

120 FERC ¶ 61,254
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Allegheny Electric Cooperative, Inc., *et al.*

v.

Docket No. EL07-56-000

PJM Interconnection, L.L.C.

Organization of PJM States, Inc., *et al.*

v.

Docket No. EL07-58-000

PJM Interconnection, L.L.C.

(Consolidated)

ORDER ON OFFER OF SETTLEMENT AND COMPLAINTS

(Issued September 20, 2007)

1. This case concerns two complaints that were filed against PJM Interconnection, L.L.C. (PJM) in April 2007, alleging tariff violations and interference with the independence of PJM's Market Monitor. The complaints sought expedited action on their requests for relief. In August of 2007, PJM filed a unilateral Offer of Settlement, in which it proposed changes to the structure and function of its market monitoring unit (MMU). The complainants oppose adoption of the Offer of Settlement, but support negotiations over elements of PJM's proposal. Most of the other parties, including PJM, request the Commission to allow, or actively facilitate, settlement negotiations with respect to the offer.

2. In this order, the Commission makes two findings. First, we find that PJM has not committed tariff violations, and that the existing record is sufficient to support that finding. Second, we find that the significant tension between PJM management and the Market Monitor could compromise the MMU's ability to perform its tariff-defined functions and that, as a result, tariff modifications may be necessary to reform that relationship. We make a preliminary finding that the Market Monitor should report to the Board of Managers or to an independent committee of the Board, rather than to both the

Board and PJM management. However, we defer ordering a tariff amendment to that effect, because we agree with the majority of the parties that it is desirable for the parties themselves to work out the details of the relationship between PJM and its Market Monitor. Therefore, we institute settlement procedures for that purpose. Given the large number of parties and the multiplicity of issues presented, we believe a facilitator is essential. We will allow the parties 14 days to select a facilitator and, if they cannot agree, the Commission will appoint one. The parties may avail themselves of the settlement options traditionally available in Commission proceedings, including the use of a Settlement Judge or the Dispute Resolution Service. As a third option, given the unique nature of this proceeding, the Commission, if the parties so choose, will also make available its General Counsel, John S. Moot, to serve as facilitator. Once selected, the facilitator will make an interim report back to the Commission within 45 days and a final report within 90 days, to advise us whether agreement has been reached or is likely to be reached in the near future. If no settlement appears possible, the Commission will issue a further order resolving those structural and functional issues that bear on the ability of PJM's Market Monitor to perform his tariff-defined duties.

3. It is the Commission's strong desire that the parties reach a mutual accommodation on these issues and submit a proposed settlement at the end of the 90-day period. A consensual resolution is most likely to restore confidence in the efficient, impartial and competitive operation of PJM's markets and in the monitoring of those markets, confidence that has been jeopardized by the recurring controversy over the role of PJM's MMU.

I. Procedural History

4. On April 17, 2007, the District of Columbia Office of the People's Counsel (DC Counsel), on behalf of Joint Complainants,¹ filed a Complaint for a Show Cause Order, on a Fast Track Basis and Request for Shortened Response Time, alleging certain tariff

¹ Allegheny Electric Cooperative, Inc.; Borough of Chambersburg, Pennsylvania; Cities and Towns of Hagerstown, Thurmont and Williamsport, Maryland; District of Columbia Office of the People's Counsel; Illinois Citizens Utility Board; Indiana Office of Utility Consumer Counsel; Maryland Office of the People's Counsel; New Jersey Division of Rate Counsel; Office of the Attorney General of Virginia, Division of Consumer Counsel; Office of the Ohio Consumers' Counsel; Old Dominion Electric Cooperative; Pennsylvania Office of Consumer Advocate; PJM Industrial Customer Coalition; Southern Maryland Electric Cooperative, Inc.; State of Delaware, Division of the Public Advocate.

violations by PJM. This complaint, filed pursuant to sections 205 and 206 of the Federal Power Act (FPA), 16 U.S.C. §§824d and 824e (2000), was assigned Docket No. EL07-56-000. On April 26, 2007, DC Counsel filed an Errata to the Complaint.

5. On April 23, 2007, the Organization of PJM States, Inc. (OPSI), on behalf of itself and several of its member utility regulators,² filed a Complaint against PJM Requesting Fast Track Processing and Motion for Interim Relief, and alleging certain tariff violations by PJM. This complaint, filed pursuant to sections 201, 206, 207 and 209 of the FPA, 16 U.S.C. §§ 824, 824e, 824f, and 824g (2000), was assigned to Docket No. EL07-58-000. On April 30, 2007, OPSI filed an Amended Complaint.

6. Timely motions to intervene were filed by 25 entities in Docket No. EL07-56-000 and by 26 entities in Docket No. EL07-58-000. Late motions to intervene were filed by three entities in Docket No. EL07-58-000. PJM filed answers in both dockets, generally denying the allegations made in the complaints and opposing the relief sought. OPSI filed a Motion for Leave to Respond to Answer and Answer.

7. On May 18, 2007, the Commission issued an Order Consolidating Proceedings, Issuing Data Requests and Related Matters (Initial Order), in which it consolidated the two dockets, granted the requests for late intervention, granted the Motion for Leave to Respond to Answer filed by OPSI, granted fast track processing, deferred action on the request for interim relief, and directed the Secretary to serve data requests on PJM and Dr. Joseph E. Bowring, PJM's Market Monitor.³

8. On May 23, 2007, Dayton Power and Light Company (Dayton P&L) filed a Motion to Intervene Out-of-Time. On May 24, 2007, Dr. Bowring filed a Motion for Extension of Time to provide his responses to the Commission's data requests. On May 25, 2007, PJM filed an Answer, and OPSI filed an Answer and a Motion to Supplement Commission Data Requests. On May 25, 2007, the Secretary issued a Notice granting an extension of time to both Dr. Bowring and PJM in which to file responses to the Commission's data requests. On June 12, PJM filed an Answer to OPSI's Motion to Supplement Commission Data Requests.

² District of Columbia Public Service Commission; Indiana Utility Regulatory Commission; Kentucky Public Service Commission; Maryland Public Service Commission; New Jersey Board of Public Utilities; North Carolina Utilities Commission; Pennsylvania Public Utility Commission; Virginia State Corporation Commission.

³ *Allegheny Electric Cooperative, Inc.*, 119 FERC ¶ 61,165 (2007).

9. On June 12, 2007, both Dr. Bowring and PJM submitted responses to the Commission's data requests. On July 2, 2007, PJM submitted a supplemental response, and on July 11, 2007, Dr. Bowring submitted a supplemental response.
10. The Lehigh Cement Company sent a letter to the Commission, dated June 28, 2007, which was placed in the record on July 3, 2007. Senator Robert Menendez sent a letter to the Commission, dated July 10, 2007, which was placed in the record on July 11, 2007. The Electricity Consumers Resource Council sent a letter to the Commission, dated July 19, 2007, which was placed in the record on July 19, 2007.
11. On July 17, OPSI filed an Answer to PJM's July 2, 2007 filing.
12. On July 27, 2007, Joint Complainants filed a document styled as supplemental comments to the June 12, 2007 data responses of PJM and Dr. Bowring, to PJM's July 2, 2007 supplemental response, and to the July 17, 2007 Answer of OPSI.
13. The motion by Dayton P&L to intervene out of time was unopposed, and the Commission finds that granting late intervention will not disrupt the proceedings. Therefore, the Commission accepts the late intervention of Dayton P&L.
14. Under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2007), an answer to an answer is prohibited. The letter filing made by PJM on July 2, 2007, although untitled, was responsive to Dr. Bowring's data response filed on June 12, 2007, and was in substance an answer.⁴ Although OPSI's Answer of July 17, 2007 is generally prohibited under the rules, we find that it assists us in the decision-making process, and therefore accept it for filing.
15. The Joint Complainants' July 27, 2007 filing addresses and responds to the various submissions it cites, and therefore constitutes an answer. Insofar as it answers the June 12, 2007 pleadings of PJM and Dr. Bowring, it is filed past the 30-day response period provided in the rules and thus is out of time. However, we find that it assists us in the decision-making process, and accept it for filing.
16. On August 2, 2007, PJM filed a unilateral "Offer of Settlement," in which it proposed numerous changes to its market monitoring plan, including the establishment of

⁴ See *American Electric Power Service Corp.*, 98 FERC ¶ 61,156, at 61,563 (2002) (declining to accept answers to a motion for clarification which was, in substance, a request for rehearing).

an external MMU. It specifically exempted from its offer a resolution of the tariff violation allegations of the complaints, as well as the request for interim relief, both of which PJM requested the Commission to rule upon separately.

17. On August 22, 2007, twelve entities filed comments on PJM's Offer of Settlement, including the two complainants and Dr. Bowring. Those entities are: Joint Complainants; OPSI; Dr. Bowring; the PJM Power Providers Group (P3); the PSEG Companies;⁵ the Mirant Parties;⁶ Pepco Holdings, Inc. (on its own behalf and on behalf of its public utility affiliates); Electricity Consumers Resource Council (ELCON); North Carolina Electric Membership Corporation, together with Delaware Municipal Electric Corporation, Inc. and Blue Ridge Power Agency (collectively, NCEMC); Dayton P&L; FPL Energy Generators,⁷ together with DC Energy, LLC; and the PPL Parties.⁸

18. Also on August 22, 2007, motions to intervene out-of-time were filed by P3 and Delaware Municipal Electric Corporation, Inc. These were unopposed and the Commission finds that the late intervention of these parties will not disrupt the proceedings. Therefore, their motions for intervention are granted. Blue Ridge Power Agency, which joined in the NCEMC comments, is not a party. However, the comments in which it joined will be accepted for filing, due to the party status of the other two filers. Dr. Bowring is also not a party, but his personal interest in the proceedings render his comments of assistance to the Commission in its deliberations. They will therefore be accepted for filing.

19. In their August 22 comments, the two complainants do not accept PJM's Offer of Settlement, and request hearings with the right of discovery. Many of the commenters

⁵ Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources and Trade LLC.

⁶ Mirant Energy Trading, LLC; Mirant Chalk Point, LLC; Mirant Mid-Atlantic, LLC; and Mirant Potomac River, LLC.

⁷ FPL Energy Marcus Hook, L.P.; North Jersey Energy Associates, L.P.; Doswell Limited Partnership; Backbone Mountain Windpower LLC; Mill Run Windpower LLC; Somerset Windpower LLC; Meyersdale Windpower LLC; Waymart Wind Farm L.P.; and Pennsylvania Windfarms, Inc.

⁸ 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.

approve of portions of PJM's offer, and suggest the offer be submitted to a Settlement Judge for Commission-sanctioned negotiations over its contents. Two commenters, ELCON and NCEMC, suggest that since the Commission is currently considering market monitoring policies in a rulemaking docket,⁹ any overhaul of PJM's market monitoring plan should be held in abeyance until the Commission completes its rulemaking deliberations. ELCON further suggests that interim provisions be put in place to ensure market monitor independence.

20. On September 4, 2007, PJM filed its reply to the comments filed on August 22. It requests the Commission to initiate formal settlement proceedings before a Commission Administrative Law Judge, in order to resolve the issues of MMU structure and function.

21. Also on September 4, 2007, replies were filed by P3 and the PPL Parties, both requesting a Commission-sanctioned settlement process.

22. On September 12, 2007, Joint Complainants filed a Motion for Leave to File, Answer to New Issues and Clarifying Comments, stating that PJM had mischaracterized its position on settlement, and responding to a new request for relief raised by PJM in its reply comments (requesting the Commission to establish certain guidelines for the settlement process). This pleading will be accepted in order to clarify the record as to the Joint Complainants' position, and to afford Joint Complainants the opportunity to respond to PJM's newly requested relief.

23. Also on September 12, 2007, OPSI filed a Motion for Leave to Answer and Answer, addressing PJM's reply comments. As OPSI notes, under the Commission's Rules of Practice and Procedure, only comments and reply comments are permitted in response to an offer of settlement.¹⁰ However, since PJM's reply comments raise a new request for relief, we will grant OPSI's Motion for Leave to File Answer and accept for filing its Answer.

II. Background

24. Allegations of interference by PJM with the independence of its MMU were first publicly raised by Dr. Bowring at the Commission's April 5, 2007 technical conference on market monitoring policies. In his prepared statement, Dr. Bowring alleged that PJM

⁹ See *Wholesale Competition in Regions with Organized Electric Markets*, FERC Stats. & Regs. ¶ 32,617, 72 Fed. Reg. 36,276 (2007) (Competitive Markets ANOPR).

¹⁰ 18 C.F.R. § 385.602(f) (2007).

had taken a series of actions towards the MMU that he found objectionable. He presented his concerns as a difference in philosophy regarding the concept of MMU independence. He stated:

PJM has made it clear that, from management's perspective, the market monitor is first an employee of PJM with all the duties of an employee including obeying management orders, i.e. following the chain of command. I do not believe that this is consistent with independence of market monitoring or with meeting the tariff defined objectives of market monitoring.¹¹

25. The complaint filed by the Joint Complainants relies on the statements of Dr. Bowring made at the technical conference in support of its request for relief, and argues that PJM has interfered with the independence of the Market Monitor and violated its tariff. The Joint Complainants request the Commission to do the following:

- Direct PJM to show cause why it should not be found to have attempted to undermine the monitoring ability of the Market Monitor;
- Direct PJM to show cause why it should not be found in violation of Attachment M of its tariff, requiring it to provide the Market Monitor adequate resources, staff, and access to data; and
- Direct PJM to comply with Attachment M by requiring it to:
 - provide the Market Monitor with access to data,
 - fully staff the Market Monitor to 2006 levels,
 - ensure the Market Monitor independence regarding reports and recommendations,
 - ensure the Market Monitor independence to meet its tariff obligations,
 - direct the Market Monitor to file reports every two weeks on sufficiency of resources, staff and access to data as well as its independence.

¹¹ Prepared Statement of Joseph E. Bowring, PJM Market Monitor, Technical Conference: Review of Market Monitoring Policies, Docket No. AD07-8, at P 10 (Apr. 5, 2007) (Bowring Statement). Although Dr. Bowring made these allegations at the technical conference, he did not claim that PJM had violated its filed tariff and did not make any formal referral to the Commission alleging a tariff violation, either before or after the technical conference.

26. The complaint filed by OPSI also relies on Dr. Bowring's statements at the technical conference, and argues that PJM has interfered with the independence of the MMU and violated its tariff. OPSI requests the Commission to do the following:

- Hold an open hearing and investigation with right of discovery;
- Provide interim relief by ordering PJM to return the MMU to status quo ante regarding funding, organization, staffing and resources;
- Determine that PJM has violated its Market Monitoring Plan with respect to MMU independence and determine that interstate service of PJM is inadequate under section 207 of the FPA;
- Direct PJM to remedy such violations and refrain from them in the future;
- Direct PJM to modify its Market Monitoring Plan to convene a joint federal and state board under section 209 of the FPA, or amend its tariff to remove the MMU and its personnel from supervision by any officer or employee of PJM and have it supervised by the PJM Board of Managers, and to mandate that any action by the Board regarding discipline or discharge of MMU personnel be subject to formal notice to and review by the Commission; and
- If the Commission finds it lacks statutory authority for the foregoing, to declare that PJM no longer satisfies the requirements of a regional transmission organization (RTO) and revoke or suspend its status as an RTO until such time as PJM is in compliance with Commission rules and orders governing MMU independence.

27. Inasmuch as the complaints rely solely on the brief statements made by Dr. Bowring at the technical conference in support of their allegations, the Commission has reviewed additional evidence, i.e., the responses to data requests filed by Dr. Bowring and PJM, to determine (i) whether PJM committed any tariff violations, and (ii) even if no tariff violations had been committed, whether any actions by PJM might be preventing or impeding the MMU from performing its tariff-defined responsibilities. That factual predicate has now been provided through the responses to data requests filed by Dr. Bowring and PJM, and is examined in the following section of this order.

III. Review of the Evidence

28. The Commission, in determining whether the evidence in this case demonstrates the existence of a tariff violation, reviewed the prepared and oral statements made by Dr. Bowring at the technical conference, upon which the complainants rely, and over

2,700 pages of documents received in response to our data requests. We also considered whether these incidents, apart from the question of whether tariff violations have been committed, demonstrate the existence of a work environment at PJM that may be making it difficult for the MMU to adequately perform its tariff-defined functions.

29. Inasmuch as the allegations of tariff violations are predicated upon PJM's actions toward its Market Monitor, we also considered whether the Market Monitor himself was of the opinion that a tariff violation has been committed. Neither in his remarks at the technical conference, nor in his statement submitted in response to our data requests, has Dr. Bowring claimed that PJM violated its tariff.¹² When specifically asked whether PJM was preventing the MMU from performing its tariff functions, either by failing to provide appropriate staffing and resources, failing to provide access to required information, or failing to arrange for the cooperation of PJM employees with the MMU, all as required by PJM's tariff, he declined to say that PJM had done so.¹³ Rather, Dr. Bowring stated: "I am concerned that if left unchecked, such PJM actions [as described at the technical conference] will escalate to the point where PJM would violate the tariff." (emphasis added).¹⁴

30. The tariff obligations imposed on PJM in Attachment M to its tariff are as follows:

- A. Establishment: PJM shall establish, and provide appropriate staffing and resources to, the Marketing Monitoring Unit, an organization within PJM that shall be responsible for implementing this Plan.

¹² Dr. Bowring did send a short e-mail to an employee in the Commission's Division of Energy Market Oversight on January 29, 2007, in which he characterized an action by PJM as "a clear infringement of MMU independence and a violation of the tariff Attachment M." Statement of Joseph E. Bowring in Response to the Federal Energy Regulatory Commission's Order of May 19, 2007, Docket Nos. EL07-56-000, EL07-58-000, at Bates No. SMM-00140 (June 12, 2007) (Bowring Data Response). However, Dr. Bowring was asked explicitly whether he wished to make a referral of a tariff violation to the Office of Enforcement's Division of Investigations, as provided for in the Commission's *Policy Statement on Market Monitoring Units*, 111 FERC ¶ 61,267, Appendix A (2005). At the time of those conversations, Dr. Bowring was not willing to make such a referral. And, as noted in the body of this order, he did not later assert such a claim in his remarks at the technical conference or in his data responses.

¹³ Bowring Data Response at 7, 18, 19, 35.

¹⁴ *Id.* at 19.

D. Resources: The President shall ensure that the Market Monitoring Unit has adequate resources, access to required information, and cooperation of PJM for the effective functioning of the Market Monitoring Unit.¹⁵

Dr. Bowring's allegations of interference are examined within three broad headings, which correspond to PJM's tariff obligations: staffing, access to data, and PJM cooperation. As discussed below, we find that the incidents do not establish a tariff violation on the part of PJM. However, they do demonstrate an unusual degree of supervision over the Market Monitor by PJM management, which appears to be affecting the ability of the Market Monitor to optimally perform his tariff-defined functions. We address the tariff violation allegations immediately below, and follow that with a discussion of the appropriate solution to the concerns of the Market Monitor regarding his working relationship with PJM management.

A. Staffing

31. Dr. Bowring contends that two MMU employees were targeted by PJM for transfer out of the MMU. He interprets this as an effort to weaken the MMU in anticipation of a switch from an internal market monitor arrangement to an external one (a proposal made by PJM management which stakeholders have not yet approved).¹⁶ Dr. Bowring separately complains of this assignment as evidence of lack of PJM cooperation, a concern that is discussed further below. The evidence, however, suggests that these two employees accepted job offers in the Markets Department because of their expertise in the development of cost-based rates, a function that PJM had recently assigned to that department.¹⁷

32. E-mails indicate that Dr. Bowring accused Andrew Ott, Vice President of Markets, of threatening one of the MMU employees if he refused to transfer.¹⁸ After Dr. Bowring made this accusation, PJM management assigned a member of the Human Resources

¹⁵ PJM's Open Access Transmission Tariff, Attachment M, sections V.A. and V.D. (Attachment M).

¹⁶ Answer of PJM to Complaint and Motion for Interim Relief, Docket No. EL07-58-000, at 2 (Apr. 30, 2007).

¹⁷ See, e.g., PJM Data Response at 15 and 1-1.

¹⁸ Bowring Data Response at SMM-00614.

Department (HR) to interview the transferee. The HR employee reported that the transferee did not feel intimidated by Mr. Ott or PJM management and, in fact, agreed that the cost-based rates function should properly be in the Markets Department.¹⁹

33. Dr. Bowring states that full time staffing levels have declined from 15 in 2004 to 13 in 2007.²⁰ However, the two transferred employees continue to allocate 30 percent of their time to MMU duties.²¹ Also, in addition to the full-time staff, the MMU has three college students and additional contract labor.²² In light of the current uncertainty as to whether PJM will switch to an external market monitor, the temporary use of contract help does not appear on its face to be unreasonable. However, PJM acknowledges that it has not been able to find suitable contract replacements, and has posted two additional full-time MMU employee positions, one senior analyst and one junior analyst.²³ PJM has also put in place an employee retention plan for the MMU, to encourage the remaining employees to stay until such time as it is decided whether the internal MMU will be replaced by an external MMU.²⁴

34. While Dr. Bowring states the MMU's resources are being increasingly stretched thin, he agrees that the MMU is still meeting its obligations to date.²⁵ Considering the current level of staffing, coupled with the reduction in non-tariff related MMU duties, PJM's retention efforts, and Dr. Bowring's acknowledgement of resource adequacy, the Commission finds that the concerns raised by Dr. Bowring do not amount to a violation of PJM's tariff requirement to provide adequate staffing for the MMU.

¹⁹ E-mail from Dionne Wright, 3/21/07, PJM Data Response at 9-12.

²⁰ Bowring Data Response at 37.

²¹ *Id.* at 38.

²² PJM Data Response, at 20. Dr. Bowring disapproves of PJM's initial determination to meet MMU staffing needs with contract help, due to the highly specialized nature of the work.

²³ *Allegheny Electric Cooperative, Inc.*, Docket No. EL07-56-000, PJM Supplemental Filing, at P 10 (July 2, 2007).

²⁴ PJM Data Response at 18.

²⁵ Bowring Data Response at 21.

B. Access to Data

35. Dr. Bowring's concerns on the issue of data access stem from PJM's proposal to transfer stewardship of the database used by the MMU to Mr. Ott of the Markets Department. Dr. Bowring notes that the MMU staff does not simply rely on PJM's market data, but adds to that database and otherwise alters it to produce its own work product. He fears that if someone outside the MMU had stewardship over this augmented database, that person could alter the MMU-augmented data or could limit the ability of the MMU to gather new types of data.²⁶ Further, in both complaints, the complainants agree that any limitation on the MMU's unfettered access to data could interfere with the MMU's responsibilities. PJM points out that PJM has not adopted this proposed substitution of stewardship. PJM also asserts that the only effect of the proposed change would be that Mr. Ott would have the responsibility to establish or modify an individual user's ability to create, read, update or delete data. Stewardship by Mr. Ott would not, according to PJM, interfere with the MMU's access to the data.²⁷

36. The mere change of stewardship, without more, would not constitute a tariff violation. However, if PJM were to change stewardship and then limit MMU access to the database, or allow a non-MMU employee to alter the MMU-augmented data, such actions might well be considered a denial of access to required data, and thus constitute a tariff violation. However, that has not happened, and may never happen. Therefore, the Commission finds that the allegations fail to establish that a tariff violation has been committed. However, the comments of the MMU and the stakeholders highlight concern about the stewardship of data. The Commission would encourage PJM to work with the MMU and its stakeholders when considering this issue.

C. PJM Cooperation

37. Dr. Bowring alleges many instances in which he believes PJM has interfered with MMU independence through a lack of cooperation. For ease of reference, these instances are categorized and discussed as follows: interference with reports, restriction of MMU roles, and refusal to follow MMU recommendations.

1. Interference with Reports

38. 2005 State of the Market Report. Dr. Bowring alleges that Audrey Zibelman, then Chief Operating Officer of PJM, ordered him to remove a newly drafted section of the

²⁶ *Id.* at 42.

²⁷ PJM Data Response at 19.

2005 State of the Market Report (SOM). This section contained Dr. Bowring's conclusions regarding an absence of structural competition in the regulation market, together with accompanying analysis, both of which Dr. Bowring changed from ones he had presented in an earlier draft.²⁸ Whether Ms. Zibelman's discussion with Dr. Bowring amounted to an "order" is uncertain in light of Dr. Bowring's assertion that Ms. Zibelman repeated her removal order in an e-mail, an assertion that is not borne out by the evidence. In the e-mail, Ms. Zibelman writes that certain senior employees had concerns with Dr. Bowring's analytical approach, and contends that Dr. Bowring, in altering his conclusions and analysis, had circumvented PJM's internal review process and prevented the timely review of his work. Ms. Zibelman suggests in the e-mail that Dr. Bowring work with the two senior employees who had concerns, to make sure there were no holes in the new analysis that were not present in the earlier version.²⁹ Dr. Bowring does not indicate whether he met with these two employees. However, it is uncontroverted that his new analysis was retained in the final draft, although he replaced his new conclusion with a statement that the MMU would make a recommendation in the future on the issue of competitiveness.³⁰

39. It is unclear whether PJM was attempting to influence Dr. Bowring to alter his conclusion, or whether it was simply trying to make sure his revised analysis was sound. In any event, his new analysis remained in the revised draft, and Dr. Bowring did not insist on his preferred wording regarding the regulation market. Nor did he take his concerns to PJM's Board of Managers.³¹ He agrees that the basic conclusions he reached in the SOM about the competitiveness of the PJM markets are accurate, although they "do not reflect the full conclusions of the MMU."³² Furthermore, the conclusory statement Dr. Bowring did include did not contradict his revised analysis, but simply indicated he would defer a recommendation to the future. Therefore, based on the totality of the circumstances, we find that this incident did not give rise to a tariff violation.

40. Requested Modification of Data. Dr. Bowring alleges that PJM, in connection with its reliability pricing model, refused his request to include avoidable cost data in the

²⁸ Bowring Data Response at 22.

²⁹ *Id.* at SMM-01158.

³⁰ *Id.* at 24.

³¹ PJM Data Response at 26.

³² Bowring Data Response at 24.

PJM computer system, instead opting for a single avoidable cost number. He also alleges that PJM “pressured” the MMU to modify the avoidable cost template and to increase the proxy costs the MMU had developed, but that the MMU refused to do so.³³ Dr. Bowring submits no supporting documentation on what he means by “pressured.” In any event, however, the MMU did not make the changes. Furthermore, it was not part of the Market Monitor’s tariff-defined duties to determine how the avoidable cost data should be reflected by PJM in its generic database.³⁴ Therefore, PJM was not under any obligation to make the recommended change,³⁵ and its actions do not constitute a tariff violation.

41. Presentation to Markets Implementation Committee. Dr. Bowring alleges that PJM prevented the MMU from making a presentation to the Markets Implementation Committee (MIC) regarding the exemption of certain interfaces from mitigation, and

³³ *Id.* at 9.

³⁴ Supplemental Response of Joseph E. Bowring, filed in response to PJM Data Response, Docket Nos. EL07-56-000, EL07-58-000, at 23 (July 10, 2007) (Bowring Supplemental Response).

³⁵ Both PJM and the MMU currently bear certain responsibilities in connection with the Reliability Pricing Model (RPM); the MMU, among other things, verifies data from market participants and determines resource classes and corresponding prices. The avoidable cost rate is governed by a formula set out in the tariff. PJM Open Access Transmission Tariff, section 6.7(d). PJM contends that it is up to PJM to determine what costs should be collected (Supplemental Response of PJM, filed in response to Bowring Data Response, Docket Nos. EL07-56-000, EL07-58-000, at 20) (PJM Supplemental Response); Dr. Bowring disagrees (Bowring Supplemental Response, at 23). The RPM portions of the tariff became effective on June 1, 2007, six months after the incident of which Dr. Bowring complains, and thus this difference of opinion regarding tariff responsibilities does not directly relate to the incident described by Dr. Bowring. We parenthetically note that the question of whether the MMU should be involved in tariff implementation, in addition to its monitoring functions, has been raised in the Commission’s recent Competitive Markets ANOPR, which among other things addresses market monitoring policies. Competitive Markets ANOPR at 117-19. We have solicited comments from the industry on the topic. In any event, in light of the current shared responsibilities of PJM and Dr. Bowring regarding the RPM, the Commission encourages them to work together to make sure each can optimally perform their respective tariff duties. Should a difference of opinion regarding tariff interpretation still remain, that difference should be brought to the Commission for clarification.

states that Ms. Zibelman refused to post his slides on this subject on the MIC web page.³⁶ However, this seems to be contradicted by an e-mail to Mr. Ott dated February 12, 2007, in which Dr. Bowring states that “Audrey indicated that she is ok with posting my slides....”³⁷ An examination of the e-mails concerning this incident demonstrates that Mr. Ott had significant concerns with Dr. Bowring’s underlying analysis, and requested a meeting to review the MMU materials.³⁸ Dr. Bowring concedes that there were problems with the timely exchange of slides leading up to the MIC meeting.³⁹ He did in fact appear before the committee, and although he did not present his slides, he did explain his disagreement with the analysis prepared by Mr. Ott’s staff.⁴⁰

42. Significantly, under the PJM Operating Agreement it is the responsibility of PJM, not the MMU, to determine whether to make a filing with the Commission on the issue of exemptions of interfaces from mitigation.⁴¹ Therefore, PJM’s actions, although indicative of friction between management and Dr. Bowring, do not constitute interference with a tariff-defined MMU function.

43. Regulation Market Filing. Dr. Bowring alleges that PJM sought to prevent the issuance of MMU reports on the regulation market. This matter involved a case before the Commission, and the filings in the case are illuminating as to Dr. Bowring’s claim. The record shows that PJM’s October 1, 2004 filing in Docket No. ER05-10-000 included a detailed analysis by Dr. Bowring.⁴² Similarly, PJM’s April 25, 2005 filing in

³⁶ Bowring Data Response at 30.

³⁷ *Id.* at SMM-00152.

³⁸ *See* Bowring Data Response at SMM-00143-00144. The difficulties in reviewing slides led to some heated exchanges. At one point, Mr. Ott personally visited the MMU Department to get its slides before the committee meeting and, finding Dr. Bowring absent, “demanded” that the MMU employees give him the slides, which were not available. Mr. Ott later apologized for this behavior. PJM Data Response at 29.

³⁹ Bowring Data Response at 29.

⁴⁰ *Id.* at 28.

⁴¹ *Id.* at 28, *citing* PJM Operating Agreement, Schedule 1, section 6.4.1(d)(ii).

⁴² *PJM Interconnection, L.L.C.*, Docket No. ER05-10-000, Exhibit A (October 1, 2004).

that docket included an updated analysis by Dr. Bowring.⁴³ Therefore, the MMU was able to present its views in a time and manner that enabled them to be factored into the Commission's deliberations. That being the case, we do not find that PJM has interfered with the Market Monitor's ability to present his views to the Commission, and thus did not commit a tariff violation.

44. We also note that the fact that PJM disagreed in its filing with some of Dr. Bowring's conclusions does not indicate interference with the MMU. As we stated in that case, in response to the request made by an intervenor to disregard any statements in PJM's transmittal letter that contradicted the Market Monitor's findings, "[t]he Commission finds no basis to strike comments of any filer, simply because they may or may not coincide with the statements of the PJM Market Monitor. PJM has every right to express its views on the conclusions reached by its Market Monitor."⁴⁴

45. Dr. Bowring did not indicate that he took any of his complaints regarding these various reports to PJM's Board of Managers, nor did he insist that any of the statements he contends he was pressured to change remain unaltered. The Commission finds that the evidence on these incidents of alleged interference with draft reports by the MMU does not, on balance, establish a tariff violation on the part of PJM.⁴⁵ Nonetheless, the incidents reflect a systemic problem in the relationship between Dr. Bowring and PJM management, as well as a fundamental disagreement between them as to the appropriate balance between independence and accountability of the MMU.

2. Restriction of MMU Roles

46. Role as Chair of Market Monitoring Advisory Committee. Dr. Bowring states he was ordered not to post minutes of a Market Monitoring Advisory Committee meeting, and was ordered to remove from a committee meeting agenda his proposed discussion of

⁴³ *PJM interconnection, L.L.C.*, Docket No. ER05-10-000, Exhibit 1 (April 25, 2004).

⁴⁴ *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,129, at P 10 (2005).

⁴⁵ In a tariff filing by Southwest Power Pool (SPP), the Commission found that it did not compromise the independence of the market monitor for SPP to review and comment on the market monitor's draft reports, so long as SPP did not force the market monitor to change its findings or recommendations. *Southwest Power Pool, Inc.*, 115 FERC ¶ 61,051, at P 44 (2006).

a recent FERC order.⁴⁶ It does not appear that Dr. Bowring's chairmanship of this committee, or his activities relating to that chairmanship, fall within the duties imposed on the Market Monitor under Attachment M of the PJM tariff. Dr. Bowring states that this committee met for the purpose of discussing a PJM filing to modify the Market Monitoring Plan, and under Attachment M, the responsibility for such filings rests with PJM, not the Market Monitor.⁴⁷ Therefore, these restrictions on the internal roles played by Dr. Bowring within the PJM organization do not constitute tariff violations.

47. Avoidable Cost Implementation. Dr. Bowring states that PJM management ordered the transfer of authority on the implementation of avoidable costs from the MMU to the Markets Department, although the Vice President of Markets allegedly declined to take on these duties.⁴⁸ The implementation of avoidable costs, as opposed to certain specified duties regarding the verification of data and the formulaic calculation of the avoidable cost rate, is not a tariff-defined function of the MMU. Therefore, this transfer of authority by PJM does not constitute a tariff violation.

48. Interpretation of the Tariff. Dr. Bowring alleges he was informed not to speak with PJM's external reliability pricing model lawyers about the reliability pricing tariff, and was told that any requests for interpretation of the tariff should go through the Vice President of Markets.⁴⁹ Dr. Bowring does not indicate whether he passed on his request in accordance with this procedure, or whether he requested PJM to provide an independent attorney to advise him. Nor is there any indication that this restriction interfered with an MMU tariff-defined function. Thus, the allegation does not establish a tariff violation on the part of PJM. It does, however, suggest a lack of communication between Dr. Bowring and PJM management.

49. Auction Analysis. Dr. Bowring alleges that PJM told him he could not perform an auction analysis that the New Jersey Board of Public Utilities requested from him, and that the Markets Department would instead perform the analysis.⁵⁰ Attachment M provides that the MMU shall, to the extent practicable, respond to reasonable requests by

⁴⁶ Bowring Data Response at 8.

⁴⁷ See Attachment M, section IV.C. 4.

⁴⁸ Bowring Data Response at 9.

⁴⁹ *Id.* at 9.

⁵⁰ *Id.* at 9-10.

authorized government agencies for reports provided to PJM's Board of Managers,⁵¹ and consult with authorized government agencies concerning the need for specific investigations or monitoring activities.⁵² However, it does not grant the MMU explicit independent authority to respond to requests for original analyses, such as that made by the New Jersey Board of Public Utilities.⁵³ Nor did it at the time the request in question was made.⁵⁴ We note as well that Dr. Bowring's concerns about the adequacy of MMU staffing resources highlight the fact that an RTO may not always find it appropriate or possible to permit its internal MMU to respond to every request for analysis from the state commissions, given the necessity for the MMU to simultaneously fulfill its core market monitoring functions. In any event, the allegation concerning PJM's refusal to allow the MMU to conduct the analysis in question does not, for the reasons stated, constitute a tariff violation.⁵⁵

50. Chairmanship of CDTF. Dr. Bowring alleges that PJM removed him from the chairmanship of the Cost Development Task Force (CDTF) and transferred the CDTF chairmanship to the Vice President of the Markets Department. As is the case with the

⁵¹ Attachment M, section VII.B.

⁵² Attachment M, section IV.C.5.

⁵³ In ruling on PJM's 2006 request to amend Attachment M, we found it "just and reasonable for PJM to limit its provision of reports only to those reports provided by the MMU to the PJM Board." We noted that the states could seek special reports by requesting them from the PJM Board or from the Commission itself, but that the MMU should not be required to prepare them without such authorization. *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,263, at P 47 (2006).

⁵⁴ In his Supplemental Response, Dr. Bowring states that the version of PJM's tariff in effect at the time of this incident in 2005 would have authorized the MMU to respond to the request. The tariff in effect at the time provided that the MMU should submit to such agencies not only the reports provided to the PJM Board of Managers, but also "other such reports, either as may be requested by such Agencies, or as may be deemed appropriate under section IV.B.5." It did not, however, provide that the MMU should conduct independent analyses. See PJM Request for Tariff Amendment, Docket No. ER-826-000, Attachment B (redlining First Revised Sheet No. 452) (Apr. 3, 2006).

⁵⁵ We note that our recent ANOPR makes certain proposals regarding state commission requests for MMU analyses, and solicits comments from the industry on the topic. Competitive Markets ANOPR, FERC Stats. & Regs. ¶ 32,617 at P 128-29.

Market Monitoring Advisory Committee allegations, activities relating to chairing the CDTF are not tariff-defined functions of the MMU.⁵⁶ Although the Market Monitor does have an interest in cost-based rates, and also has certain specified duties in connection with the verification of data relating to the Reliability Pricing Model, there is no requirement that he chair this internal PJM committee. Thus, this allegation does not constitute a violation of PJM's tariff.

51. In summary, for the reasons stated, we find that the various restrictions on Dr. Bowring's roles within the organization, which are cited by Dr. Bowring as instances of interference with his independence, fail to establish that PJM committed a tariff violation.

3. Refusal to Follow MMU Recommendations

52. Black Start Filings. Dr. Bowring states that the MMU believed the black start filings made by certain member companies were not consistent with the PJM tariff, and recommended that PJM modify its black start tariff. According to Dr. Bowring, PJM declined.⁵⁷ PJM's refusal, however, is consistent with Attachment M, which does not require PJM to adopt any given recommendation made by the MMU.⁵⁸ Since PJM is free to disagree with the recommendations of the Market Monitor, it does not constitute a tariff violation on its part to do so.

53. Exemption from Offer Capping. Dr. Bowring alleges that the MMU requested PJM to submit an FPA section 205 filing with the Commission to remove a certain unit's exemption from offer capping, but that PJM declined to do so.⁵⁹ Again, these events conform to the requirements of section IV.C.4 of Attachment M. As such, they do not constitute tariff violations.

54. These two instances of refusal by PJM to follow recommendations by the MMU do not constitute tariff violations. In whatever way independence of the Market Monitor

⁵⁶ Dr. Bowring notes that cost-based offers are central to the market power mitigation rules in PJM's tariff. Such offers are indeed relevant to the MMU's job of monitoring the market, but the MMU does not itself perform mitigation for PJM.

⁵⁷ Bowring Data Response at 9.

⁵⁸ Attachment M, section IV.C.4.

⁵⁹ Bowring Data Response at 10.

might be defined, it does not encompass a requirement that PJM adopt each and every Market Monitor recommendation.⁶⁰

55. In sum, then, the Commission finds that the record in this proceeding does not establish a prima facie case of tariff violation on the part of PJM. Therefore, the Commission finds it unnecessary to submit additional data requests to Dr. Bowring or PJM, or to hold a hearing on the issue as requested by OPSI and, most recently, the Joint Complainants.

IV. MMU Independence and Accountability

56. The accusations made by Dr. Bowring on the one hand, and the defenses asserted by PJM on the other, represent two poles on the continuum of independence versus accountability.⁶¹ While the evidence does not support allegations of tariff violations, the evidence raises serious questions as to whether the tension between PJM management and the Market Monitor prevents a workable relationship between the two and thus may compromise the ability of the MMU to perform its tariff-defined functions. It also raises concerns that affected persons may lose confidence in the integrity of PJM's market operations. As we noted in Order No. 2000, efficient and competitive markets are possible only if market participants have confidence in the institutions and rules that govern those markets.⁶²

⁶⁰ Attachment M, section IV.C.4. In the event PJM determines not to follow the MMU's recommendations, the MMU is obligated to make its views known to Commission staff and the PJM Members, either orally or in writing. *Id.*

⁶¹ Dr. Bowring objects to PJM's adoption of its Procedures for the Implementation of the PJM Market Monitoring Plan, effective February 21, 2006, and refers to them as "confidential procedures" that effectively modify Attachment M. The procedures generally flesh out details of an internal review process and provide for an exchange of information between the MMU and other departments within the organization. While some of these procedures may appear expansive, they do not modify Attachment M, as the document specifically provides that "[n]othing stated in these procedures shall be interpreted to require the Market Monitoring Unit or PJM to take or refrain from any action inconsistent with the provisions of the Plan [Attachment M] or Operating Agreement or otherwise compromise the independence of the Market Monitoring Unit as required by the Plan." Bowring Data Response, SMM-00291.

⁶² Order No. 2000, FERC Stats. and Regs., Regulations Preambles July 1996-December 2000 ¶ 31,089 at p. 31,017 (1999) (Order No. 2000).

57. The proper balance between independence and accountability on the part of MMUs is an issue that is being addressed in an ongoing rulemaking. On June 21, 2007, we issued the Competitive Markets ANOPR concerning various aspects of competition in regions with organized electric markets, in which we made certain proposals, and solicited comments and suggestions from the industry, on the subject of MMU independence. However, a final rule in that proceeding will likely not be issued for several months, and the strained relationship between PJM management and Dr. Bowring, with its ongoing potential to affect MMU performance, makes it impractical to wait for the results of the rulemaking before addressing the appropriate balance between independence and accountability in PJM's situation.

58. PJM has taken a first step by submitting proposed tariff amendments in its Offer of Settlement, which it argues will increase the independence of the MMU and address most of the requested changes sought by the complainants. The complainants do not agree that their issues have been adequately addressed, and oppose acceptance of the Offer of Settlement. The majority of the parties, however, including PJM, OPSI and Dr. Bowring, support settlement procedures, and believe they may be able to settle the outstanding issues of MMU independence and accountability.

59. The Commission commends PJM for submitting an Offer of Settlement with suggested tariff amendments that offer greater specificity as to its relationship with the MMU. We also commend the general willingness of the parties to enter into negotiations over these issues. We do not accept PJM's suggested amendments, but instead institute settlement proceedings, in order to provide the parties the opportunity to reach a consensual resolution of their disputes. We will allow the parties 14 days to select a facilitator and, if they cannot agree, the Commission will appoint one. The parties may avail themselves of the settlement options traditionally available in Commission proceedings, including the use of a Settlement Judge or the Dispute Resolution Service. As a third option, given the unique nature of this proceeding, the Commission, if the parties so choose, will also make available its General Counsel, John S. Moot, to serve as facilitator. If selected, Mr. Moot will become a non-decisional employee in this matter and would therefore have no further off-the-record communications with the Commissioners or other decisional Commission employees regarding the merits of the issues in these dockets.⁶³

60. Once selected, the facilitator shall make an interim report back to the Commission within 45 days of this order, and a final report within 90 days of this order, as to the status and progress of the negotiations. If agreement has been reached, the Commission

⁶³ See 18 C.F.R. § 385.2201(c)(3)(2007).

will determine if the settlement is just and reasonable.⁶⁴ If no agreement has been reached and it appears likely one will not be reached in the near future, the Commission will issue a further order deciding the structural and functional issues in dispute, pursuant to our authority under section 206 of the FPA.⁶⁵

61. PJM requests the Commission to make several key policy findings to facilitate settlement. We decline to do so. We believe that, with one exception, the parties should be given the opportunity to negotiate such matters during the settlement process. The exception concerns the reporting relationship between the MMU and PJM management. Attachment M currently provides the MMU shall be accountable to both the President and the PJM Board.⁶⁶ We find, on a preliminary basis, that this practice is no longer just and reasonable, under the particular circumstances involved in PJM's current situation. Given the significant tension that has existed between the MMU and PJM management, we consider it essential that any negotiated settlement include a provision that the MMU report solely to PJM's Board of Managers, or to an independent committee of that Board.

62. The Commission hopes that the negotiations among the parties will prove fruitful, and expects the parties to make every effort to resolve their difficulties concerning the relationship between PJM and the Market Monitor. In its 2003 Review of Market Monitoring Unit Organization,⁶⁷ PJM's Board of Managers stated that:

The Board, itself an independent entity, must ensure that the MMU has the proper degree of autonomy from both PJM management and market participants...At the same time, a proper organizational structure must be in place to ensure that the Market Monitor will be able to communicate easily and effectively, and be accountable to, both FERC and the

⁶⁴ As noted above, the Commission is currently considering, on a generic basis, many of the same issues that the parties will be addressing in the settlement process on a PJM-specific basis. Any agreement reached by the parties in this matter is subject to modification and revision at such time as a final rulemaking is issued in the Competitive Markets ANOPR proceeding.

⁶⁵ Under section 206 of the FPA, the Commission may, on its own motion, find that a given practice affecting a rate, charge, or classification is unjust or unreasonable, and fix it by order. 16 U.S.C. §824e (2000).

⁶⁶ Attachment M, section V.C.

⁶⁷ Bowring Supplemental Response at SMM-002078 to SMM-002091.

independent governing board of the RTO....Reporting lines and accountability should not inhibit the MMU's effectiveness, objectivity, or independence.

63. The Commission agrees with this observation, and urges the parties to keep these principles in mind as they embark on their negotiations.

The Commission orders:

(A) The Commission denies Joint Complainants' request for a show cause order.

(B) The Commission denies OPSI's Motion for Interim Relief, its request for an open hearing and investigation with right of discovery, and its Motion to Supplement Commission Data Requests.

(C) The Commission denies Joint Complainants' and OPSI's requests that PJM be found to have committed tariff violations.

(D) The Commission declines to adopt PJM's Offer of Settlement, establishes settlement proceedings in which the parties are to negotiate the structural and functional issues raised in the Offer of Settlement, and provides the parties 14 days to select a facilitator.

(E) Once selected, the facilitator shall make an interim report back to the Commission on the status of negotiations in the settlement proceedings within 45 days from the date of this order, and make a final report back to the Commission on the status of negotiations within 90 days.

(F) The Commission grants the Motion to Intervene Out-of-Time of Dayton Power and Light Company.

(G) The Commission grants the Motion to Intervene Out-of-Time of P3.

(H) The Commission grants the Motion to Intervene Out-of-Time of the Delaware Municipal Electric Corporation, Inc.

(I) The Commission accepts for filing OPSI's July 17, 2007 Answer.

(J) The Commission accepts for filing Joint Complainants' July 27, 2007 supplemental comments.

(K) The Commission accepts the August 22, 2007 comments of Dr. Bowring and NCEMC.

(L) The Commission accepts for filing Joint Complainants' September 12, 2007 Motion for Leave to File, Answer to New Issues and Clarifying Comments.

(M) The Commission accepts for filing OPSI's September 12, 2007 Motion for Leave to Answer and Answer.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.