSI submits that the Commission should reject PJM’s Offer of Settlement in its current form and return the matter to the parties for multilateral negotiations. If such negotiations prove unsuccessful, the Commission should set this matter for hearing, allow appropriate discovery, and grant the request for interim relief set forth in OPSI’s initial complaint.

## II. MOTION FOR LEAVE TO ANSWER

Pursuant to Rule 212 of the Commission’s Rules of Practice and Procedure, OPSI requests leave to respond to PJM’s Reply Comments in order to assist the Commission’s decision-making process.

OPSI recognizes that Rule 602 specifically provides only for Comments and Reply Comments in response to a unilateral Offer of Settlement, such as that proposed by PJM. However, the Commission generally allows such additional pleadings if they provide information that will assist the Commission in its decision-making process.<sup>7</sup> OPSI submits that this Answer will assist in the decision-making process by, *inter alia*, providing additional information regarding the evidentiary record in these proceedings relating to PJM’s claim that the

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<sup>6</sup> *Id.* at 2-3.

<sup>7</sup> *See, e.g., Midwest Independent Transmission System Operator*, 120 FERC ¶ 61,083 at P 23 (2007).

Commission should bifurcate its proposal for the future state of the MMU from allegations regarding PJM's past treatment of the MMU.

### III. ANSWER

#### A. Introduction

PJM makes two primary claims in its Reply Comments that OPSI believes require additional consideration by the Commission. First, PJM asserts that the Commission should refer this matter to a Commission Settlement Judge after first issuing a policy order in which the Commission "make[s] clear that it does not plan to conduct a trial-type hearing on these 'going-forward' issues, and that it will issue a final order resolving market monitoring structure and functions in the PJM region promptly after allowing the parties a reasonable opportunity to conduct negotiations, whether or not they reach an uncontested settlement."<sup>8</sup>

Second, PJM argues that the Commission should approve the Offer of Settlement on policy grounds, inasmuch as PJM based the structure of the proposed external MMU on similar structures approved by the Commission for other RTOs, including the Midwest ISO ("MISO"), the California ISO ("Cal ISO") and the Southwest Power Pool ("SPP").<sup>9</sup> Therefore, according to PJM, it is opponents of the Offer of Settlement such as OPSI who bear the burden of

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<sup>8</sup> PJM Reply Comments at 2.

<sup>9</sup> *Id.* at 9.

demonstrating that procedures appropriate for other RTOs are not appropriate for PJM.<sup>10</sup>

Notably, PJM does not directly attempt to refute the arguments of OPSI and other commenters that its proposal presents opportunities for PJM to create informational and other bottlenecks and to otherwise interfere with strong, independent operation of the MMU. Rather, PJM claims that OPSI misunderstands the intent of its proposals, and argues that the proposals are justified by operation of law, since those proposals are consistent with procedures, structures and protocols previously approved for other RTOs. Given that PJM does not directly contest, or even address, the bulk of OPSI's complaints, OPSI will not restate those complaints here, but will focus on PJM's new assertions presented in its Reply Comments.

PJM's proposal is premised on a presumed distinction between allegations about past conduct and the merits of its "going-forward" proposal for the future structure of the MMU.<sup>11</sup> This distinction is artificial and inappropriate. PJM did not propose changes to the structure of its MMU in a vacuum. PJM did not propose such changes as a way to increase the efficiency of the MMU in monitoring PJM markets or mitigating market power. Rather, it appears to OPSI that PJM filed its Offer of Settlement as a way to forestall Commission action on two separate complaints filed by state commissions, consumer advocates and

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

<sup>11</sup> *Id.* at 5.

customer representatives alleging that PJM was interfering with the independence of its MMU. It is entirely inappropriate, therefore, for PJM to claim that the Commission should focus on the future and leave the past for consideration in another venue. PJM's proposal is not a "going-forward" change to the MMU for the purpose of making the MMU better; it is advanced as an alternative to a Commission-mandated remedy for alleged misconduct and tariff violations by PJM. Consequently, before the Commission can consider the future and determine what remedy should be implemented, it must determine the nature and extent of any and all past misconduct. There simply are not "past" issues and "going-forward" issues. All are part and parcel of the entire issue of the continuing function and efficacy of the market monitor.

**B. The Commission Should Refer This Matter For Multilateral Negotiations, Not To A Settlement Judge**

As discussed above, PJM and certain intervenors propose that the Commission refer PJM's Offer of Settlement to a Commission settlement judge under Rule 603 in the hope of converting PJM's unilateral Offer of Settlement into an uncontested (or at least marginally less-contested) settlement agreement. PJM goes further, and suggests that the Commission should first issue a "policy order" limiting the scope of any such proceedings. OPSI continues to oppose PJM's proposal for negotiations before a settlement judge. Further, the Commission should note that *none* of the initial complainants initiating these proceedings, nor the PJM Market Monitor, requested referral to a settlement judge, but instead

proposed that the Commission either set this matter for hearing immediately (in the case of the Joint Complainants)<sup>12</sup> or allow some form of multilateral negotiations outside of the Rule 603 process prior to setting the matter for hearing (in the case of OPSI and Dr. Bowring)<sup>13</sup>. That PJM and its generator supporters argue for a less vigorous process should not outweigh the substantial arguments of the original complainants for a full, fair and complete investigation by the Commission to uncover the extent of any misconduct by PJM.

Furthermore, PJM's proposal that the Commission make clear that it will not permit a hearing or discovery in this matter is premised on PJM's artificial and inappropriate distinction between allegations regarding the past and considerations for the future. As discussed above, OPSI submits that the Commission cannot appropriately consider the structure of a future PJM MMU without first uncovering all of the facts regarding the past. Put another way, the Commission cannot fashion a remedy for misconduct without first determining what, if any, misconduct has occurred.

Therefore, *all* of PJM's citations to previous Commission proceedings regarding RTO market monitoring are inapposite. It is true that the Commission did not require a trial-type hearing before approving the external MMU systems in the SPP, Cal ISO or MISO; in none of these cases were the external MMU systems proposed in response to allegations that those RTO(s) had violated their

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<sup>12</sup> Initial Comments of the Joint Complainants on the Unilateral offer of Settlement at 6.

<sup>13</sup> Letter to the Commission from Robert F. Muse on behalf of Dr. Joseph Bowring, August 6, 2007 at 2.

tariffs by interfering with their MMUs. It is likewise true that the Commission did not require a hearing before referring PJM's reliability pricing model proposal to a settlement judge, but again, PJM did not file its RPM proposal in response to two separate complaints alleging past misconduct.

While OPSI strongly believes that the Commission should immediately implement procedures designed to uncover the full extent of PJM's alleged interference with its MMU, OPSI is not opposed to negotiating with PJM to attempt to resolve the parties' respective differences. This procedure should be open to all parties, as well as to all MMU-related issues. Therefore, instead of referring the matter to a settlement judge who will endeavor to structure a settlement according to a policy order, as PJM proposes, the Commission should allow the parties to conduct independent multilateral negotiations. If the parties can craft a multilateral settlement, so much the better. If that effort fails, however, the Commission should set the matter for hearing and allow discovery to commence immediately, with the express intention of fully investigating both PJM's past conduct and crafting appropriate remedies for the future based on an adequately-developed factual record.

If, in the alternative, the Commission determines that structured proceedings are appropriate, OPSI urges the Commission to preface such negotiations not with a policy order limiting the scope of the discussions, but instead with a procedural order requiring PJM to comply with discovery requests, thus permitting the parties to investigate PJM's past behavior in an attempt to



ensure that any settlement provides an appropriate remedy for any misconduct which occurred.

**C. The Structure Of The PJM MMU Should Be Determined In Light Of PJM's Past Conduct, Rather Than The Characteristics Of Other RTO MMU Systems**

PJM's justification for its external MMU proposal is replete with references to previous Commission orders regarding other RTOs. Thus, PJM argues that an external MMU is acceptable, because that is what other RTOs use.<sup>14</sup> PJM asserts that its proposal that only the Commission could replace the external MMU is consistent with the system in the MISO.<sup>15</sup> It argues that the proposed two-year initial term for the external market monitor is consistent with the MISO and is longer than the initial terms in SPP and the New York ISO.<sup>16</sup> PJM claims that its Market Monitoring Liaison proposal would not create a bottleneck of information, but is consistent with the structure used in the MISO.<sup>17</sup> And it argues that its proposal that the RTO be permitted prior review of MMU draft reports is consistent with the system used in SPP.<sup>18</sup>

These references to Commission precedent are interesting, but largely beside the point. Other RTOs proposed and implemented external MMUs as part of a stakeholder process, not because their own market monitor and numerous stakeholders alleged that the RTO was interfering with the independent operation

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<sup>14</sup> PJM Reply Comments at 10.

<sup>15</sup> *Id.* at 11.

<sup>16</sup> *Id.* at 14.

<sup>17</sup> *Id.* at 17.

<sup>18</sup> *Id.* at 18.

of an internal MMU. SPP and the New York ISO may have had shorter initial terms for their external MMUs, but they were not attempting to staff such external units following allegations of interference with the MMU by the RTO, which will undoubtedly make staffing any external PJM MMU more difficult. MISO may use a liaison between its MMU and RTO staff, but it did not implement such a structure following allegations that the RTO was unresponsive to MMU requests or that the RTO had attempted to interfere with critical MMU database management. SPP is permitted prior review of RTO drafts, but the SPP RTO is not permitted, nor was ever alleged, to have exercised prior restraint of MMU publications, as PJM has done. What is good for the goose is not necessarily good for the gander, especially where, as here, the restructured MMU is proposed in response to allegations of misconduct.

Commission approval should not turn on what the Commission approved for MISO or SPP. Rather, the Commission should approve a structure for the PJM MMU that is consistent with Commission policy, that will result in effective market monitoring in the PJM footprint, and that adequately remedies any misconduct which may have occurred in the past (if any misconduct is determined, following discovery and appropriate hearing procedures, to have occurred).

**D. The Commission Should Not Prejudge Issues From The Market Monitoring Portion Of Its Organized Market Improvement ANOPR In This Proceeding**

Many of the issues implicated by PJM's Offer of Settlement are also addressed in the Commission's recent Advance Notice of Proposed Rulemaking

regarding organized wholesale markets.<sup>19</sup> In its Reply Comments on the Offer of Settlement, PJM encourages the Commission to approve certain aspects of its proposal based on PJM's interpretation of the ANOPR. For example, PJM claims that its proposal that "the MMU shall not be involved in implementation of the PJM Tariff, Operating Agreement and other market rules... is exactly in accord with the Commission's preliminary determination in the ANOPR that an MMU's role should be monitoring and reporting, not administration of the RTO's tariff."<sup>20</sup>

The Commission should not prejudge any of the issues it presented in the ANOPR in these proceedings. Rather, the Commission should first investigate PJM's conduct regarding its internal MMU and should use the result of that investigation to fashion a remedy that insures the independence of the MMU going forward, consistent with existing Commission policy. That the Commission raised an issue in the ANOPR does not establish that PJM's proposal herein is appropriate; nor does PJM presenting an issue herein indicate that the Commission should take any particular action in response to the ANOPR. In addition, fundamental due process considerations dictate that the Commission should avoid addressing any of the ANOPR issues in these proceedings, as there are undoubtedly many parties interested in the ANOPR process that are not parties to these proceedings.

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<sup>19</sup> *Wholesale Competition in Regions with Organized Electric Markets*, Advanced Notice of Proposed Rulemaking, IV FERC Stats. & Regs. Proposed Regs. ¶ 32,617 (2007) ("ANOPR").

<sup>20</sup> PJM Reply Comments at 19-20.

## **E. Conclusion**

As discussed above and in OPSI's initial comments, OPSI welcomes PJM's proposal as a first step in a process that could result in a strong, independent MMU that operates free of interference or the threat of interference from the RTO.

PJM's proposal as it stands now is unacceptable, and would merely replace an internal MMU that PJM has not proven to be unworkable with an external MMU that is unproven and open to interference by the RTO. OPSI continues to believe that the current MMU system can be effective and respectfully requests that the Commission reject PJM's Offer of Settlement and either provide the parties an opportunity to discuss the development of a MMU framework that allows actual independence or set this matter for a full evidentiary hearing.

PJM says that "the Commission also should make clear to the participants that it will not let conflict over the future structure of PJM market monitoring continue indefinitely." OPSI agrees that the Commission should take decisive action in this matter soon. The issue of how to address PJM's alleged interference with its MMU should not be sidetracked to settlement judge procedures at this point. Nor should the Commission attempt to address the underlying issues based on PJM's artificial "going-forward" dichotomy. The issues raised in these complaints are simply not going away. Public (and public official) confidence in the PJM wholesale market is at this point, it is fair to say, at an all-time low. One PJM footprint state has already stepped away from market pricing for electricity generation and at least three others are actively considering re-regulation

measures. The Commission must commit to a complete and open investigation of its RTO's alleged interference with the market monitor, the complete extent of which remains undiscovered, if it hopes ever to re-establish that confidence.

Respectfully Submitted,

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Dated: September 12, 2007



**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document in accordance with the requirements of the Commission's Rules of Practice and Procedure.

Dated at Richmond, Virginia this 12<sup>th</sup> day of September, 2007.

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