

127 FERC ¶ 61,182
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

Docket No. EL08-49-000

v.

PJM Interconnection, LLC

ORDER DENYING MOTION

(Issued May 27, 2009)

1. On April 15, 2009, PJM Interconnection, LLC (PJM) filed a motion requesting the Commission to authorize the public release of currently non-public documents of BJ Energy, *et al.* (Tower Companies) that PJM attached to a late-filed answer and request for rehearing in this docket.¹ As discussed below, the Commission denies PJM's motion.

I. Background

2. On March 28, 2008, the Tower Companies filed a complaint against PJM contending that PJM was withholding excess 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.

¹ The request related to: (1) PJM's answer to Tower Companies supplemental answer and amendment of PJM's answer to the complaint filed in this proceeding on March 4, 2009; and (2) PJM's April 15, 2009 filing for clarification and rehearing in this proceeding.

3. At the same time, PJM had pending a complaint in Docket No. EL08-44-000 against Tower Companies alleging market manipulation. This complaint was held in abeyance pending the results of an investigation by the Commission's Office of Enforcement (OE).²

4. On April 2, 2009, the Commission issued orders in both dockets. The Commission dismissed two of the allegations in PJM's complaint that Tower Companies' dealings with Power Edge constituted a scheme or artifice to defraud, based on the conclusion of the OE report that these activities did not rise to the level of a violation of 18 C.F.R. § 1c.2 (2008).³ As to Tower Companies' complaint in this docket, 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.⁴

5. In July 2008, the Tower Companies had 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.⁵ On January 7, 2009, the district court issued a protective order in its proceeding preventing the public disclosure of confidential documents filed with the court, but allowed the parties to submit the documents under seal to the Commission.⁶ On March 26, 2009, the district court issued another order stating that "[t]he court's protective order does not prohibit FERC from issuing an order declassifying documents submitted to this court under seal."⁷

² *PJM Interconnection, L.L.C. v. Accord Energy, LLC*, 123 FERC ¶ 61,103 (2008).

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 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>.

⁶ *BJ Energy LLC, et al. v. PJM Interconnection, LLC*. Protective Order, C.A. No. 08-cv-03649-NS (Jan. 7, 2009) (January 7 Protective Order).

⁷ *BJ Energy LLC, et al. v. PJM Interconnection, LLC*. Protective Order, C.A. No. 2:08-cv-03649-NS (Mar. 26, 2009) (March 26 Protective Order).

II. Motion

6. In its motion, PJM requests that the Commission publicly release the confidential documents attached to its late-filed answer and to its request for rehearing in this docket. PJM asserts it originally filed the documents as confidential due to the January 7 District Court Protective Order. However, PJM contends that the March 26 District Court Protective Order no longer restricts the Commission from releasing the documents. Accordingly, PJM argues that it is in the public interest for the Commission to allow PJM members, state regulators and other interested parties to view documents to better understand the actions taken by Tower Companies surrounding Power Edge's default.

7. PJM asserts that a majority of the documents are internal, non-privileged email communications among Tower Company employees as well as characterizations of those emails. PJM asserts that the documents are evidence of Tower's intent in: (1) establishing and organizing the separate limited liability companies; and (2) operating the funds to ensure they maintained no free cash. PJM argues that while the communications may be embarrassing to Tower Companies that is an insufficient basis for maintaining confidentiality. PJM argues that under the Commission's regulations documents that are entitled to confidential treatment are limited to those that protect trade secrets and commercial or financial information.⁸ PJM asserts that, since the Commission issued the interim report publicly discussing some of the documents, due process demands that the Commission release all of the communications bearing on PJM's claims and defenses.

8. Finally, PJM argues that the Commission should publicly release this information because PJM members who have paid for Tower Company's default have a right to know all of the facts surrounding the incident. PJM argues that PJM members, state regulators and the public have a right to see the facts contained in these documents that PJM, as representative of its members, is relying on in pursuing remedies to redress Tower's practices. PJM argues that, during the California energy crisis, the Commission publicly released relevant confidential information corresponding to the end of that aspect of the investigation.⁹ PJM argues that, similarly, the Commission should publicly release the requested documents since this stage of the investigation has concluded.

⁸ 18 C.F.R. § 388.107(d) (2008).

⁹ *See Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 102 FERC ¶ 61,311, at P 6 (2003).

III. Answer

9. On April 23, 2009, the Tower Companies filed an answer, requesting that the Commission deny PJM's motion and maintain the confidentiality of this information. Tower Companies assert that the documents in question contain a substantial amount of confidential financial and commercial information pertaining to the Tower Companies, including: (1) the identify of investors and the size of their investments; (2) Tower Companies' trading strategies; (3) employment terms and compensation information; and (4) financial documents.

10. The Tower Companies argue that the Commission's April 2 Order, including the 42 page interim report attached thereto, provides sufficient information on the factual and legal basis of the Commission's decision for the PJM Board and its members to participate in the Commission's rehearing process. Furthermore, PJM has copies of all of these documents and is actively representing PJM's members and stakeholders at the Commission as well as in district court. Furthermore, Tower Companies argue that PJM's Operating Agreement expressly prohibits PJM from distributing such confidential information of one PJM member to other PJM members.

11. The Tower Companies also assert that any public release of these documents must be done on a document-by-document basis pursuant to the Freedom of Information Act (FOIA).¹⁰ Tower Companies assert that a purpose of a non-public investigation is to facilitate a participant's cooperation. Tower Companies assert that to now publicly release the documents, after Tower provided them to the Commission under a protection of confidentiality and after the Commission found insufficient evidence of manipulation, would establish a disturbing precedent. Furthermore, Tower Companies assert that, even prior to PJM filing this motion, Tower Companies have been discussing with PJM conditions to making some of the documents available to the PJM Board and certain counsel for PJM members. Tower Companies state that these discussions are still ongoing.

12. Tower Companies argues that while the Commission has publicly released confidential information involving the California energy crisis that was an extraordinary situation unlike here. Tower Companies assert that, here, the Commission has not found any evidence of manipulation and the issue is simply a payment default by one member, Power Edge. Tower Companies also argue that PJM has objected to the release of the names and titles of PJM employees, even under FOIA, as confidential information.¹¹

¹⁰ 18 C.F.R. § 388.107 (2008).

¹¹ *PJM Interconnection, LLC*, 109 FERC ¶ 61,094 (2004).

IV. Other Pleadings

13. On April 17, 2009, Old Dominion Electric Cooperative (Old Dominion) filed a motion to intervene out-of-time. Old Dominion states that it failed to timely intervene due to an administrative oversight. Old Dominion states that its intervention will neither disrupt the proceeding nor prejudice the existing parties, because it agrees to accept the docket as it stands. Old Dominion states that it is seeking intervention in this docket for the limited purpose of supporting PJM's request for release of information. Old Dominion states that as a member of PJM, it has an interest in, and could be materially affected by, the outcome of the Commission's decision on PJM's Motion. On May 13, 2009, Old Dominion filed a request asking for an expedited ruling on its motion to intervene.

14. On April 23, 2009, DTE Energy Trading, Inc. (DTE Energy) filed comments in support of PJM's motion for the public release of the documents. DTE Energy states that it was granted party status in the April 2 Order and that its ability to file for rehearing is severely hampered by the fact that substantial and material portions of the record upon which the April 2 Order relies is non-public information to which DTE Energy does not have access. DTE Energy asserts that due process requires the public release of the information.

15. On April 24, 2009, Monitoring Analytics, LLC, (Monitoring Analytics) the Independent Market Monitor for PJM, filed comments in support of PJM's motion for public release of the documents and a motion to intervene out-of-time in the proceedings. Monitoring Analytics states that it has been investigating the Tower Companies and has been hindered by its lack of access to these documents. Monitoring Analytics argues that the stakeholders also deserve access to these documents so they have the complete record from which they can make appropriate decisions on how to proceed and to prevent undue and one-sided influence from interested parties.

16. On May 13, 2009, PPL Parties filed motions to intervene out-of-time. PPL Parties states that it is a party in the companion docket, EL08-44-000, but did not file for intervention in this docket. As such, PPL states that it has not been given access to the privileged documents. PPL argues that as a PJM Member who is bearing the cost of the Tower Companies' default and the associated litigation, they should be able to assess the costs PJM is incurring on its behalf similar to the members who had timely intervened in this docket and are being granted access to the documents.

V. Commission Determination

A. Procedural Matters

17. We deny Old Dominion, PPL Parties and Monitoring Analytics late motions to intervene. When late intervention is sought after the issuance of a dispositive order,

the Commission will deny the late intervention due to the prejudice to other parties and burden upon the Commission unless sufficient good cause is demonstrated.¹² None of the parties have met the higher burden of justifying its late intervention. As such, we deny the motions to intervene out-of-time.

18. Monitoring Analytics' stated reason for its request is that it has been actively investigating the "core matters of concern in this proceeding." Under the Commission's recent Order No. 719,¹³ the Commission has directed that following a referral to the Commission of suspected violations, "the Market Monitoring Unit is not to undertake any investigative steps regarding the referral except at the express direction of the Commission or Commission staff."¹⁴ Staff's investigation is concluded with respect to the matters covered in the OE report filed in Docket No. EL08-44-000, and therefore there is no reason for Monitoring Analytics to continue to investigate those issues (nor may it, absent a directive from the Commission or Commission staff).¹⁵

B. Substantive Issues

19. We will deny PJM's motion to make public the entirety of the documents in its late-filed answer and rehearing because PJM has failed to meet the burden of showing that disclosure of this material is necessary. The Commission can require disclosure of information, even if such information could be protected from disclosure, when

¹² *E.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

¹³ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 61,400 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008) (Order No. 719).

¹⁴ 18 C.F.R. § 35.28(g)(3)(iv)(E) (2009). Similar language was also in effect before Order No. 719, as set forth in the protocols attached to the Commission's Policy Statement on Market Monitoring Units. *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267, at P 8 (2005).

¹⁵ The fact that OE was investigating these matters was made public in the Commission's April 30, 2008 Order on Complaint in Docket No. EL08-44-000. *PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,103, at P 15 (2008). Once a market monitor is on notice that OE has begun a non-public investigation into a matter (whether or not the market monitor for the involved RTO made a referral regarding the matter), a market monitor is to abide by the regulation promulgated in Order No. 719 and not conduct a separate investigation of its own with respect to that matter.

such disclosure is “found appropriate in the public interest and permitted by law.”¹⁶ The Commission also has the ability to require disclosure of otherwise confidential information to the parties in a case, with a protective order, when such information is necessary for the parties’ to participate in the proceeding.¹⁷

20. In this case, the parties to this proceeding have already been afforded the opportunity to view these documents pursuant to a protective order so that they can actively participate in this proceeding.¹⁸ We find insufficient justification to release these documents more broadly.

21. The documents PJM requests be released are subject to the January 7 District Court Protective Order which determined that these documents are sensitive enough to warrant confidential treatment. We appreciate the comity the District Court affords us through the opportunity to release the documents if needed to protect the integrity of our own proceedings. However, by providing for release to the parties pursuant to a protective order, we have ensured that all parties’ due process rights have been protected.

22. Release of these documents also is not necessary to ensure public understanding of our April 2, 2009 Order. We did not cite to these documents in this proceeding and these documents are not necessary to understand the Commission’s resolution of this proceeding.¹⁹ Our order was limited to the legal issue of whether PJM should be required to return the withheld funds. Moreover, PJM has made only a sweeping assertion that these documents are internal non-privileged communications, but has not sought to identify specific documents that are particularly relevant, nor addressed why any specific document is not, for example, a trade secret, an invasion of personal privacy or confidential personal information.²⁰

¹⁶ 18 C.F.R. § 1b.9 (2008).

¹⁷ 18 C.F.R. § 385.206(e)(3) (2008); 18 C.F.R. § 385.213(c)(5) (2008).

¹⁸ 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.

¹⁹ Should the Commission, in its order on rehearing, rely on any of these confidential documents, we will address at that time whether disclosure of any of the documents may be appropriate.

²⁰ *See* 18 C.F.R. § 388.107 (2008).

23. PJM claims the release of documents collected during the investigation of the California energy crisis is equivalent to its request to release documents in this case. Our general policy in investigations is not to release confidential material because it will discourage the provision of such information. We made an exception in the case of the California energy crisis, because that proceeding involved the collapse of the California PX and the energy market in the western United States. In contrast, this case involves only the limited issue whether one group of affiliated companies is entitled to the return of funds being held by PJM.

The Commission orders:

PJM's motion is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.