

129 FERC ¶ 61,010
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 No. EL08-44-001

v.

Accord Energy, LLC
BJ Energy, LLC
Franklin Power, LLC
GLE Trading, LLC
Ocean Power, LLC
Pillar Fund, LLC
Power Edge, LLC
Tower Research Capital, LLC
Tower Research Capital Investments, LLC

BJ Energy, LLC
Franklin Power, LLC
GLE Trading, LLC
Ocean Power, LLC and
Pillar Fund, LLC

Docket Nos. EL08-49-001
EL08-49-003

v.

PJM Interconnection, LLC

ORDER ON REQUESTS FOR REHEARING AND CLARIFICATION
AND REFUND REPORT

(Issued October 2, 2009)

1. This order addresses two rehearings and a refund report in two related proceedings. In Docket No. EL08-44-000, PJM filed a complaint alleging that Tower

Companies¹ manipulated the PJM market by entering into coordinated, offsetting positions in the market for Financial Transmission Rights (FTR), concentrating high-risk or losing positions in one affiliate, Power Edge, LLC (Power Edge), while hedging its risk in other, more profitable affiliates. In Docket No. EL08-49-000, Tower Companies² filed a complaint contending that PJM should be required to return collateral and other funds from Tower Company affiliates that PJM was holding as collateral for the default by Power Edge.

2. In orders issued on the same day, April 2, 2009, the Commission dismissed, in part, the PJM complaint in Docket No. EL08-44³ and granted Tower Companies complaint in Docket No. EL08-49 for the return of funds, buy, without prejudice to PJM seeking orders from district courts in ongoing litigation between these parties.⁴ The Commission required PJM to refund the withheld funds to the Tower Companies.

3. Requests for rehearing and clarification were filed in both proceedings, and PJM filed a refund report. As discussed below, the Commission grants PJM's request for clarification that the April 2 Order in Docket No. EL08-49-000 did not rule on PJM's affirmative defense that the Tower Companies' corporate veil should be pierced, deferring instead to the ongoing district court litigation, and accepts, subject to the provision of interest, PJM's refund report. The Commission denies the rehearing requests in Docket No. EL08-44-001.

I. Background

4. On March 7, 2008, PJM filed a complaint contending that the Tower Companies manipulated PJM's Day-ahead energy and FTR markets. In its April 2008 Order,⁵ in response to PJM's manipulation complaint, the Commission directed its Office of Enforcement (OE) to continue its investigation of the Tower Companies' conduct under

¹ Accord Energy, LLC; BJ Energy, LLC; Franklin Power, LLC; GLE Trading LLC; Ocean Power, LLC, Pillar Fund, LLC, Power Edge, LLC; Tower Research Capital, LLC; and Tower Research Capital Investments, LLC.

² BJ Energy, LLC; Franklin Power, LLC; GLE Trading, LLC; Ocean Power, LLC; and Pillar Fund, LLC.

³ *PJM Interconnection, L.L.C. v. Accord Energy, LLC*, 127 FERC ¶ 61,007 (2009).

⁴ *BJ Energy, LLC v. PJM Interconnection, LLC*, 127 FERC ¶ 61,006 (2009) (April 2 Order).

⁵ *PJM Interconnection, L.L.C. v. Accord Energy, LLC et al.*, 123 FERC ¶ 61,103 (2008) (April 2008 Order).

18 C.F.R. § 1b.5 (2008) and to report its findings to the Commission at the conclusion of its investigation.⁶

5. On March 28, 2008, the Tower Companies filed a complaint against PJM contending that PJM was withholding collateral and revenues due several Tower Company affiliates in violation of its tariff. The Tower Companies requested that the Commission direct PJM to distribute the funds.

6. In July 2008, the Tower Companies filed a civil suit against PJM in federal district court in Pennsylvania. Based on claims such as conversion and breach of contract, the suit seeks, *inter alia*, compensatory damages equal to the withheld collateral.⁷

7. On February 17, 2009, the Tower Companies filed an amended answer arguing that PJM was violating its tariff by withholding Tower Companies' collateral as evidenced by an email message that Tower obtained through discovery in the civil suit. On March 4, 2009, PJM filed an amended answer arguing that new information obtained through discovery in the civil suit supported a piercing the corporate veil defense such that PJM was entitled to retain Tower Companies' collateral to cover Power Edge's default.

8. On April 2, 2009, the Commission issued orders in both dockets.⁸ In Docket No. EL08-44-000, the Commission issued an order partially dismissing PJM's complaint. In that order, the Commission stated that, although the OE investigation remained ongoing, OE had completed its investigation with respect to two of the allegations made by PJM in its complaint, and included an Enforcement Report detailing OE's findings. The first complaint allegation addressed in the report was that certain Tower Companies' affiliates perpetrated a fraud upon PJM by entering into coordinated, offsetting positions in the market for FTRs, concentrating high-risk or losing positions in one affiliate, Power Edge, and deliberately causing Power Edge to default on its obligations by saddling it with these positions, and hedging its risk in its other, more profitable affiliates. The second complaint allegation addressed in the report was that Power Edge was deliberately under- or de-capitalized in order to trigger its collapse. Other allegations and issues raised by, or

⁶ See *PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,279, at P 56 (2008) (indicating the Office of Enforcement had already instituted an investigation of these issues).

⁷ See *BJ Energy LLC v. PJM Interconnection, L.L.C.*, C.A. No. 08-cv-3649-NS, First Amended Complaint (Nov. 7, 2008), <http://www.pjm.com/~media/about-pjm/member-services/default-notification/amended-complaint-with-cert-of-service.ashx>.

⁸ *PJM Interconnection, L.L.C. v. Accord Energy, LLC et al.*, 127 FERC ¶ 61,007 (2009); *BJ Energy, LLC v. PJM Interconnection, LLC*, 127 FERC ¶ 61,006 (2009).

related to, the PJM Complaint remained under investigation and thus were not addressed in the Enforcement Report.

9. Regarding the two complaint allegations, OE reported that it found insufficient evidence of manipulation to support finding of a violation of the Commission's regulations.⁹ As a result, the Commission stated that it was taking no further action regarding these claims of market manipulation.

10. As to Tower Companies' complaint in Docket No. EL08-49-000, the Commission ordered PJM to return to Tower Companies the monies it was holding, within 120 days, without prejudice to PJM seeking an order from the district court requiring the preservation of those funds for district court litigation.¹⁰

11. On April 15, 2009, in Docket No. EL08-49-000, PJM filed a motion with the Commission requesting authorization to publicly release Tower Companies' documents that PJM had attached to a late-filed answer and its request for rehearing. The Commission denied PJM's motion to publicly release the documents because PJM had failed to meet the burden of showing that public disclosure of the material was necessary. However, the parties to the proceeding were afforded the opportunity to view the documents pursuant a protective order.¹¹

II. Responsive Pleadings

A. Docket No. EL08-49-000

1. Requests for Rehearing and Clarification

12. PJM requests clarification that the Commission did not address PJM's piercing the corporate veil defense in its April 2 Order, thereby leaving the issue for district court. In a late-filed amended answer in this docket, PJM had argued that the Tower Companies: (1) operate as a single enterprise; (2) are all controlled by the same owners; (3) are managed and operated by the same employees; (4) commingle funds without respect to the separate identities of the companies; and (5) operate without adequate capitalization for the individual companies to support their trading activities and

⁹ 18 C.F.R § 1c.2 (2009).

¹⁰ April 2 Order at P 1.

¹¹ 74 Fed. Reg. 20,479 (2009). On April 24, 2009, a notice was issued requiring PJM to provide such documents to those parties whose interventions were accepted in the April 2 Order that request the documents and sign a protective order no less stringent than the one already approved by the district court.

protecting credits from defaults. PJM filed several confidential documents with the Commission as proffered support for these claims. PJM argued that these facts support its common law defense to allow it to pierce the corporate veil so as to retain the Tower Companies' collateral to offset the Power Edge default.

13. In its request for rehearing, PJM asserts that, since the April 2 Order did not discuss PJM's piercing the corporate veil defense presented in its amended answer, the Commission intended to leave the matter to the common law courts. PJM requests that the Commission confirm either that PJM's piercing the corporate veil defense exceeds the Commission's jurisdiction, or that the Commission shares concurrent jurisdiction with the courts but has chosen to leave it for the courts to address. PJM asserts that the district court should have a clear statement from the Commission that it did not address this claim and that these questions were reserved for the district court to decide. PJM states that, if the Commission does not provide the requested clarification and instead finds that the April 2 Order did silently reject PJM's defense, then PJM requests the Commission grant rehearing.

14. PJM argues that the staff report in Docket No. EL08-44-000 was limited to whether the Tower Companies violated the Commission's anti-manipulation regulations through their corporate structure. PJM states that it does not challenge the Commission's determination in Docket No. EL08-44-000 or the OE report. But PJM asserts that the OE report did not address PJM's defense. PJM argues that it is entitled to argue a pierce the corporate veil defense even though the Commission found insufficient evidence of manipulation to support a violation of the Commission's regulations.

15. PJM argues that piercing the corporate veil does not require a finding of fraud or market manipulation. PJM asserts that since individual Tower Companies' were inadequately capitalized, operated as a single enterprise, controlled by the same owners, managed and operated by the same employees and commingled funds without respect for the individual companies, then PJM is entitled to treat the Tower Companies as one and retain the monies being held to offset Power Edge's default.

16. DTE Energy Trading, Inc. (DTE) also filed a request for rehearing asserting that the Commission erred in failing to consider PJM's amended answer. DTE argues that PJM's evidence demonstrates that the Tower Companies' treated their multiple limited liability affiliates as a single enterprise, rather than respecting the separateness of the entities. DTE argues that, since the Commission is still investigating Tower Companies' trading activities, PJM should continue withholding Tower Companies' collateral until such time that the Commission concludes its entire investigation.

2. Refund Report

17. On July 31, 2009 PJM returned the withheld collateral and revenues, including interest, to the Tower Companies and filed a refund report with the Commission, as

directed in the April 2 Order.¹² On August 21, 2009 the Tower Companies' filed a protest to PJM's refund report arguing that PJM failed to pay the proper amount of interest. The Tower Companies state that PJM incorrectly calculated the interest due and that PJM owes Tower Companies an additional \$1.6 Million in interest.

18. Tower Companies argue that according to PJM's tariff and Commission policy it is entitled to the FERC interest rate on all of the withheld funds. The Tower Companies assert that section 7.2 of PJM's tariff states that interest on "any unpaid amounts shall be calculated in accordance with the methodology specified for interest on refunds in the Commission's regulations at 18 C.F.R. § 25.19a(a)(2)(iii)."¹³ The Tower Companies also assert that Commission precedent holds that the Tower Companies should be made whole for the time value of the money that it otherwise would have had available for its use.¹⁴

19. On September 3, 2009, PJM filed an answer to Tower Companies protest of the refund report. PJM argues that in the April 2 Order the Commission did not require PJM to pay interest, much less specify a specific interest rate that should be paid. Furthermore, since Tower Companies failed to seek rehearing of the April 2 Order, they are not entitled to protest PJM's refund report. PJM asserts that, contrary to the Tower Companies assertion, section 7.2 applies to the non-payment of PJM bills by PJM members. PJM argues that it could not justify Commission silence in the April 2 Order as to an interest rate as requiring it to voluntarily pay additional funds to the Tower Companies which had already cost PJM members approximately \$50 million in absorbing Tower Companies' losses. PJM also argues that the Commission's interest rate does not apply to this proceeding since by its terms it only applies when proposed increased rates or changes are suspended and made subject to refund.¹⁵

¹² PJM returned \$20,015,580.96 in collateral and \$17,019,278.30 in withheld revenues, and \$1,200,861.38 in interest.

¹³ PJM Tariff, section 7.2 First Revised Sheet No. 50A.

¹⁴ See Tower Refund Protest at 3 (*citing H.Q. Energy Services (U.S.), Inc. v. NYISO*, 113 FERC ¶ 61,184 (2005); *Public Service Co. of Colorado*, 82 FERC ¶ 61,058 (1998); *New Charleston Power L.P.*, 83 FERC ¶ 61,168 (1998)).

¹⁵ See PJM Answer at 2 (*citing* 18 C.F.R. § 35.19(a)(1)).

B. Docket No. EL08-44-000

20. DTE and Indicated Entities¹⁶ argue that the Commission erred in relying on the OE Report to dismiss PJM's complaint. They argue that the Commission should have allowed all parties an opportunity to review the evidence and then made a decision on the merits, instead of treating PJM's publicly filed and noticed complaint as an enforcement investigation and relying on a non-public investigation to dismiss PJM's complaint.

21. Indicated Entities contend that the OE Report should be viewed as evidence to be considered by the Commission "on equal par with the evidence and arguments" submitted by PJM. Indicated Entities and DTE argue that, by treating the complaint as an enforcement proceeding, the parties were deprived of their rights to participate in the case. Indicated Entities argue that in Order No. 670 the Commission stated that complaints alleging market manipulation would be processed as Federal Power Act section 206 complaints which does not expressly provide for a dismissal based on a non-public investigation.

22. Indicated Entities also argues that, combined with the Commission's decision in the investigation of Edison Mission Energy in Docket No. IN08-3-000, the instant filing demonstrates a lack of public procedures that reduces the public's faith in the Commission's enforcement process.

23. DTE also asserts that the Commission failed to address its argument that Tower Companies' corporate structure allowed it to convert FTR obligations into an FTR option, which resulted in a fraudulent scheme even if Tower Companies had no intent to defraud. DTE attacks PJM's credit policies for allowing this practice.

24. The Independent Market Monitor filed a motion to intervene out of time and comments and a motion for clarification requesting that the Commission clarify that: (1) the Commission has not made a final determination as to whether Tower Companies manipulated PJM's credit rules; and (2) the determinations in Enforcement's investigation report may be revisited as they relate to Tower Companies manipulative scheme that resulted in bankruptcy as a contingency.

25. The National Rural Electric Cooperative Association and the American Public Power Association (Trade Associations) also filed a motion to intervene out of time and a request for rehearing. They object to the Commission's use of its non-public

¹⁶ Indicated Entities consist of: Old Dominion Electric Cooperative, The American Public Power Association, Borough of Chambersburg, Pennsylvania, Allegheny Electric Cooperative, Inc., The Pennsylvania Office of Consumer Advocate, the PJM Industrial Customer Coalition, and the Pennsylvania Public Utility Commission.

investigation procedures to resolve complaints filed under section 206. They assert that, prior to the April 2 Order, they reasonably expected the Commission to engage in reasoned decision-making instead of relying on the OE Report to resolve PJM's complaint. Therefore, they argue that good cause exists to permit them to intervene out of time. The Trade Associations also assert that intervention at this time would not disrupt the proceedings since they accept the record as it exists and only dispute the lack of due process afforded to PJM and the parties. Finally, they assert that their status as national trade associations affords them a unique position and that some of their cooperative and association members will be directly affected by this proceeding. The Trade Associations' arguments are, otherwise, identical to the Indicated Entities' arguments.

26. On September 4, 2009, PJM filed a letter with the Commission stating that the Commission recently ordered an administrative hearing in response to a complaint alleging that participants in the ISO New England market violated the Commission's regulations.¹⁷ PJM states that the allegations in that case are similar to its complaint against Tower Companies. PJM further states that the Commission treated these cases of like circumstances differently, establishing hearing procedures for ISO-New England's complaint, but referring PJM's complaint to enforcement proceedings.

III. Discussion

A. EL08-49-001 Clarification Request

27. The Commission grants PJM's request and clarifies that we have not addressed PJM's affirmative, common law defense of piercing the corporate veil, and that, under the *Arkla* doctrine, PJM is not prohibited from litigating this issue in a common law court.¹⁸

28. We note that the district court already has an ongoing proceeding that is addressing piercing the corporate veil, among other things. PJM argues that the veil

¹⁷ *Blumenthal v. ISO New England, Inc.*, 128 FERC ¶ 61,182 (2009) (*Blumenthal*).

¹⁸ *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*). Under the *Arkla* doctrine, the Commission may defer to a court proceeding when the Commission finds that it need not exercise primary jurisdiction. In considering whether to exercise primary jurisdiction, the Commission outlined three factors to be considered: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.

should be pierced based on common and corporate law principles applicable to its contract with the Tower Companies. We see no need to assert primary jurisdiction over this issue under the *Arkla* doctrine.¹⁹

29. DTE's request for rehearing is denied. As discussed above, at PJM's request the Commission is deferring to PJM's ongoing litigation in district court where it is pursuing its common law claims against Tower Companies and we see no need to duplicate those proceedings here. Additionally, as we stated in our April 2 Order, although a portion of the investigation continues, the Commission dismissed PJM's complaint into the allegations that Tower Companies violated the Commission's anti-manipulation rules by operating Power Edge with the intent to defraud, which formed the basis of PJM's argument to withhold collateral and revenues.

B. EL08-44-001 Rehearing Request

30. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.²⁰ We deny the Independent Market Monitor's and the Trade Associations' interventions because they have not met this higher burden of justifying their late interventions.

31. We deny the requests for rehearing. The complaint here relates to the Commission's enforcement of its regulations prohibiting market manipulation. When the matter at issue is enforcement of the Commission's regulations, the Commission has discretion in determining how best to proceed in conducting its investigation -- based on the facts and circumstances of each individual case.²¹ In this case, the Commission

¹⁹ We find that in this case the Commission does not possess any special expertise with respect to determinations of piercing the corporate veil in the context of a contractual dispute; there is no need for uniformity of interpretation on piercing questions since they are heavily fact dependent; and the case is not important in relation to the regulatory responsibilities of the Commission. *See Morgan Stanley Capitol Group, Inc.*, 119 FERC ¶ 61,298, at P 19 (2007) (declining to rule on the interpretation of specific contract provisions in seller's choice contracts).

²⁰ *E.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

²¹ *See Burlington Resources, Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008) (Commission has prosecutorial discretion in enforcement, as opposed to adjudicatory, proceedings).

recognized that it already had an ongoing enforcement investigation of the Tower Companies' conduct, and determined it was appropriate to continue the investigation.²²

32. Moreover, PJM did not file a request for rehearing of the Commission's determination to dismiss the complaint alleging market manipulation.²³ It has asked only for clarification in the Docket No. EL08-49-000 proceeding that the Commission's findings do not preclude it from raising a piercing the corporate veil argument in a common law court, and we have granted that request above. We, therefore, find no basis for establishing a trial-type proceeding when such a proceeding already is ongoing in the district court.

33. Contrary to Indicated Entities' assertions, the Commission did not limit its discretion in handling manipulation claims in Order No. 670. The section Indicated Entities refers to discusses the Commission's discretion on remedies arising out of manipulation claims. In that regard, the Commission stated that "[h]ow the Commission addresses market manipulation will depend on the facts presented," and "we have significant discretion to shape equitable remedies that achieve the purpose of Congress' enactment of anti-manipulation provisions."²⁴

²² The Commission recognizes that in the recent *Blumenthal* order, 128 FERC ¶ 61,182 (2009), we found that a trial-type hearing was an appropriate response to a complaint alleging market manipulation. We emphasized in *Blumenthal* that our decision was due to "the unique history of the allegations" in that case. The *Blumenthal* decision, was not intended to, nor did it, establish that every complaint alleging market manipulation is entitled to a trial-type hearing.

²³ To the contrary, PJM has stated that:

PJM is not challenging the Commission's determination in Docket No. EL08-44-000 to discontinue aspects of its investigation of the Tower Companies under its anti-manipulation regulations, the subject of the staff report. It is the enforcement staff's prerogative to determine what matters to prosecute as manipulation under the Commission's anti-manipulation regulations.

PJM Rehearing Request, Docket No. EL08-49-000, at 7 (April 15, 2009) (emphasis added).

²⁴ *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 72, *reh'g denied*, 114 FERC ¶ 61,300 (2006).

C. Refund Report

34. We will accept PJM's refund report, subject to PJM making an interest payment as discussed below. Attachment Q, Section VI.A of the PJM tariff specifies that cash provided as Financial Security will be held in a depository account by PJM with interest earned at PJM's overnight bank rate or through other investment options chosen by the participant. For funds that were provided by the Tower Companies as Financial Security, PJM must pay interest in accordance with the requirements of this section of its tariff. With respect to all other funds withheld, PJM must pay interest in accordance with section 7.2 of its tariff and the Commission's interest rate.²⁵

35. PJM claims that the Tower Companies are foreclosed from challenging its determination on interest because they failed to seek rehearing of the Commission's April 2, 2009 order in Docket No. EL08-49-000 that specified that PJM refund the withheld amounts, but did not specifically specify the payment of any interest. We do not find that the Commission's silence requires a party to seek rehearing before raising a concern that the interest rate chosen by the company is inadequate. The payment of interest is not a penalty, and merely reflects the time value of the money withheld.²⁶ PJM therefore must pay interest on funds as specified in its tariff and the Commission's regulations.

The Commission orders:

(A) In Docket No. EL08-44-001, the Commission denies the requests for rehearing.

²⁵ Section 7.2 states: "Interest on Unpaid Balances: Interest on any unpaid amounts shall be calculated in accordance with the methodology specified for interest on refunds in the Commission's regulations at 18 C.F.R. § 35.19a(a)(2)(iii)." This section is not limited only to customers, as PJM suggests, since section 7.1A(d) refers to payments by PJM as well. In any event, we see no reason why, absent a specific tariff provision specifying otherwise, the same interest rate should not be applied to both withheld payments by customers and by PJM.

²⁶ *E.g., Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264, 1268 (D.C. Cir. 1999); *Southeastern Michigan Gas Co. v. FERC*, 133 F.3d 34, 44 (D.C. Cir. 1998).

(B) In Docket No. EL08-49-001 *et al.*, the Commission grants PJM's request for clarification, as discussed in the body of this order, and orders PJM to refund to the Tower Companies the additional interest owed, as discussed above, and file an updated refund report with the Commission within 30 days of the date of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.