

107 FERC ¶ 61,322
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

PJM Interconnection, L.L.C.

Docket No. ER04-776-000

ORDER ACCEPTING TARIFF REVISIONS SUBJECT TO MODIFICATION

(Issued June 28, 2004)

1. In this order, we accept for filing, subject to modification, revised tariff sheets submitted by PJM Interconnection, L.L.C. (PJM) to implement procedures pursuant to which PJM and the PJM Market Monitoring Unit (MMU) may provide confidential information to state commissions. This order will benefit customers by providing an easier means for state regulatory commissions within PJM to obtain confidential information that they believe is necessary for them to satisfy their statutory responsibilities, while at the same time ensuring that this information remains confidential and protected from unauthorized disclosure.

I. Tariff Filing

2. On August 28, 2003, the Commission held a regional meeting concerning Regional Transmission Organization (RTO) compliance with the Commission's Standard Market Design (SMD) criteria. At this conference, several state commissions expressed concern that they did not have access to certain confidential information that they believe is necessary to enable them to carry out their statutory responsibilities at the state level. In response to these concerns, PJM worked with its stakeholders to develop a recommendation addressing the access of confidential information by state commissions within PJM. According to PJM, the process of developing the proposal involved a drafting committee of representatives of the state commissions, PJM and the PJM stakeholders. The PJM Members Committee overwhelmingly approved the proposal, with one clarifying amendment.¹

¹ See PJM cover filing at 3; and, Comments of the PJM Regional State Commissions at 7.

3. On April 29, 2004, pursuant to section 205 of the Federal Power Act, PJM submitted revisions to its Amended and Restated Operating Agreement (Operating Agreement) proposing to establish procedures by which PJM and the PJM MMU may provide confidential information to state commissions. As approved through the stakeholder process, PJM and the state commissions² have agreed on the following principles regarding the disclosure of confidential information: (a) state commissions should have access to confidential data; (b) appropriate protections must ensure confidentiality of information; (c) PJM members should know when their data are being shared; (d) the Commission would resolve disputes concerning disclosures under PJM's new procedures; and, (e) there should be flexibility built into the procedures.

4. The new provisions include: (1) amendments to the Operating Agreement necessary to implement the confidentiality rules; (2) a non-disclosure agreement between PJM and persons authorized to receive confidential information; and, (3) a certification by the state commissions ("State Certification") for the benefit of PJM and its members setting forth the terms for use and protection of confidential information and identifying persons authorized to receive such information ("Authorized Person").

5. The changes to the above documents contain several provisions. First, the provisions include measures that will utilize several legal vehicles to protect the confidentiality of information. These vehicles include the Commission's approval of the proposal, individual state commission certifications of their ability to keep information confidential under state law, and execution of non-disclosure agreements by representatives of the state commissions that will be authorized to receive confidential information.

6. Second, the PJM proposal would provide a formal process through which the state commissions can request confidential information. The requests must be made in writing, but the proposal envisions and allows for situations in which confidential information could be disclosed orally in discussions with state commission personnel as a means of helping determine whether the state commission needs access to further confidential information. PJM members affected by such requests must be notified by PJM, and those members have a right to challenge such requests. PJM states the procedures for oral disclosure are not intended as a substitute for written requests but rather are designed to enable the state commissions to determine if they need access to further information.

² The following state commissions within PJM have agreed to the principles discussed herein: Pennsylvania, Maryland, New Jersey and the District of Columbia. In addition, the Ohio state commission, whose state will soon be located in part within PJM, has also agreed to the changes. *See Revised Comments of the Regional State Commissions at 9.*

7. Third, the signatories to the non-disclosure agreements and the State Certification, including the state commissions and their employees receiving such data, agree to utilize the Commission as the forum for resolution of disputes regarding the release of confidential information.

8. PJM states a “pivotal component” of the proposed confidentiality provisions is that the confidentiality of the information will be protected under both federal and state law through FERC orders restricting release of confidential information and certifications by the state commissions agreeing to the Commission’s orders through the voluntary execution of appropriate state certifications.³ Through the execution of non-disclosure agreements and the State Certification, the PJM proposal establishes a streamlined method for the release of confidential information between PJM and the state commissions that will alleviate the need for those state commissions to invoke more time consuming legal processes, such as state or federal Freedom of Information Act requests, to obtain confidential information. According to PJM, in the event that a state commission elects not to participate in this process, nothing in the provisions is intended to interfere with a state commission’s ability to obtain information under existing legal processes, or to supersede existing Operating Agreement provisions regarding PJM’s responsibilities toward protecting confidential information.

II. Notice, Interventions, and Protests

9. Public notice of PJM’s filing was issued on May 5, 2004 and published in the Federal Register⁴ with interventions and protests due on May 20, 2004. On May 13, 2004, the Illinois Commerce Commission (ICC) filed a motion for an extension of time for filing comments and protests to May 26, 2004, which the Commission granted on May 17, 2004. Timely motions to intervene that raised no substantive concerns were filed by: Constellation Power Source, Inc.; Consumers Energy Company; Duke Energy North America LLC and Duke Energy Trading and Marketing, L.L.C.;⁵ National Grid

³ See Operating Agreement Proposed section 18.17.4(a)(2).

⁴ 69 Fed. Reg. 26,587 (2004).

⁵ The Duke companies’ motion was filed on May 11 and, although it sought leave to intervene out-of-time, it was timely filed.

USA; the New England Transmission Owners;⁶ the New York Transmission Owners;⁷ the Public Service Commission of the District of Columbia; the Maryland Public Service Commission; the New Jersey Board of Public Utilities; the Public Utilities Commission of Ohio; the Pennsylvania Public Utility Commission; and the New England Conference of Public Utilities Commissioners (NECPUC).⁸ Timely motions to intervene with comments were filed by: the Office of the People's Counsel of the District of Columbia (DC OPC); PJM Regional State Commissions;⁹ PPL Parties;¹⁰ New England Power Pool Participants Committee (NEPOOL); and, ISO New England, Inc. (ISO-NE). A motion to intervene-out-of-time was filed jointly by the Connecticut Municipal Electric Cooperative (CMEEC) and Massachusetts Wholesale Electric Company (MMWEC). The Illinois Commerce Commission (ICC) filed a protest and detailed comments. PJM filed an answer to the protests and comments. The PaPUC, whose initial comments support the PJM proposal,¹¹ filed additional comments that also address the protest of the

⁶ The New England Transmission Owners are: Bangor Hydro-Electric Company; Central Maine Power Company; NSTAR Electric & Gas Corporation on behalf of its affiliates Boston Edison Company, Commonwealth Electric Company, Cambridge Electric Light Company and Canal Electric Company; Northeast Utilities Service Company on behalf of The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire; Holyoke Power and Electric Company and Holyoke Water Power Company; The United Illuminating Company; and, Vermont Electric Company.

⁷ The New York Transmission Owners are, for purposes of this proceeding: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; LIPA; New York Power Authority; New York State Electric & Gas Corporation; Rochester Gas and Electric Corporation; and, Orange and Rockland Utilities, Inc.

⁸ NECPUC is a not-for-profit corporation comprising public utility commissioners of the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

⁹ The PJM Regional State Commissions are: The DC PSC; the Maryland Public Service Commission (MD PSC); the New Jersey Board of Public Utilities (NJ BPU); the Public Utilities Commission of Ohio (PUCO); and, the Pennsylvania Public Utility Commission (Pa UC). The PJM Regional State Commissions' initial intervention was filed on May 26; however, they filed a revised motion to intervene that reflects the joinder in the intervention by PUCO on June 4.

¹⁰ For purposes of this proceeding, the PPL Parties are: PPL Electric Utilities Corporation; PPL EnergyPlus, LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; PPL University Park, LLC; and Lower Mount Bethel Energy, LLC.

¹¹ See PaPUC Notice of Intervention in Support of the Filing at 2.

ICC. Finally, the Delaware Public Service Commission (Delaware PSC) filed a timely motion to intervene raising no substantive issues; however, on June 25, the Delaware PSC filed a Motion for Leave to File Supplemental Comments and Supplemental Comments, echoing a number of concerns raised by the ICC.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), all unopposed timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. In addition, while Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2003), prohibits answers to protests unless ordered by the decisional authority, we will allow the answers of PJM and the PaPUC, as they have provided information that has served to clarify the issues and assisted us in the decision making process. In addition, the Commission will also grant the Delaware PSC's motion and its supplemental comments, as they have assisted the Commission in its understanding of the issues.

B. Commission Decision

11. Based on our initial review, and subject to the modifications discussed below, we find that PJM's proposed Operating Agreement revisions appear to be just and reasonable, and have not been shown to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. The provisions accepted herein will provide a streamlined procedure through which state commissions may request certain confidential information, without a burdensome legal process. The Commission views this proposal as an effective and fair market rule that will allow PJM to protect market participant information that is of confidential nature, while providing the state commissions with the information they believe is needed to fulfill their statutory responsibilities. Thus, the Commission finds that it satisfies the objectives set forth at the August 2003 meeting. The Commission accepts this proposal understanding that it is entirely voluntary, and those state commissions who wish not to participate for any reason, or are not able to abide by the provisions, will still have the ability to obtain confidential information through the legal means that already are at their disposal. It is important to note that this proposal resulted from a process that involved the state commissions, PJM and the PJM stakeholders and was approved overwhelmingly by the PJM Members Committee.

12. As required by changes to the Operating Agreement that we approve in this order, PJM's disclosure of confidential information pursuant to section 18.17.4 of the Operating Agreement is limited to "Authorized Persons" and "Authorized Commissions" as those terms are defined in the changes approved today. Authorized Persons' and Authorized

Commissions' disclosure of the confidential information to any other person is prohibited by this order, as well as by the terms of the Operating Agreement, the required State Certification, and the Non-Disclosure Agreement between PJM and any Authorized Person and Authorized Commission.

13. Several PJM state commissions and parties filed comments in support of PJM's proposal, with ICC and the Delaware PSC filing adverse comments. ICC has requested a substantial number of changes to PJM's proposed revisions to the Operating Agreement. ICC's main concern is that the proposal provides a burdensome and lengthy process to obtain confidential information: "PJM's proposed documents...place an overwhelmingly excessive burden on the states, requiring more red tape than either the ICC or the Commission as government entities could manage on the best (or worst) of days."¹²

14. We disagree with the basic arguments that are made by ICC in its protest. The information that is the subject of this order is confidential information that cannot now be released by PJM absent more extensive legal procedures. Because this information is confidential, it is important that the release procedures adopted by PJM provide adequate protections for market participants. In this regard, the Commission finds that the process proposed by PJM balances carefully the need for disclosure against necessary due process protections for market participants. PJM proposes to notify the affected PJM member that it has received a request for confidential information pertaining to that affected member. Disclosure to the state commission would not occur until a non-disclosure agreement is executed along with the consent of PJM. Moreover, and as noted above, the provisions accepted herein are entirely voluntary. Previously, there was no mechanism in place for state commissions to obtain confidential information from PJM, other than through judicial process. It is unlikely that a state court procedure aimed at obtaining confidential information would be less burdensome than the straightforward process proposed by PJM. If the ICC is unable to follow these provisions due to reasons that are unique to its own statutory directives, it may continue to use the existing judicial procedures for obtaining confidential information. For these reasons, we will reject ICC's protest.

15. The Commission notes that the procedures proposed by PJM are consistent with the Commission's regulations that govern the treatment of non-public and confidential information.¹³ The Commission's regulations provide that, if a filer claims that information is privileged or confidential or critical energy infrastructure information ("CEII"), the Commission treats it as such and maintains the information in a non-public file with access strictly limited. The Commission requires that a person who submitted confidential information be given at least five days notice and an opportunity to comment

¹² ICC Protest at 5.

¹³ See 18 CFR section 388.112.

prior to disclosure of the information. Access to privileged or confidential information or CEII is subject to confidentiality agreements, as is the case with the PJM proposal. The PJM proposal also incorporates a five day notice period and provides for ADR by the Commission if disputes arise on disclosure of confidential information. In the event ADR does not resolve a dispute, a complaint can be filed with the Commission.

16. In its answer to ICC's protest, PJM agreed with several of ICC's minor wording edits. These changes are shown on Appendix A. We will accept these revisions, and direct PJM to make a compliance filing within 30 days of the date of this order. Since we find the proposed process just and reasonable and voluntary on behalf of the state commissions, we will address the major concerns raised by ICC rather than the specific wording changes requested by the ICC.

C. Scope of Confidential Information

17. ISO-NE, NEPOOL, ICC, and the Delaware PSC are concerned that PJM's proposal does not adequately define the scope of the materials that would be subject to the new information sharing provisions.¹⁴ The proposed provisions indicate that any information that is considered non-public or confidential would be subject to review by state commissions. ISO-NE states that the intent of the new provisions seems to be to provide confidential market data to state commissions. However, the proposed language might be construed to apply to other confidential information that an ISO should not be compelled to disclose to state commissions, such as draft versions of reports and analyses, internal documents, and other legally privileged information. ICC suggests that there be established criteria used to determine if information warrants confidential treatment; however, it does not propose any criteria or suggest parameters for such criteria.

18. The purpose of PJM's proposal is to provide access to non-public or confidential market data to state commissions to enable them to carry out their regulatory functions. The Commission finds PJM's definition of "confidential information"¹⁵ to be adequate for this purpose. However, if ISO-NE believes that a further definition of the term "confidential information" is needed, the Commission can address that issue when ISO-NE makes a filing related to sharing confidential information with state commissions.

¹⁴ In our order on RTO-NE we required that the applicants in that case file provisions to permit state commission access to confidential data that were similar to those approved for PJM. *See* ISO New England *et al.* 106 FERC ¶ 61,280 (2004) at 62,049, P 191.

¹⁵ *See* Proposed section 1.4 of Non-Disclosure Agreement, which defines confidential information as follows: "Any information that would be considered non-public or confidential under the Operating Agreement."

Moreover, to the extent that a market participant believes that the information requested by a state commission goes beyond market-related data, the notice and dispute resolution provisions provide the necessary safeguards.

D. Definition of Authorized Commission

19. The current proposed definition of “Authorized Commission” is a state public utility commission within the PJM region “that regulates the distribution or supply of electricity to retail customers *and* is legally charged with monitoring the operation of wholesale or retail markets serving retail suppliers or customers within its State.”¹⁶ ICC states that this definition is overly limiting because not all state commissions perform the functions of traditional regulation and market oversight in the same way and in the same combinations. ICC recommends that the word “and” be changed to “or.”

20. DC OPC comments that access to the confidential information should also be provided to consumer advocates’ offices that have a statutory market monitoring obligation similar to that of state commissions. DC OPC states that consumer advocate offices with statutory market monitoring responsibilities have the same obligations under state law and the same need for access to confidential information as state commissions and thus should be afforded access to confidential information as proposed by PJM’s provisions. The joint comments of CMEEC and MMWEC make a similar argument; *i.e.*, “As joint action agencies, CMEEC and MMWEC assist their respective member systems in meeting load serving obligations through a range of power supply resources and through participation in the restructured NEPOOL markets. CMEEC and MMWED are NEPOOL Participants and members of NEPOOL’s Publicly Owned Entities Sector.”¹⁷

21. In its answer, PJM states that this proposed change by DC OPC would open up the classification of authorized state commissions to an unknown set of other entities with monitoring functions but no regulatory responsibility. PJM believes the change proposed by ICC would add rather than eliminate ambiguity as to which entities can invoke the proposed specialized disclosure procedures.

22. We agree with PJM, and therefore reject the concerns raised by ICC, DC OPC, CMEEC and MMWEC. The original purpose of establishing these provisions was to provide access to confidential information to state commissions who have the regulatory and legal authority to monitor retail electric markets within the state. The change proposed by these commenters would open up the possibility of many other state agencies being able to receive confidential information, which is not the purpose of the Commission’s directive to PJM. Further, we decline to apply these changes to entities

¹⁶ See Operating Agreement proposed section 1.4A (emphasis added).

¹⁷ CMEEC/MMWEC Motion at 3.

other than state commissions. While this proposal provides a means for which state commissions can obtain confidential information, it should not be extended to a larger group of unknown and undefined state agencies. We would also like to note that DC OPC, or any other state agency for that matter, may continue to use other appropriate legal means to seek certain information.

23. Finally, we note that PJM's proposed definition of "Authorized Commission" would require that the commission be "legally charged with monitoring the operation of *wholesale or* retail markets serving retail suppliers or customers within its State."¹⁸ We interpret PJM's language to mean that an "Authorized Commission's" access to and use of confidential information under the PJM proposal would be for the sole purpose of informing its regulation of the retail markets within its jurisdiction. Our acceptance of these tariff provisions implementing procedures to provide confidential information to state commissions does not expand the jurisdictional authority of the states nor does it cede any statutory authority vested with the Commission.

E. Definition of State Certification

24. ICC would like PJM to clarify that the proposed definition of "State Certification"¹⁹ does not impose a requirement on each state commission to make a filing with the Commission whenever it adds or removes a name from its list of Authorized Persons who may view confidential information.

25. In its response, PJM clarifies that the state commission will file its State Certification once with the Commission without the list of Authorized Persons. The list of Authorized Persons will be provided only to PJM and updated as necessary by each state commission. PJM then will provide a public posting of the current list of Authorized Persons.²⁰ We will accept PJM's clarification.

F. Third Party Requests

26. ICC protests the definition of "Third Party Request"²¹ because it seeks to circumvent state law that may require disclosure to other state agencies in certain circumstances, such as in the event of a state investigation into potential wrongdoing. ICC proposes language that stipulates that third party requests shall not include requests from other state agencies represented by the Authorized Commission.

¹⁸ See Operating Agreement Proposed section 1.4A (emphasis added).

¹⁹ See Operating Agreement Proposed section 1.42.01.

²⁰ *Id.* at Proposed section 18.17.4(a)(vi).

²¹ *Id.* at Proposed section 1.43A.

27. PJM states that it is simply not appropriate to provide market sensitive data in an open-ended manner to governors, attorneys general, legislators or others. PJM further states that one of the important issues for stakeholders was the ability to track and maintain a record of who received the confidential information. The proposed change recommended by ICC would open the door to any state agency acquiring the information and would make keeping track of those who receive the information virtually impossible.

28. We will reject ICC's protest in this matter. As stated above, the purpose of these provisions is to provide a mechanism through which state commissions can obtain confidential information while ensuring the confidentiality of that information. Allowing other state agencies, or any other entity, to obtain confidential information through a state commission would disregard the highly sensitive nature of this market information and could pose considerable harm to a PJM member and the PJM marketplace. Any entity within PJM may continue to obtain confidential information through legal means as specified currently in PJM's Operating Agreement.

G. Conditions Placed on Authorized Commissions

29. PJM's provisions include language and requested language to be put in a Commission order that will prohibit state commissions and Authorized Persons from disclosing confidential information to any other person or group.²² ICC states that in certain circumstances it may be required by state law to disclose information to other state agencies or offices.²³ The Delaware PSC also asserts that it "can only commit to resist a request for disclosure of confidential information under the Delaware Public Records law."²⁴ PJM's proposal essentially requires state commissions to obtain an order from the Commission prohibiting that state commission from following state law.

30. Included in this section is language that stipulates that state commissions will "defend against any disclosure of Confidential Information pursuant to any Third Party Request through all available legal process..."²⁵ ICC asserts that state commissions should not be obligated to carry out PJM's responsibilities by requiring the state commissions to engage in legal processes to defend against third party requests for confidential information and to engage in legal processes to protect PJM's interest and the interests of PJM members in the event that there has been a disclosure of PJM's

²² *Id.* at Proposed section 18.17.4(a)(ii)

²³ ICC Protest at 23.

²⁴ *Citing* 29 Del. C. Sec. 10001 *et seq.*; Delaware PSC Supplemental Comments at 8.

²⁵ *See* Operating Agreement Proposed section 18.17(a)(ii)(ii).

confidential information to a third party.²⁶ The Delaware PSC expresses a similar concern, asserting that “*the burden to protect the confidentiality of data should be on the party asserting the need for confidential treatment.*”²⁷

31. PJM reiterates again that nothing mandates that the ICC follow these procedures rather than invoking its own legal process to compel member release of confidential data within its jurisdiction. PJM states that the proposed disclosure procedures are in addition to, and do not substitute for, other means of access to confidential information that may be sought by state commissions under other provisions of state or federal laws relating to access of data. PJM states that the ICC seeks to change the voluntary agreement reached through the stakeholder process concerning the role of the Commission in assuring the confidentiality of highly sensitive market information.

32. In response to ICC’s protest of the requirement that states defend against third party requests for access to confidential information, PJM believes it is entirely appropriate that the state remain an active participant in that process along with PJM and the affected PJM member. PJM and the affected PJM member would cooperate with, and give legal support to the state commission to oppose third party requests for release of the confidential information. If a state feels that particular information should not be deemed confidential, it can always raise that issue with the Commission at the onset of the process rather than once the process is in court.

33. We reject ICC’s protest in this section for the same reasons mentioned above.²⁸ ICC states that in certain circumstances they may be required to disclose confidential information to other state agencies.²⁹ Our concern is that confidential information only be released to state commissions, and not other miscellaneous groups. To the extent that a state commission is incapable of protecting against the release of confidential information, then they are not required to participate in these voluntary procedures. State commissions in this case may still seek discovery of confidential information through other legal processes.

34. We agree with PJM that the Authorized Commission, Authorized Person, along with PJM and the Affected Member should all participate in defending against third party requests. It is entirely appropriate that the tariff provisions place responsibilities on all

²⁶ ICC Protest at 22 – 25.

²⁷ Delaware PSC Supplemental Comments at 8 - 10 (emphasis in original).

²⁸ See P. 26 of this Order, *supra*.

²⁹ ICC Protest at 10 - 20.

parties that have agreed to the terms of PJM's proposal to defend against the unauthorized release of confidential information. Therefore, we reject ICC's protest in this matter.

H. Discussions Among Authorized Persons

35. PJM proposes procedures pursuant to which an Authorized Person may discuss confidential information only with another Authorized Person who also has been authorized to receive the same confidential information.³⁰ ICC protests these procedures, which would prevent one Authorized Person from discussing confidential information with another Authorized Person unless both have requested and received from PJM the same confidential information. ICC believes that this provision will delay the effective use of confidential information by an Authorized Person and is procedurally burdensome. ICC recommends that the Commission reject this provision and permit unrestricted contact between Authorized Person and unrestricted discussion of PJM confidential information by Authorized Persons.³¹ The Delaware PSC expresses a similar view, asserting that state commissions should be able to share information among Authorized Persons," without having to obtain a separate request for access for each individual.³²

36. PJM states that this requirement is designed to ensure the proper tracking of which Authorized Person requested specific confidential information. PJM notes that it is possible that state commissions could designate different Authorized Persons to receive different types of data associated with his or her area of expertise. PJM contends that ICC's proposal would make accountability for who has what specific data much harder to track.

37. We agree with PJM. Collaboration among Authorized Persons may only take place if both persons obtain the same specific confidential information through PJM. Otherwise, an Authorized Person may obtain information through another Authorized Person rather than through PJM. Information must flow from PJM to the Authorized Person only. We do not find that this provision is overly burdensome to state commissions and believe that it will allow PJM to better track the flow of information.

³⁰ See Operating Agreement Proposed section 18.17.4(a).

³¹ ICC Protest at 23 – 24.

³² Delaware Public Service Commission Supplemental Comments at 10 – 11.

I. Procedures for Information Requests

38. Proposed section 18.17.4(c)(i) in the Operating Agreement establishes the procedures and content of requests for confidential information. Specifically, the procedures call for the information requests to include with particularity the information sought, provide a description for the purpose of the information request, and state the time period for which confidential information is requested.

39. ICC states that state commissions should not have to justify the purpose of such information requests given that such a request is necessary for the state commission to perform its duties. ICC also objects to the requirement that requests for confidential information identify the information with particularity.³³

40. We agree with PJM that it is reasonable and fair for state commissions to provide PJM with the information required in this section. The Commission's regulations governing the disclosure of Critical Energy Infrastructure Information (CEII),³⁴ persons applying for access to this information are required to disclose why access to CEII is needed. To date, this requirement does not appear to have impeded necessary access to CEII or to have adversely affected meaningful participation in Commission proceedings. State commissions should be able to state in their request for specific confidential information a purpose that is consistent with the purposes of PJM's proposal. We find it acceptable for the state commissions to provide PJM with the specifics of why the information is being sought and how it will be used. Additionally, we also find that this provision aids market participants in identifying whether they believe they need to object to a particular request for confidential information.

J. Objection to an Information Request

41. Proposed section 18.17.4(c)(iii) of the Operating Agreement establishes the procedures by which PJM or an Affected Member may object to a request for confidential information and appeal to the Commission. ICC protests this provision because it believes this provision will result in excessive objection and appeal rights. ICC asserts that this process will delay access to confidential information.

42. PJM replies that the Affected Member whose information is being sought has a right to object to any information request. PJM has provided a fair and timely mechanism in circumstances in which an Affected Member or PJM may object to information requests. PJM asserts that state commissions are not entitled to confidential information and must recognize the rights of Affected Members to seek protection for

³³ ICC Protest at 57 – 58.

³⁴ Order No. 630-A, FERC Statutes and Regulations ¶ 31,147, 18 C.F.R. Part 388.

confidential information. The Commission agrees with PJM that, as voluntary provisions, the confidentiality provisions must contain an appropriate mechanism to allow market participants or PJM to object to a specific request that is inconsistent with the intent of these confidentiality provisions. The mechanism proposed by PJM will allow for timely resolution of these disputes in a manner that protects both the rights of the state commissions and the market participants.

The Commission orders:

(A) PJM's proposal is hereby accepted for filing, as modified, to become effective June 29, 2004.

(B) PJM is hereby directed to make a compliance filing within 30 days of the date of this order to make the changes identified in Appendix A.

By the Commission. Commissioner Kelliher dissenting with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

Appendix A

Operating Agreement

Section 18.17.4(a):

Notwithstanding anything in this section to the contrary, the Office of the Interconnection and/or the PJM Market Monitor ~~may~~ shall disclose confidential information, otherwise required to be maintained in confidence pursuant to this Agreement, to an Authorized Person under the following conditions.

Section 18.17.4(a)(i)(iv):

(iv) is familiar with and will comply with any applicable procedures of the Authorized Commission which the Authorized Person represents,...

Section 18.17.4(a)(i)(v):

(v) covenants and agrees on behalf of himself or herself to deny any Third Party Requests and defend against any legal process which seeks the release of any confidential information ~~received~~ that would be released in contravention of the terms of the Non-Disclosure Agreement, and...

Section 18.17.4(b):

In any such discussions, the PJM Market Monitor or other representative of the Office of the Interconnection shall ensure that the individual or individuals receiving such confidential information Authorized Persons defined herein, orally designate confidential information that is disclosed, and refrain from identifying any specific ~~market participant~~ Affected Member whose information is disclosed.

Non-Disclosure Agreement

Recitals:

Whereas, the Operating Agreement ~~permits~~ requires PJM and the PJM Market Monitor to disclose Confidential Information to Authorized Persons upon satisfaction of conditions stated in the Operating Agreement, including, but not limited to, the execution of this Agreement by the Authorized Person and the maintenance of the confidentiality of such information pursuant to the terms of this agreement.

Section 2.5.2:

Access to Confidential Information: The Authorized Person shall ensure that Confidential Information received by that Authorized Person is disseminated only to those persons publicly identified as Authorized Persons on Exhibit "A" to the certification provided by the State Commission pursuant to the procedures contained in section 2.3 of this Agreement.

Section 2.5.3(i):

The Authorized Person shall promptly notify PJM of any change ~~or termination of employment or agency~~ that would affect the Authorized Person's status as an Authorized Person, in such event shall request, in writing, deletion from the schedule referred to in section (ii) below.

Section 3.2:

In any such discussions, the PJM Market Monitor or other PJM representative shall ensure that the individual or individuals receiving such Confidential Information are Authorized Persons under this Agreement, orally designate Confidential Information that is disclosed, and refrain from identifying any specific ~~market participant~~ Affected Member whose information is disclosed.

Section 6:

Notices. All notices required pursuant to the terms of this Agreement shall be in writing, and served upon ~~parties~~ the following individuals in person, or at the following addresses or email addresses:

Section 9:

Third Party Beneficiaries. The Parties specifically agree and acknowledge that each ~~PJM Member~~ Member as defined in the Operating Agreement is an intended third party beneficiary of this Agreement entitled to enforce its provisions.

Form of State Certification

Section 2.d:

The Commission will, at all times after the provision of Confidential Data to the Authorized Person, provide PJM with (i) written notice of any changes in the Authorized Persons' ~~employment or retention, affecting any Authorized Person's~~ qualification as an Authorized Person within two (2) business days of such change: (ii) written confirmation

to any inquiry by PJM regarding the status or identification of any specific Authorized Person within two (2) business days of such request; and (iii) periodic written updates, no less often than semi-annually, containing the names of all Authorized Persons appointed by the State Commission.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.,

Docket No. ER04-776-000

(June 28, 2004)

Joseph T. KELLIHER, Commissioner *dissenting*:

I dissent from the Commission's decision in this order to approve revisions to PJM Interconnection, L.L.C.'s (PJM) tariff to establish special procedures by which PJM and the PJM Market Monitoring Unit (MMU) may provide confidential information to state commissions. In my view, in order to justify approval of such preferential procedures for state commissions, PJM would need to demonstrate that (1) obtaining special access to confidential information possessed by PJM and the MMU is necessary for the state commissions to discharge their legal responsibilities, and (2) the state commissions cannot obtain such information under state law. Apart from a few generalized assertions, there has been no demonstration made that access to confidential information held by PJM or the MMU is necessary to enable the state commissions to carry out their statutory responsibilities. There has also been no demonstration that state commissions are unable to obtain access to confidential information from PJM and the MMU under state law. In the absence of an adequate showing on either of these critical points, I cannot support providing state commissions with confidential information from PJM or the MMU.

Joseph T. Kelliher