

128 FERC ¶ 61,238
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

PJM Interconnection, L.L.C.

Docket Nos. ER09-701-000
ER09-701-001

ORDER CONDITIONALLY ACCEPTING
PROPOSED TARIFF REVISIONS

(Issued September 14, 2009)

1. On February 9, 2009, as amended on February 13, 2009, PJM Interconnection, L.L.C. (PJM) submitted for filing, pursuant to section 205 of the Federal Power Act (FPA),¹ proposed revisions to the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (PJM Operating Agreement) and the PJM Open Access Transmission Tariff (PJM OATT). In its filing, PJM proposes to clarify the effect of state regulatory actions regarding retail customer authorization to participate in PJM's economic load and emergency load response programs (Demand Response Programs). PJM also proposes changes to the registration procedures applicable to its Demand Response Programs.
2. In its initial filing, PJM asserted that its proposed tariff revisions comply, in part, with Order No. 719.² However, in a motion to defer ruling, submitted June 2, 2009, PJM stated that the issues raised by its filing overlap with many of the same issues raised on

¹ 16 U.S.C. § 824d (2006).

² *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 FR 64,100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g*, Order No. 719-A, 74 FR 37,776 (Jul. 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009). As discussed below, Order No. 719, among other things, directed the operators of organized markets to accept bids from demand response resources unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate. *Id.* P 47, 154.

rehearing of Order No. 719 and should therefore be addressed first in that proceeding. Accordingly, PJM requested that the Commission defer action on its filing until 60 days following the issuance of Order No. 719-A.³

3. For the reasons discussed below, we will accept PJM's proposed tariff changes, conditioned on PJM making a compliance filing, as discussed below, no later than 60 days after the date of this order.

Background

4. In its transmittal letter, PJM states that its proposed tariff changes are designed to provide clarity to the PJM Operating Agreement and PJM OATT regarding the right of a retail regulatory authority to prohibit participation of a retail customer in PJM's Demand Response Programs, consistent with Order No. 719. Specifically PJM proposes to: (i) define the term "relevant electric retail regulatory authority;"⁴ (ii) clarify that PJM's Demand Response Programs are subject to an opt-out allowance (as described more fully below); and (iii) set forth the obligations applicable to an electric distribution company or load serving entity that seeks to assert, during the Demand Response Program registration process, that a state law or regulation bars retail customer participation.

5. PJM proposes that if an electric distribution company or load serving entity seeks to assert, during the Demand Response Program registration process, that a state law or regulation bars retail customer participation, then the electric distribution company or load serving entity must provide to PJM: (1) an order, resolution or ordinance of the relevant electric retail regulatory authority expressly barring end-use customer participation; (2) an opinion of the relevant electric retail regulatory authority's legal counsel attesting to the existence of a regulation or law expressly barring end-use customer participation, or (3) an opinion of the state attorney general, on behalf of the relevant electric retail regulatory authority, attesting to the existence of a regulation or law expressly barring end-use customer participation. PJM proposes that any such evidence be provided to PJM within ten business days of PJM's informing the electric

³ The Commission issued Order No. 719-A on July 16, 2009. The Commission will address in a separate docket the compliance filing that PJM will make in accordance with Order No. 719-A. Nothing in this order relieves PJM from the obligations that the Commission imposed in Order No. 719-A.

⁴ Proposed section 1.38.01A of the PJM Operating Agreement reads: "[A Relevant Electric Retail Regulatory Authority is an] entity that has jurisdiction over and establishes prices and policies for competition for providers of retail electric service to end-customers, such as the city council for a municipal utility, the governing board of a cooperative utility, the state public utility commission or any other such entity."

distribution company or load serving entity that an end-use customer has applied to participate in PJM's Demand Response Programs, subject to PJM's right to require additional evidence, or clarification, as may be required. PJM states that it will construe the failure of an electric distribution company or load serving entity to provide evidence of an "opt out" provision within a ten business-day notification period to mean that the load to be reduced is not subject to a state-issued prohibition or any other conflicting contractual obligation.⁵

Notices of Filings and Responsive Pleadings

6. Notices of PJM's filings were published in the *Federal Register*, 74 Fed. Reg. 7,882 and 8,925 (2009), with protests and interventions due on or before March 10, 2009. Notices of intervention and timely-filed motions to intervene were submitted by the entities listed in the Appendix to this order.

7. Protests were filed by American Municipal Power – Ohio, Inc. (AMP-Ohio); American Electric Power Service Corporation (AEP); the American Public Power Association and the National Rural Electric Cooperative Association (APPA); the Indiana Utility Regulatory Commission (Indiana Commission); the Indiana Office of Utility Consumer Counselor (Indiana Consumer Agency); and the Borough of Chambersburg, PA and North Carolina Electric Membership Corporation (Chambersburg).⁶ Comments generally supportive of PJM's filing were submitted by the PJM Industrial Customer Coalition (Industrial Customers), EnerNOC, Inc. (EnerNOC), Converge, Inc. (Converge), Integrys Energy Services, Inc. (Integrys), ClearChoice Energy, Energy Curtailment Specialists, Inc., and the New Jersey Board of Public Utilities. Answers to protests and

⁵ PJM also states that neither its proposal nor Order No. 719 precludes a retail regulatory authority from passing ordinances or issuing orders outside of this 10-business day notification period to establish requirements for eligibility of retail customers to provide demand response. Thus, this 10-business day notification period is relevant to PJM's initial action on a registration request, but an electric distribution company or load serving entity may provide PJM at any time with the types of evidence described above as to retail regulatory authority policies. As discussed further below, after receiving the requisite evidence, PJM will take appropriate responsive action.

⁶ The following entities also submitted protests that incorporate by reference the APPA protest: Blue Ridge Power Agency, Delaware Municipal Electric Corporation, Inc., Indiana Municipal Power Agency, California Municipal Utilities Association, Northern Illinois Municipal Power Agency (IMPA), AMP-Ohio, Southern Maryland Electric Cooperative, Inc. (SMEC), Chambersburg, and Virginia Municipal Electric Authority No. 1.

answers to answers were submitted by PJM, SMEC, Converge, Chambersburg, EnergyConnect, APPA, AMP-Ohio, and Integrys.

Deficiency Letter, PJM's Response, Responsive Pleadings and Motion to Defer Ruling

8. On April 10, 2009, the Commission issued a deficiency letter directing PJM to provide additional information and clarifications regarding its proposed tariff changes. Among other things, the Commission requested that PJM further support and explain the operation of its opt-out proposal. PJM was also required to address the effect of a retail regulatory determination prohibiting participation in PJM's Demand Response Programs on existing commitments made in PJM's markets.

9. PJM submitted its response to the deficiency letter on April 28, 2009. Notice of PJM's response was published in the *Federal Register*, 74 FR 21799 (2009), with protests and interventions due on or before May 19, 2009. A motion to intervene was timely filed by NRG Companies. Protests and comments were submitted by IMPA, Industrial Customers, AMP-Ohio, APPA, the Indiana Commission, and SMEC.

10. As noted above, PJM requested, on June 2, 2009, that action on its filing be deferred until 60 days following the Commission's issuance of Order No. 719-A. Responsive comments were submitted by AMP-Ohio, AEP, and the Indiana Commission.

Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest and an answer to an answer unless otherwise ordered by the decisional authority. We will accept the above-noted answers because they have provided information that assisted us in our decision-making process.

B. Conditional Opt-Out/Opt-In Rights

12. For the reasons discussed below, we will accept PJM's filing subject to a compliance filing to be made within 60 days of the date of this order.

1. PJM's Proposal

13. PJM proposes that, if the relevant electric retail regulatory authority has laws or regulations prohibiting a specific customer class or rate class of end-use customers from participating in PJM's Demand Response Programs, upon receipt of evidence of such laws or regulations, no such customers in that jurisdiction would be permitted to participate.⁷ PJM characterizes its proposal as an "opt-out" approach. PJM does not, however, permit the retail regulatory authority to "opt-in" to PJM's Demand Response Programs subject to conditions (e.g., by permitting end-use participation, but precluding any entity other than a municipality to aggregate that jurisdiction's demand response).

14. PJM states that its proposal is consistent with Order No. 719.⁸ PJM asserts that, in Order No. 719, the Commission made clear that RTOs and ISOs should not be required to interpret the laws or regulations of a retail regulatory authority. PJM submits that, instead, Order No. 719 left to individual RTOs and ISOs the responsibility to craft clear rules for implementation of Order No. 719's broad directives.⁹

2. Responsive Pleadings

15. Protestors argue that PJM's proposed registration requirements effectively present retail regulators with an unwarranted all-or-nothing proposition regarding customer participation in PJM's Demand Response Programs. Specifically, intervenors argue that, under PJM's proposed rules, a retail regulator would be required to either: (1) allow the participation of third-party aggregators of retail customers or (2) prohibit the participation

⁷ PJM, in its deficiency letter response, acknowledges that this interpretation, provided in its transmittal letter, is not expressly reflected in its proposed tariff language. Deficiency Letter response at 3.

⁸ PJM transmittal letter at 3, citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 47 (requiring "each [regional transmission organization (RTO)] or [independent system operator (ISO)] to accept bids from demand response resources, on a basis comparable to any other resources, for ancillary services that are acquired in a competitive bidding process, if the demand response resources: (1) are technically capable of providing the ancillary service and meet the necessary technical requirements; and (2) submit a bid under the generally-applicable bidding rules at or below the market-clearing prices, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate").

⁹ *Id.*, citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at n. 212. PJM, in its deficiency letter response, reiterates this argument.

of all load in the retail regulator's service territory.¹⁰ Protestors argue that PJM's proposal violates the spirit and intent of Order No. 719,¹¹ and, if approved, would require retail regulators to opt out of PJM's Demand Response Programs altogether. Intervenors conclude that PJM should be required to amend its proposal to permit retail regulators to condition the participation of their retail customers in PJM's Demand Response Programs, i.e., to condition their participation, among other things, on the use of a single aggregator, as overseen or controlled by the electric distribution company or load serving entity.

16. The Indiana Commission argues that, while Order No. 719 refers to state authorities that "expressly do not permit" end-use customers participating in an RTO's or ISO's demand response programs, PJM refers, instead, to a state authority that "expressly prohibits" such participation. The Indiana Commission requests clarification that PJM's use of the term "expressly prohibits" requires only a generic state regulatory prohibition applicable to all such transactions, subject to a case-by-case exception.

17. Finally, Industrial Customers assert that, while PJM's proposed opt-out language is intended to apply to PJM's economic and emergency load response programs as well as to interruptible load for reliability, the proposed changes to PJM's Operating Agreement and OATT are not sufficiently clear in this regard. Industrial Customers therefore request that the Commission clarify that the "opt-out" requirement applies to each of the aforementioned programs. Industrial Customers also request that the Commission direct PJM to update its Operating Agreement and OATT so as to replace references to the now defunct active load management program with references to the superseding interruptible load for reliability program, as appropriate.

¹⁰ APPA notes that some of its members endorsed PJM's proposed tariff revisions, as presented in PJM's stakeholder proceedings. APPA adds that this support was based on the erroneous understanding that PJM would construe the relevant tariff language to allow a retail regulator to prohibit a third-party aggregator of retail customers from participating in PJM's Demand Response Programs by prohibiting a load's participation in that applicant's aggregation bid.

¹¹ APPA protest at 9 (arguing that Order No. 719 permits retail regulators to protect the load-serving and aggregating activities of the utilities they supervise from the unintended consequences and undue burden imposed by the activities of unauthorized third-party aggregators); *see also* Chambersburg protest at 11; SMEC protest at 7; AMP-Ohio protest at 5 and 12.

3. PJM's Answer and Deficiency Letter Response

18. PJM argues that, while the conditional opt-in concept was considered by the Commission in Order No. 719,¹² the Commission ultimately did not include this requirement.¹³ PJM concludes that, while Order No. 719 permits retail regulatory authorities to opt-out of PJM's Demand Response Programs, it does not permit these entities to conditionally opt-in.¹⁴

19. PJM also clarifies, in its deficiency letter response, that it expects its proposed tariff revisions to apply to all wholesale market participation for demand response resources, including its interruptible load for reliability program, the synchronized reserve market and the regulation market. PJM states that customers wishing to participate in the synchronized reserve or regulation markets do so after their economic load response program registration has been reviewed through the existing customer review process provided for in the PJM Operating Agreement. PJM states that, as a result, its proposed tariff revisions cover customer participation in these other markets.

20. PJM also clarifies that "the Active Load Management ('ALM') option that currently exists in the PJM Tariff and PJM Operating Agreement refers to the Load Management now provided for in the Reliability Pricing Model [RPM] Capacity Market through [interruptible load for reliability] and/or Demand Resource."¹⁵

¹² PJM notes that AMP-Ohio and APPA, among others, specifically requested a conditional opt-in allowance in their comments.

¹³ Specifically, PJM relies on Order No. 719's statement that:

(e) Except for circumstances where the laws and regulations of the relevant retail regulatory authority do not permit a retail customer to participate, there is no prohibition on who may be an [aggregator of retail customers]; (f) An individual customer may serve as an [aggregator of retail customers] on behalf of itself and others; (g) the RTO or ISO may specify certain requirements, such as . . . certification that participation is not precluded by the relevant electric retail regulatory authority.

Order No. 719, FERC Stats & Regs. ¶ 31,281 at P 158.

¹⁴ PJM, in its deficiency letter response, reiterates this argument.

¹⁵ PJM deficiency letter response at 10 footnote 10.

4. Commission Determination

21. Since the submission of PJM's filing in this docket, the Commission has issued Order No. 719-A. In Order No. 719-A, the Commission clarified that it was not "challeng[ing] the role of states and others to decide the eligibility of retail customers to provide demand response."¹⁶ Similarly, the Commission stated that we "leave it to the appropriate state or local authorities to set and enforce their own requirements."¹⁷ The Commission also emphasized that "[w]hile we leave it to the relevant retail authority to decide the eligibility of retail customers, their decision or policy should be clear and explicit so that the RTO or ISO is not tasked with interpreting ambiguities."¹⁸

22. Order No. 719-A thus clarified that relevant retail regulatory authorities retain substantial flexibility in establishing requirements for eligibility of retail customers to provide demand response. In light of that clarification, we find that PJM's proposal would, in practice, excessively limit a retail regulatory authority's ability to condition the eligibility of its retail customers to participate in PJM's Demand Response Programs. Accordingly, we condition our acceptance of the proposal on PJM revising its tariff and Operating Agreement to recognize a retail regulatory authority's ability to condition such eligibility, consistent with Order No. 719-A. Consistent with the Commission's statement in Order No. 719-A, any such retail regulatory authority decision, policy, or condition should be clear and explicit so that PJM is not tasked with interpreting ambiguities.

23. The Indiana Commission requests that PJM be required to adopt specific language recognizing this ability. Given that we are conditioning our acceptance on PJM's submitting revised tariff language, we will not address the Indiana Commission's request at this time. Rather, the Indiana Commission may renew its request, if it chooses, following PJM's submission of its compliance filing.

24. We agree with Industrial Customers that references in PJM's Operating Agreement and OATT to the active load management program, a program whose load management is now provided for, according to PJM, through other programs, may be confusing. We therefore condition our acceptance on PJM revising its Operating Agreement and OATT to replace references to the active load management program with appropriate current terms. We also condition our acceptance on PJM clarifying, in its Operating Agreement and OATT, its stated intent that the demand response registration

¹⁶ Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 49.

¹⁷ *Id.* P 54.

¹⁸ *Id.* P 50.

process discussed herein applies not only to PJM's economic load and emergency load response programs, but to all wholesale market participation by demand resources.

C. Revocations of Previously Granted Authority

25. For the reasons discussed below, we condition our acceptance on PJM, in its compliance filing, submitting revised tariff language expressly addressing how retail regulatory prohibitions will affect existing registrations and/or commitments made by PJM's market participants.

1. PJM's Proposal

26. PJM's filing does not expressly address the effect of a retail regulatory authority prohibition on prior registrations and/or prior commitments made by PJM's market participants.

2. Responsive Pleadings

27. According to the Indiana Commission, the retail tariff of Indiana Michigan Power Co. (I&M) prohibits an I&M retail customer from reselling power, such as by participating in PJM's demand response programs, unless the customer has I&M's consent and the Indiana Commission has approved the customer's participation. The Indiana Commission argues that PJM's proposed tariff revisions would permit participation by an I&M customer, in violation of the retail tariff, if, for whatever reason, I&M did not meet the ten-day deadline to object to the customer's registration.¹⁹

28. The Indiana Commission argues that PJM's proposal also does not allow for changes in circumstances allowed under I&M's retail tariff that would afford or revoke the opportunity for demand response participation in PJM's markets by retail Indiana customers. For example, the Indiana Commission asserts that, under PJM's proposal, if I&M objected and provided documentation in a timely manner regarding a customer that was not approved to participate in PJM's demand response programs and that customer later obtained approval, the customer would apparently still be prohibited from participating. The Indiana Commission concludes that, by not respecting its regulatory authority and the retail tariff it has approved, PJM ends up either allowing participation when it is not permitted or barring participation even though it is permitted. The Indiana Commission requests that PJM include provisions for changes regarding whether an aggregator of retail customers or an end-use customer is precluded from participation in PJM's demand response programs.

¹⁹ Indiana Commission protest at 18.

29. The Indiana Consumer Agency similarly states that PJM's enrollment language should address the situation in which a demand response enrollee ceases to be eligible to participate.

3. PJM's Answer and Deficiency Letter Response

30. PJM clarifies in its answer that it would honor any new statute, ordinance, order or regulation as it may affect a participant's status in its Demand Response Programs. PJM further clarifies, in its deficiency letter response, that when it receives the requisite evidence regarding a state opt-out determination, it will take steps to "unregister" the relevant registrations of the demand response provider, with all such demand response providers of record still permitted to submit settlements covering those services they have already provided.

31. With respect to demand resources that have cleared in PJM's RPM capacity markets, or which have been designated in RPM as demand resources, or as interruptible loads for reliability resources, PJM states that the timing of retail regulatory action will be important to make it feasible for PJM to effectuate the regulatory action without causing reliability issues or the unintended assessment of large penalties on demand response providers. PJM states that it intends to work with the state regulators in its footprint to ensure that the timing of any retail regulator's actions apply prospectively to future delivery years, as opposed to the present delivery year.

4. Additional Answers

32. Industrial Customers agree with PJM that, with respect to PJM's RPM capacity market, PJM should give only prospective effect to any change in status authorized by a retail regulatory authority. Industrial Customers argue, however, that PJM is not clear as to when it would give specific effect to the retail regulator's prohibition.

33. Industrial Customers note that capacity resources that clear PJM's base residual auction commit to deliver capacity at the start of the delivery year three years in the future.²⁰ Industrial Customers assert that, if a demand resource that cleared in the May 2009 auction is located within a retail regulatory authority's jurisdiction that subsequently bars demand response participation by its retail customers, then PJM should effectuate the retail regulator's decision by precluding the demand resource from registering to participate in any capacity auctions that are conducted subsequent to the effective date of the retail regulator's actions, but should not undo the demand resource's

²⁰ Industrial Customers note, for example, that capacity resources that cleared in the May 2009 auction are required to fulfill their capacity obligation during the 2012-13 delivery year.

cleared position from any auctions that were conducted prior to the effective date of retail regulator's actions. Industrial Customers argue that a capacity resource should be permitted to fulfill its capacity obligation in the delivery year for which its bid cleared and should be entitled to the compensation for that performance. Industrial Customers note that, otherwise, a demand resource that cleared in an RPM auction prior to a retail regulator's decision would be required to procure replacement capacity in order to satisfy its obligations, which Industrial Customers assert runs contrary to the Commission's strong reluctance to reset auctions. Accordingly, Industrial Customers seek clarification that PJM's proposal would not undo auction outcomes.

34. With respect to newly-adopted retail regulatory authority prohibitions, Integrys objects to PJM acting to overturn the reasonable expectations of the parties when they first enrolled in PJM's Demand Response Programs. Integrys argues that the demand response customer in this instance should be permitted to remain registered until its contract expires or is terminated. Integrys asserts that end-use customers participating in PJM's Demand Response Programs have a reasonable right to expect that their participation will continue over the applicable contract term.

5. Commission Determination

35. As discussed in prior orders,²¹ the Commission found in December 2006 that PJM's then-existing capacity market was unjust and unreasonable because it failed to procure sufficient capacity to enable PJM to maintain a reliable transmission system. To remedy this concern, the Commission approved the RPM program, a capacity market under which PJM purchases capacity on a multi-year forward basis through an auction mechanism. Thus, under RPM, capacity resources that clear in a Base Residual Auction commit to deliver capacity in a Delivery Year three years in the future. We are concerned that the reliability-centered purpose for which the RPM tariff construct was established could be undermined if policies adopted by a retail regulatory authority to restrict the eligibility of demand to participate in the RPM market were implemented in a manner that requires changes to the results of completed RPM auctions. We agree with Industrial Customers that a capacity resource should be permitted to fulfill its RPM capacity obligation in the Delivery Year for which its bid cleared and receive compensation for that performance. This approach also accounts for PJM's concerns as to both reliability issues and the potential unintended assessment of large penalties on demand response providers.²² Therefore, we direct PJM to clarify in its compliance

²¹ See, e.g., *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 2 (2009).

²² In its answer, PJM discusses interruptible load for reliability (ILR) resources, as well as demand resources that have cleared in the RPM capacity market. As described in
(continued...)

filing that, with respect to RPM, PJM will effectuate such retail regulatory authority policies prospectively by precluding affected resources from offering capacity in auctions that are conducted subsequent to the effective date of those policies.²³

36. By contrast, we find that Integrys's arguments as to reasonable expectations in its relationships with end-use customers neither raise concerns similar to those discussed above in connection with the RPM tariff construct nor otherwise warrant divergence from the Commission's statement in Order No. 719-A that relevant retail regulatory authorities retain substantial flexibility in establishing requirements for eligibility of retail customers to provide demand response.²⁴ Therefore, we accept PJM's clarification that, upon receipt of the requisite evidence of a retail regulatory authority determination affecting the right of an end-use customer to participate in PJM's Demand Response Programs,²⁵ it is appropriate that PJM promptly terminate all affected registrations. It is also appropriate, as PJM clarifies, that the demand response provider in this instance only be permitted to submit settlements for the curtailment service it has already provided. We direct PJM to make these clarifications in its compliance filing.

prior orders, in the current RPM framework, a portion of the reliability requirement target is not procured in the Base Residual Action, but rather is explicitly reserved to be served by ILR resources, which are certified no later than three months prior to the Delivery Year. *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 66 (2009). The Commission has accepted a PJM proposal to eliminate the ILR provisions of its tariff beginning with the 2012 Delivery Year, subject to conditions, including a requirement that PJM revise the structure of incremental auctions in order to allow greater participation, as close as possible to the Delivery Year, of short lead time resources. *Id.* P 83-85. We find that the concerns discussed above as to potential detrimental effects on the RPM tariff construct also apply with respect to commitments made by ILR resources and short lead time resources.

²³ Nevertheless, demand resources should have the option of participating in incremental RPM auctions for the purpose of buying back positions to which they have previously committed.

²⁴ See P 22-23 *supra*.

²⁵ PJM's proposal of such requisite evidence is described at P 5, *supra*.

D. Responses to a Registration Request**1. PJM's Proposal**

37. PJM proposes to require that electric distribution companies and/or load serving entities seeking to assert that the laws or regulations of the relevant electric retail regulatory authority expressly prohibit an end-use customer's participation in PJM's Demand Response Programs provide the requisite certification to PJM within ten business days of receipt of notice from PJM of a registration request.

2. Responsive Pleadings

38. APPA requests that PJM's proposed ten business-day notification period for load serving entities to submit evidence of a retail regulatory prohibition be revised to 60 days. APPA argues that ten business days may be insufficient to accommodate the notice and other due process requirements applicable to retail regulators' actions. The Indiana Commission argues that an objection to the participation of an aggregator of retail customers or an end-use customer should be permitted at any time, whether the objection is made by an electric distribution company, a load serving entity, or by the relevant electric retail regulatory authority.

3. PJM's Answer

39. PJM argues that its proposal is designed to ensure that the registration process moves expeditiously and efficiently, especially for registrations received close to the critical summer period. PJM asserts that APPA's proposed 60-day notification period, by contrast, would essentially eliminate customer participation during almost an entire summer season pending a possible challenge that could be filed with PJM. PJM adds that neither its proposal nor Order No. 719 precludes a retail regulatory authority from passing ordinances or issuing orders expressing their intention in advance of a registration request.

4. Commission Determination

40. We accept PJM's proposal. We agree with PJM that it is important for the registration process to proceed in an expeditious and efficient manner, particularly close to the peak summer period, and we find that APPA's proposed 60-day notification period is inconsistent with that need. We also note that, independent of this notification period, relevant retail regulatory authorities retain substantial flexibility in establishing requirements for eligibility of retail customers to provide demand response, as discussed above. Neither the Commission's regulations nor PJM's proposal preclude a retail regulatory authority from acting in advance of a registration request, or preclude an electric distribution company or load serving entity from providing PJM at any time with evidence as to relevant retail regulatory authority policies. Upon receipt of the requisite

evidence of a retail regulatory authority determination affecting the right of an end-use customer to participate in PJM's Demand Response Programs, it is appropriate that PJM promptly terminate all affected registrations.

E. Transparency

1. PJM's Proposal

41. PJM states that its practice has been to inform state commissions of the status of its Demand Response Programs, including the extent of any customer registrations in these programs.²⁶

2. Responsive Pleadings

42. The Indiana Consumer Agency argues that PJM should be required to share information on enrollment, including specific information as to which customers are enrolled, how they participate, and whether any changes to PJM's Demand Response Programs take place during their enrollment. The Indiana Consumer Agency further requests that this information be provided both to the electric distribution company or load serving entity and to the relevant electric retail regulatory authority. The Indiana Consumer Agency adds that PJM should be required to take active measures to ensure that retail regulatory authorities and state consumer advocates have sufficient information regarding end-use customer participation in PJM's Demand Response Programs.

3. PJM's Answer and Deficiency Letter Response

43. PJM, in its answer, pledges that it will provide to its stakeholders information addressing demand response participation in each of its markets and will regularly update this information in reports made to its Market and Reliability Committee. PJM adds, however, that providing the extent of information requested by the Indiana Consumer Agency, including customer-specific information, could require PJM to disclose information that retail customers would consider confidential or proprietary.

44. PJM also states, in its deficiency letter response, that it remains committed to posting on its website a list of the relevant electric retail regulatory authorities that prohibit participation in PJM's Demand Response Programs. PJM states that it would be willing to further clarify this commitment in a compliance filing.

²⁶ PJM does not propose any specific tariff language regarding this practice, but does offer to further clarify the matter if the Commission believes clarifying language is necessary.

4. Commission Determination

45. We agree with PJM that it should not be required to disclose customer-specific confidential or proprietary information regarding demand response participation. We also agree that market participants' legitimate transparency needs can be satisfied by PJM issuing the periodic reports noted above. We condition our acceptance on PJM's memorializing this commitment in its Operating Agreement and OATT, including its obligation to timely post on its website a list of retail regulatory authorities who prohibit retail participation in PJM's Demand Response Programs. We also note that Order No. 719-A addressed issues related to information sharing with respect to demand response,²⁷ and nothing in this order relieves PJM from the obligations that the Commission imposed in Order No. 719-A.

F. Evidentiary Obligations

1. PJM's Proposal

46. PJM proposes to require that if an electric distribution company or load serving entity seeks to assert that a state law or regulation bars retail customer participation, then the electric distribution company or load serving entity must submit evidence to PJM regarding participation rights in PJM's Demand Response Programs. PJM asserts that this proposal is consistent with Order No. 719.²⁸

2. Responsive Pleadings

47. The Indiana Commission and AEP argue that the obligation to provide PJM with evidence of the laws or orders of the relevant electric retail regulatory authority should not fall on electric distribution companies or load serving entities. The Indiana Commission asserts that Order No. 719 properly places the burden of providing such evidence on aggregators of retail customers, not on the electric distribution company or load serving entity.²⁹

²⁷ Order No. 719-A, 128 FERC ¶ 61,059 at P 69-70.

²⁸ PJM transmittal letter at 4, citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 155 (holding that the Commission was not imposing a requirement directly on the retail regulatory authorities).

²⁹ Indiana Commission protest at 17, citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 158(g) (holding that the RTO/ISO may specify certain requirements for an aggregator of retail customers to qualify and register, "such as . . . certification that participation is not precluded by the relevant electric retail regulatory authority").

48. AEP adds that PJM's proposal places the electric distribution company or load serving entity in the position of interpreting state law and regulations and subjects these entities to accusations that they have unfairly or unjustifiably barred retail customers from gaining access to PJM's Demand Response Programs.

3. PJM's Answer

49. PJM asserts that placing the responsibility for providing evidence of a relevant state law or regulation on electric distribution companies and load serving entities is consistent with PJM's overall registration process. PJM argues that this responsibility will not otherwise prejudice or impose any undue burden on any other party.

4. Commission Determination

50. We accept PJM's proposal. We agree with PJM that this proposal is consistent with Order No. 719, which provides RTOs and ISOs with substantial flexibility to develop procedures with respect to this issue.³⁰

The Commission orders:

(A) PJM's proposed tariff changes are hereby accepted, subject to conditions, as discussed in the body of this order, to become effective September 15, 2009.

(B) PJM is hereby directed to make a compliance filing within 60 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁰ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 158.

Appendix

Intervenors

American Electric Power Service Corporation
American Municipal Power- Ohio, Inc.
American Public Power Association
Blue Ridge Power Agency
Borough of Chambersburg, PA
California Municipal Utilities Association
ClearChoice Energy
Converge Inc.
Cpower, Inc.
Delaware Municipal Electric Corporation
EnergyConnect, Inc.
Energy Curtailment Specialists, Inc.
EnerNOC, Inc.
Exelon Corporation
Indiana Municipal Power Agency
Indiana Office of Utility Consumer Counselor
Indiana Utility Regulatory Commission
Integrus Energy Services, Inc.
National Rural Electric Cooperative Association
New Jersey Board of Public Utilities
Northern Illinois Municipal Power Agency
NRG Companies
Old Dominion Electric Cooperative
PJM Industrial Customer Coalition
Public Service Commission of Maryland
Sam's East LP
Southern Maryland Electric Cooperative, Inc.
Virginia Municipal Electric Association
Wal-Mart Stores East, LP