

135 FERC ¶ 61,036  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

PJM Interconnection, L.L.C.

Docket No. EL10-78-000

ORDER DENYING PETITION FOR DECLARATORY ORDER  
AND ALTERNATIVE REQUEST FOR WAIVER

(Issued April 18, 2011)

1. On July 20, 2010, PJM Interconnection, L.L.C. (PJM) submitted a petition for a declaratory order seeking approval of PJM's proposed methodology for permitting PJM employees, board members, their spouses, and their minor children (PJM personnel) to hold financial interests in certain companies or their affiliates that are "market participants," but whose participation in PJM's markets are minimal in relation to their overall business activities. In the alternative, PJM requests an on-going waiver of section 35.34(j)(1)(i)<sup>1</sup> with respect to such entities. The Commission denies PJM's petition for a declaratory order and its alternative request for waiver, as discussed below.

**I. Background and Details of the Filing**

2. Section 35.34(j)(1)(i)<sup>2</sup> of the Commission's regulations prohibits Regional Transmission Organization (RTO) employees and non-stakeholder directors from having financial interests in any market participants. PJM states that it administers a Code of Conduct that, consistent with this regulation, restricts PJM personnel from directly owning the securities of its market participants. PJM states that it also places all market participants and their affiliates on a "prohibited investments" list. PJM states that the Code of Conduct requires PJM personnel to divest their financial interests in PJM members or their publicly traded affiliates within six months of the employee or the company joining PJM.

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<sup>1</sup> 18 C.F.R. § 35.34(j)(1)(i) (2010).

<sup>2</sup> *Id.*

3. However, PJM explains in its filing that in recent years, non-traditional companies whose primary businesses do not involve electricity have joined PJM in increasing numbers, including large industrials, large consumer product retailers, and financial institutions. Therefore, PJM states that its Office of General Counsel initiated this filing out of concern that the compliance obligation facing PJM personnel has become so unduly complicated that there was an increased risk of inadvertent non-compliance with the Code of Conduct.<sup>3</sup> PJM states that the existing compliance obligation places an unreasonable burden on PJM personnel to “connect the dots” that a company which is commonly regarded as running a business wholly unrelated to the business of electricity is actually participating to a minor degree in PJM, perhaps through an indirect subsidiary. Further, PJM asserts that the existing blanket prohibition meets no underlying policy or conflict of interest objective because, in the case of these market participants with minimal participation in PJM, no action that PJM personnel could take in their role with the RTO could affect the stock price of the PJM market participant.

4. Therefore, in the instant filing, PJM seeks to interpret and apply section 35.34(b)(2)(i) of the Commission’s regulations,<sup>4</sup> which defines “market participant” as “[a]ny entity that, either directly or through an affiliate, sells or brokers electric energy, or provides ancillary services to the Regional Transmission Organization, *unless the Commission finds that the entity does not have economic or commercial interests that would be significantly affected by the Regional Transmission Organization’s actions or decisions*” (emphasis added). PJM proposes a formula methodology to interpret and apply this exemption to allow PJM personnel to hold financial interests in certain companies or their affiliates that are defined by the Commission as “market participants” but whose participation in PJM’s markets are minimal in relation to their overall business activities. In the alternative, PJM requests an on-going waiver of section 35.34(j)(1)(i) with respect to such entities.

5. PJM states that its proposed formula would allow PJM to remove a market participant or its affiliates from PJM’s prohibited investments list if: (1) the company’s primary business purpose is not electricity-related, according to the company’s code under the North American Industry Classification System (NAICS), and (2) the

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<sup>3</sup> PJM states in its filing that no individual PJM stakeholder or PJM personnel asked PJM to make the filing.

<sup>4</sup> 18 C.F.R. § 35.34(b)(2)(i) (2010).

company's total activity<sup>5</sup> in the PJM markets is not significant in relation to the company's total revenues over the same time period. PJM states that it will classify a company as an electricity-related company and retain such company on the prohibited investments list if its NAICS codes indicate a company whose primary business purpose concerns the generation, transmission, or distribution of electricity (i.e., 221111 to 221122). PJM states that if the company's NAICS code indicates that its primary business purpose is not electricity-related, then PJM will apply the second prong of the formula.

6. For the second prong of the formula, PJM will determine whether the market participant's total activity in the PJM markets is less than one percent of its gross revenues over a set period of time (e.g., the company's most recently completed fiscal year). If the publicly traded company is a parent of the market participant, PJM will determine whether the market participant's total activity in the PJM markets is less than one percent of the parent company's gross revenues over a set time period.<sup>6</sup>

7. PJM attached to its filing, as Exhibit A, a "permitted investments" list of PJM members and their publicly traded affiliates that PJM characterizes as indicative of the companies that could be excluded according to the proposed methodology. PJM proposes to apply its proposed methodology to the companies on the permitted investments list and any new companies joining PJM, at least on a biannual basis.

## **II. Notice of Filing and Responsive Pleadings**

8. Public notice of the July 20, 2010 filing was issued in the *Federal Register*, 75 Fed. Reg. 45,626 (2010), on July 27, 2010, with comments due on or before August 19, 2010. Motions to intervene were filed by American Municipal Power, Inc.; Midwest Independent Transmission System Operator, Inc.; Old Dominion Electric Cooperative; The Dayton Power and Light Company; Pepco Holdings, Inc.; and Exelon Corporation. Comments were filed by the California Independent System Operator Corporation (CAISO). Motions to intervene and protest were filed by PJM Power Providers Group (P3), Pennsylvania Public Utility Commission (PaPUC), and The Office of the Ohio Consumers' Counsel (OCC). The Public Service Commission of Maryland (Maryland PSC) and Missouri Public Service Commission (MoPSC) each filed a motion for leave to

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<sup>5</sup> PJM states that the market participant's "total activity" equals the sum of the absolute value of all of its purchases and sales in the applicable ISO/RTO markets during the relevant time period.

<sup>6</sup> PJM states that it will apply the test when the market participant's financial information has been consolidated into its parent company's financial reports.

intervene out-of-time and protest. On September 3, 2010, PJM filed an answer to the protests filed by P3, PaPUC, OCC, and Maryland PSC. On September 20, 2010, OCC filed an answer to PJM's answer.

**A. Comments**

9. In its comments, the CAISO asserts that PJM's proposal is sound and practical, and ensures strong controls to protect against conflicts of interest without imposing punitive restrictions on investment opportunities. The CAISO argues that, where an RTO's independence is not at issue, there is no reason to restrict its directors and employees from investing in companies whose securities would not measurably be impacted by its participation in the RTO markets. The CAISO states that support for granting PJM's proposal is found in analogous policies under federal law.

**B. Protests**

10. Protestors argue that PJM's proposal would alter a core principle of RTO management and governance, independence, and would allow PJM personnel to own direct financial interests in companies that are PJM member companies and market participants without limitation and without disclosure. Protestors assert that permitting PJM to decide whether the rule prohibiting investment in market participants applies based on a vague test is not in the public interest and that a bright line prohibition without exceptions, like the Commission's current rule, provides clear confidence that independence is being maintained. Protestors also argue that PJM has not offered specific circumstances that justify changing the Commission's case-by-case determination of whether an entity should be exempted from the general prohibition against financial investment by deciding it is not a "market participant."

11. Protestors argue that PJM's proposed methodology contains a number of deficiencies, including that the one percent of gross revenue threshold does not accurately depict the significance of the market participant's activity in PJM markets, that the mechanics of PJM's proposal are unworkable, and lack of disclosure of and meaningful limitations on permitted investments.

12. PaPUC argues in its protest that it would be inappropriate for the Commission to grant the declaratory order because declaratory orders have general applicability and force of law not restricted solely to the petitioner, and in this case might have unintended and unforeseen consequences in other organized markets.

13. MoPSC asserts that should the Commission look with favor upon PJM's petition, the Commission should explicitly limit any relief to PJM and not extend the relief to any other RTO or ISO.

### **C. Answers**

14. PJM states in its answer that it seeks only a ruling as to whether its proposal is acceptable and meets the regulation's standards—thus, if the Commission determines either that PJM's proposal: (1) would improperly compromise RTO independence, or (2) is not a workable or appropriate means to implement the regulation, the Commission should simply deny the request for declaratory order and the alternative request for waiver. PJM contends that the Commission should not defer this question to PJM's stakeholder process.

15. PJM argues that its proposal does not seek to compromise the doctrine of independence, but rather seeks to implement the independence requirement in a meaningful way. PJM asserts that there is no value in burdening the system with individual filings and requiring PJM personnel to disclose to the Commission and PJM membership every investment in a company that is on the "permitted list" would further complicate the compliance burden. However, in order to address protestors' concerns, PJM states that it is willing to submit to the Commission an initial list of excepted companies in the form of an informational filing as well as any subsequent additions to the list.

16. OCC argues in its answer that PJM's proposal to submit an informational filing to the Commission does not address OCC's concerns about the unworkability of the proposed methodology and lack of sufficient justification to alter the status quo. Further, OCC asserts that, instead of being characterized as an informational filing, the submission of such a list should require an explicit Commission determination of whether each company should be exempted from the definition of a "market participant." Finally, OCC clarifies that PJM need not file a separate request in a separate Commission proceeding for each individual company that PJM wants excepted, but should make a formal filing each time PJM wants to update the list of Commission-excepted companies.

### **III. Discussion**

#### **A. Procedural Matters**

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>7</sup> the timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,<sup>8</sup> the Commission will grant Maryland PSC's and MoPSC's late-filed motions

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<sup>7</sup> 18 C.F.R. § 385.214 (2010).

<sup>8</sup> 18 C.F.R. § 385.214(d) (2010).

for leave to intervene out-of-time and protest given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>9</sup> prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept PJM's and OCC's answers because they have aided us in our decision-making.

**B. Substantive Matters**

19. Section 35.34(b)(2)(i) of the Commission's regulations permits the exemption of an entity from the definition of "market participant" if the Commission finds that it does not have economic or commercial interests that would be significantly affected by the RTO's actions or decisions. PJM proposes a formula methodology to allow it to independently apply and interpret this provision to permit PJM personnel to hold a financial interest in non-electricity related companies or their affiliates that are "market participants" but whose participation in PJM's markets is minimal in relation to their overall business activities. In the alternative, it requests an on-going waiver of section 35.34(j)(1)(i) with respect to such entities.

20. As discussed below, we interpret the Commission's regulations to mean that the Commission will consider, on a case-by-case basis, whether an entity meets the definition of a market participant. We find that it would be inconsistent with section 35.34(b)(2)(i) to permit PJM to make the determination of whether an entity qualifies as a market participant through use of its proposed methodology. Therefore, we deny PJM's request for a declaratory order and alternative request for waiver to allow PJM to apply its proposed formula methodology to interpret and apply the exemption in section 35.34(b)(2)(i).

21. In Order No. 2000, the Commission established an independence standard for ISOs and RTOs to ensure that these entities would provide transmission service and operate the grid in a non-discriminatory manner.<sup>10</sup> The Commission stated that an RTO "[m]ust be independent of any entity whose economic or commercial interests could be significantly affected by the RTO's actions or decisions" and therefore found that the

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<sup>9</sup> 18 C.F.R. § 385.213(a)(2) (2010).

<sup>10</sup> *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

definition of market participant should focus on “[t]hose entities whose economic and commercial interests can be affected by the RTO’s behavior.”<sup>11</sup> Accordingly, in addition to entities that sell energy or provide transmission or ancillary services, the Commission included in the definition of market participant “[a]ny other entity that the Commission finds has economic or commercial interests that would be significantly affected by the Regional Transmission Organization’s actions or decisions.”<sup>12</sup> The Commission stated that “[t]he addition of this paragraph allows us, on a case-by-case basis, to consider whether particular buyers of electric energy (or any other entity) could manipulate an RTO’s decisions to the disadvantage of other RTO customers.”<sup>13</sup> Thus, the Commission contemplated that the determination of whether an entity has economic or commercial interests that would be significantly affected by the RTO’s actions or decisions would be made by the Commission itself, on a case-by-case basis.

22. Furthermore, the definition of market participant codified in Order No. 2000 included an exemption for an entity that “[t]he Commission finds . . . does not have economic or commercial interests that would be significantly affected by the Regional Transmission Organization’s actions or decisions . . .”<sup>14</sup> Given the plain language of this clause (i.e. “the Commission finds”), we interpret the exemption to mean that the Commission itself must make a finding of whether an entity qualifies for exemption from the definition of market participant because it does not have economic or commercial interests that would be significantly affected by the RTO’s actions or decisions.

23. We therefore find that it would be inconsistent with section 35.34(b)(2)(i) to permit PJM to make the determination of whether an entity qualifies as a market participant through use of its proposed methodology. The Commission will consider, on a case-by-case basis, whether an entity meets the definition of a market participant. An applicant may submit a filing to the Commission requesting application of the exemption in section 35.34(b)(2)(i) to either a single entity or a group of entities.

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<sup>11</sup> Order No. 2000, FERC Stats. & Regs. at 31,061.

<sup>12</sup> 18 C.F.R. § 35.34(b)(2)(ii) (2010).

<sup>13</sup> Order No. 2000, FERC Stats. & Regs. at 31,062.

<sup>14</sup> 18 C.F.R. § 35.34(b)(2)(i).

The Commission orders:

PJM's petition for declaratory order and alternative request for waiver are hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.