144 FERC ¶ 61,024
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

DC Energy, LLC
DC Energy Mid-Atlantic, LLC

Docket No. EL12-8-001

v.

PJM Interconnection, L.L.C.

ORDER DENYING REHEARING

(Issued July 12, 2013)

1. On March 9, 2012, the Commission denied a complaint (Complaint) filed by DC Energy, LLC (DC Energy) and DC Energy Mid-Atlantic, LLC (DCE Mid-Atlantic) (collectively, Complainants) against PJM Interconnection, L.L.C. (PJM).[1] Complainants opposed PJM's plan to retroactively bill Complainants for balancing operating reserve charges (deviation charges) that were inappropriately avoided by reporting to PJM certain transactions between DC Energy and DCE Mid-Atlantic as internal bilateral transactions (IBTs) pursuant to section 1.7.10 of the PJM Open Access Transmission Tariff (Tariff).[2]

2. Complainants and Scylla Energy LLC (Scylla) filed requests for rehearing of the Complaint Order. In this order, we deny rehearing.

I. Background

3. DC Energy and DCE Mid-Atlantic are Delaware limited liability companies that operate under Commission-approved market-based rate tariffs, sell and buy electricity at

[1] *DC Energy, LLC and DC Energy Mid-Atlantic, LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,165 (2012) (Complaint Order).

[2] PJM, OATT, 1.7 General, Section 1.7.10 Other Transactions, 3.0.0.

wholesale, engage in transactions in PJM's Interchange Energy Market,[3] and buy and sell financial transmission rights (FTR).[4] The companies state that they are affiliated but are separate corporate entities with separate financing and different market positions and liabilities.[5]

4. In the PJM energy market and under the Tariff, deviations between day-ahead increment offers (INC)[6] and decrement bids (DEC)[7] and real-time generation and load create imbalances which are subject to deviation charges.[8] INCs and DECs are virtual

[3] The PJM Interchange Energy Market is "the regional competitive market administered by PJM for the purchase and sale of spot electric energy at wholesale in interstate commerce and related services established in the PJM Operating Agreement." Spot electric energy is "energy bought or sold by Market Participants through the PJM Interchange Energy Market at Locational Marginal Prices." PJM Manual 35, Definitions and Acronyms.

[4] Complaint at 6.

[5] *Id.* at 6-7.

[6] "Increment bid" is defined as "an offer to sell energy at a specified location in the Day-ahead Energy Market." PJM, OA, Schedule 1, § 1.3.9A.

[7] "Decrement bid" is defined as "a bid to purchase energy at a specified location in the Day-ahead Energy Market." PJM, OA, Schedule 1, § 1.3.1E.

[8] "The cost of Operating Reserves for the Real-time Energy Market for each Operating Day shall be allocated and charged to each Market Participant in proportion to the sum of the absolute values of its (i) load deviations (net of operating Behind The Meter Generation) from the Day-ahead Energy Market in megawatt-hours during the Operating Day; (ii) generation deviations (not including deviations in Behind The Meter Generation) from the Day-ahead Energy market for non-dispatchable generation resources, including External Resources, in megawatt-hours during the Operating Day; (iii) deviations from Day-ahead Energy Market for bilateral transactions from outside the PJM Region for delivery within such region in megawatt-hours during the Operating Day, except as noted in the PJM Manuals; and (iv) deviations of energy sales from the Day-ahead Energy Market from within the PJM Region to load outside such region in megawatt-hours for that Operating Day, but not including its bilateral transactions that are dynamically scheduled to load outside such area pursuant to Section 1.12." PJM, OA, Schedule 1, Section 3.2.3 Operating Reserves, § 3.2.3(h), 6.0.0.

bids made in the day-ahead market. Under section 1.7.10(a)(i) of the Tariff, market participants separately "may enter into bilateral contracts for the purchase or sale of electric energy to or from each other or any other entity" and report these bilateral contracts, or IBTs, to PJM.[9] These reported bilateral contracts can result in offsetting imbalances, i.e., offsetting the imbalances caused by the INCs and DECs, which in turn means that deviation charges would not be charged. In other words, the bilateral contracts allow market participants to avoid the deviation charges associated with these imbalances.

5. However, section 1.7.10 of the PJM Tariff permits only certain IBTs to be reported to PJM via the eSchedules tool.[10] In order to be reported to PJM, according to section 1.7.10 of the Tariff, an IBT must "contemplate the physical transfer of energy."[11] Market participants are free to engage in IBTs that do not "contemplate the physical transfer of energy," but they cannot report them under section 1.7.10, and they must pay any applicable deviation charges.

6. IBTs are considered "non-pool" transactions, meaning that they take place outside of the PJM Interchange Energy Market. PJMSettlement, Inc. (PJMSettlement)[12] is not

[9] The Commission has previously found that RTOs/ISOs, by providing settling services for IBTs, can serve as a means of counter-settling double payments. For example, in order to determine and allocate congestion costs under a forward energy market, it is necessary to settle all schedules in the market at the market clearing prices, even those associated with bilateral transactions. *See California Indep. Sys. Operator Corp.*, 111 FERC ¶ 61,384, at n.14 & P 28 (2005), *reh'g dismissed*, 116 FERC ¶ 61,274 (2006).

[10] The eSchedules tool is an Internet application used by power marketers, load serving entities (LSEs), and generation owners in PJM to submit their internal PJM energy schedule data. All PJM internal transactions, including load and generation interchange adjustment modeling and implicit internal Spot Market schedules, are handled through the PJM eSchedules system.

[11] PJM, OATT, 1.7 General, Section 1.7.10(a)(vi) Other Transactions, 3.0.0.

[12] PJM's central counterparty, PJMSettlement, serves as counterparty to market participants and customers with respect to transmission services, ancillary services transactions, purchases and sales in PJM's energy markets, purchases and sales of capacity in the Reliability Pricing Model auctions, purchases and sales of FTRs in auctions, and the contractual rights and obligations of holders of FTRs and Auction Revenue Rights. PJMSettlement is a buyer to each market seller and a seller to each

(continued…)

counterparty to these transactions, and title to the energy passes directly from the seller to the buyer. In contrast, in the PJM Interchange Energy Market, market participants purchase and sell energy within the PJM pool. PJMSettlement is counterparty to each transaction, and title passes first from the seller to PJMSettlement and then from PJMSettlement to the buyer.

7. On December 2, 2008, PJM made a filing with the Commission proposing clarifications to reduce credit risk exposure to PJM members.[13] PJM stated in its filing that it was proposing a number of revisions to section 1.7.10 of Attachment K-Appendix of the Tariff and Operating Agreement in order to clarify "that bilateral transactions are separate from the other transactions taking place in the PJM Interchange Energy Market" and "that such agreed bilateral transactions are for the physical transfer of energy…."[14]

8. On October 26, 2011, in Docket No. ER12-195-000, PJM filed a request for limited waiver of certain sections of the Tariff and Operating Agreement to suspend rebilling and associated payment obligations for the time period July 2009 to July 2011 pending the issuance of a Commission order on the substantive issues to be raised in the yet-to-be filed Complaint.[15] On November 4, 2011, the Commission issued an order

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market buyer, taking title to electricity and other products and assuming liability for payables, in its own name and right in order to establish mutuality between market participants to allow netting and reduce the risks associated with a default. PJMSettlement also performs various billing and settlement, invoicing, and credit services. Prior to PJMSettlement's establishment as a separate entity on January 1, 2011, PJM acted as counterparty to purchases and sales in PJM's energy markets. *See PJM Interconnection, L.L.C.*, 132 FERC ¶ 61,207 (2010).

[13] PJM Interconnection, L.L.C., Filing, Docket No. ER09-368-000 (filed Dec. 2, 2008) (2008 Credit Risk Filing). The Commission accepted the filing, effective Feb. 1, 2009, subject to conditions. *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,084 (2009).

[14] 2008 Credit Risk Filing at 10. The then-existing section 1.7.10(a) read: "Market Participants may enter into bilateral contracts for the purchase or sale of electric energy to or from each other or any other entity, subject to the obligations of Market Participants to make Generation Capacity Resources available for dispatch by the Office of the Interconnection. Bilateral arrangements that contemplate the physical transfer of energy to or from a Market Participant shall be reported to and coordinated with the Office of the Interconnection in accordance with this Schedule."

[15] As discussed below, the Complaint was filed the following day.

granting PJM's request for waiver until the Commission's proceedings on the now-filed Complaint were final, including rehearing, if applicable.[16]

9. On October 27, 2011, Complainants filed the Complaint at issue here pursuant to section 206 of the Federal Power Act (FPA).[17] Complainants stated that they entered into numerous IBTs with each other between May 2006 and July 2011 in order to capture small incremental margins associated with "restoring energy flow" missing from the day-ahead market schedules but occurring in real-time.[18] Complainants explained that DC Energy observed systematic divergences between day-ahead and real-time flows within PJM load zones.[19] In order to address these divergences, Complainants stated that (i) DC Mid-Atlantic placed virtual load bids for the specific load missing in the day-ahead market, (ii) DC Energy placed virtual supply offers for the specific supply resource missing in the day-ahead market, and then (iii) DC Energy and DCE Mid-Atlantic entered into a real-time IBT in the form of a bilateral agreement for the physical transfer of energy in PJM with each other.[20] Complainants stated that these IBTs were in

[16] *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,109 (2011).

[17] 16 U.S.C. § 824e (2006).

[18] Complaint at 8.

[19] Complaint at 8; Stevens Affidavit to the Complaint at 5. Complainants give the following example: a Generation Owner who intends to generate 100 MW in every hour submits a day-ahead market schedule to do so, but then submits a 100 MW load DEC bid at the same injection point. PJM sees the supply offer and the DEC bid at the same location and for the same time periods as offsetting each other, thereby eliminating from the day-ahead market the net effect of the scheduled generation. Similarly, an LSE who would intend to consume 100 MW in every hour submits a day-ahead market schedule, but then submits a 100 MW INC bid at the same location. These combined actions unwind the expected flow to load in the day-ahead market. Generation and load can contract together using a real-time IBT effectively to transfer their obligations in the real-time market and offset deviations associated with their INC and DEC. To reverse the divergence created by these transactions, Complainants transact the same structure in reverse, including the submittal of virtual transactions to restore the missing energy flow and a real-time IBT to transfer the real-time energy obligations and effectuate the offset of deviations.

[20] Complainants explain that the roles of the two companies were sometimes reversed, with DC Energy submitting DECs as the IBT Seller while DCE Mid-Atlantic submitted INCs as the IBT Buyer. Stevens Affidavit to the Complaint at 5.

the form of confirmations pursuant to a standard Power Annex of an International Swaps and Derivatives Association (ISDA) agreement, and delivery was accomplished by submitting a schedule to PJM in the eSchedule tool.[21] By reporting these IBTs to PJM through eSchedules, Complainants stated that they avoided "tens of millions" of dollars[22] in deviation charges.

10. Complainants stated that, before they engaged in their first IBT transaction in May 2006, they had various discussions with PJM staff and sent a letter to PJM to explain their proposed transactions, assert that they were tariff compliant, and invite any questions or concerns (April 2006 Letter).[23] Complainants stated that they continued submitting IBT eSchedules until July 2011, when PJM contacted them to discuss the transactions. On October 20, 2011, PJM notified Complainants by letter (October 2011 Letter) that PJM had found that their IBTs did not qualify for reporting in eSchedules under section 1.7.10(a) of the Tariff because they did not contemplate the physical transfer of energy, and therefore PJM would make billing adjustments pursuant to its Tariff to properly charge Complainants for deviation charges for their transactions starting in July 2009.[24]

11. In the Complaint, Complainants requested that the Commission issue an order rejecting PJM's plan to "unwind" certain of Complainants' IBTs, perform energy resettlements, and rebill deviation charges and find that Complainants have complied with all IBT requirements.[25] Complainants asserted that the term "contemplate the physical transfer of energy" found in section 1.7.10 of the Tariff is ambiguous and that the definition of "physical" is subject to multiple reasonable interpretations.[26] Complainants asserted that their use of IBTs is consistent with common usage of the term in the industry because (1) the transactions contemplate physical energy transfer by

[21] Complaint at 7-8; Stevens Affidavit to the Complaint at 3-4.

[22] Complaint at 61.

[23] *Id*. at 12-13.

[24] Under section 10.4 of its Tariff, PJM can only make billing adjustments for a two-year period. PJM, OATT, Section 10.4 Limitation on Claims, 1.0.0.

[25] Complaint at 2.

[26] *Id*. at 26.

causing redispatch, since virtual transactions result in commitment and redispatch of generators that affects a physical transfer; (2) in sophisticated centralized markets like those operated by PJM, merely scheduling energy results in a physical transfer of energy; and (3) the IBTs are in the form of confirmations pursuant to an ISDA Master Agreement and Power Annex that provide for the physical delivery of energy in PJM.[27]

12. Complainants asserted that the 2008 Credit Risk Filing was intended to clarify PJM's existing procedures, not to revise its procedures to prohibit parties to virtual transactions from using IBTs to provide for physical transfers of energy or eliminate deviation charges.[28] Complainants contended that the course of performance by PJM and Complainants over the last five years demonstrates that the IBTs comply with the Tariff requirements, specifically including the "contemplation of the physical transfer of energy" language contained in section 1.7.10.[29] Complainants argued that the Tariff does not restrict eScheduling to only certain parties, such as generation owners or LSEs or non-affiliates.[30]

13. In addition, Complainants asserted that their IBTs are functionally identical to two example IBTs that PJM represented as compliant with the Tariff: one example highlighted by PJM at an August 3, 2011 meeting between Complainants and PJM (PJM Example IBT)[31] and another example IBT contained in PJM training materials (example 3 in the Clarification of Internal Bilateral Transactions document) which is sourced at the Western Hub[32] and delivered to a non-LSE power marketer (Western Hub

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[27] *Id*. at 27-29.

[28] *Id*. at 18.

[29] *Id*. at 31.

[30] *Id*. at 33-36.

[31] *Id*. at 36-38 (citing Stevens Affidavit to the Complaint at P 38 and Figure 3).

[32] A hub is a group of nodes, also called buses, within a pre-determined region and at which PJM calculates individual Locational Marginal Prices (LMP), for which the individual LMP values are averaged to create a single pricing reference. A trading hub, such as the Western Hub, is an aggregation of buses and hubs that creates a common point for commercial energy trading.

Example IBT).[33] Furthermore, Complainants contended that PJM lacks the authority to unwind the IBTs, perform retroactive energy resettlements, and rebill Complainants for deviation charges. Finally, Complainants asserted that PJM did not demonstrate why the Complainants' IBTs should be treated differently from the IBTs of other market participants.[34]

14. In the alternative, Complainants requested that the Commission waive the application of sections 7.1, 7.1A, 7.3, and 10.4 of the Tariff and sections 14B.1, 14B.2, 15.1, 15.2, and 15.6 of the Operating Agreement for the two-year retroactive period in which PJM has proposed billing adjustments.[35] If the Commission did not grant waiver, Complainants requested that the Commission direct PJM to conduct a PJM-wide investigation to identify all non-compliant IBTs.[36] If the Commission decided that PJM's Tariff interpretation should be applied retroactively, Complainants requested that the Commission set the case for hearing, hold the hearing in abeyance and direct the case for settlement judge procedures.

15. In its answer to the Complaint, PJM asserted that Complainants inappropriately avoided payment of deviation charges by reporting non-Tariff compliant IBTs. PJM argued that Complainants' IBTs are purely financial swap transactions that do not "contemplate the physical transfer of energy."[37] PJM stated that the use of non-Tariff compliant IBTs like Complainants' was not widespread and that it had identified only five market participants who had reported purely financial IBTs to offset real-time imbalances associated with "virtual trades" in PJM's day-ahead energy market. PJM

[33] Complaint at 38-39 (citing Attachment H). Complainants stated that the Western Hub Example IBT depicts a typical power marketer IBT between a non-generation owner and a non-LSE, and is sourced from a hub (not a generator bus) and sunk at a non-LSE point at the Western Hub. Complainants stated that this example shows that PJM does not intend that the Tariff limit IBTs to use only by generation owners and LSEs, and that the source of energy can be the PJM Interchange Energy Market.

[34] *Id*. at 46.

[35] *Id*. at 50.

[36] *Id*. at 65.

[37] PJM Answer to the Complaint at 3.

explained that only three distinct corporate entities were actually involved—DC Energy, Scylla, and an entity that had not intervened in the Complaint proceeding. PJM stated that the unnamed entity and DC Energy each created a wholly owned subsidiary to engage in the bilateral trades, while Scylla undertook trades with itself via the creation of two sub-accounts.

16. As further discussed below, in the Complaint Order, the Commission denied the Complaint, finding that Complainants' IBTs did not satisfy the requirement of section 1.7.10 that they "contemplate the physical transfer of energy" in order to be reported to PJM pursuant to that section of the Tariff, and therefore it was appropriate for PJM to retroactively bill Complainants for deviation charges for the period July 2009 to July 2011.[38] The Commission also found that PJM's plan to rebill Complainants for these IBTs did not amount to undue discrimination. The Commission denied Complainants' alternative request for permanent waiver of the Tariff's rebilling requirement for the period July 2009 to July 2011.[39]

II. Requests for Rehearing

17. On April 9, 2012, Complainants and Scylla each filed a request for rehearing of the Complaint Order. On April 10, 2012, Complainants filed an errata. On April 24, 2012, PJM filed an answer to Complainants' request for rehearing. On May 7, 2012, the Independent Market Monitor for PJM (Market Monitor) filed an answer to Complainants' request for rehearing. On May 9, 2012, Complainants filed an answer to PJM's and the Market Monitor's answers. On May 18, 2012, the Market Monitor filed an answer to Complainants' answer.

18. On June 29, 2012, Financial Institutions Energy Group (FIEG) filed a motion to intervene out-of-time and request for clarification. On July 10, 2012, PJM filed an answer to the request. On July 16, 2012, Complainants filed an answer to FIEG's request and PJM's answer. On July 23, 2012 FIEG filed an answer to PJM's answer. On July 25, 2012, PJM filed an answer to Complainants' answer. On August 1, 2012, Complainants filed an answer to PJM's answer.

[38] We understand that the unnamed entity (and its affiliate) that also reported financial IBTs under section 1.7.10 has already agreed to be rebilled for deviation charges. Thus, all five of the market participants identified by PJM as engaging in non-compliant IBTs will be treated consistently.

[39] Complaint Order, 138 FERC ¶ 61,165 at P 94.

III. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[40] the Commission will deny FIEG's late-filed motion to intervene for failure to demonstrate good cause warranting late intervention. The Commission has found that parties seeking to intervene after issuance of a Commission determination in a case bear a heavy burden. 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 the granting of such late intervention. FIEG has not met its burden of justifying late intervention.

20. Rule 713(d) of the Commission's Rules of Practice and Procedure[41] prohibits an answer to a request for rehearing. Accordingly, we will reject PJM's, the Market Monitor's, FIEG's, and Complainants' answers.

21. We will reject Attachment A, Attachment BB-1, Attachment BB-2, Attachment BB-3, Attachment B, Attachment ASJ-1, and Attachment C to Complainants' request for rehearing, as the Commission generally does not permit parties to introduce new evidence for the first time on rehearing.[42]

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[40] 18 C.F.R. § 385.214 (2012).

[41] 18 C.F.R. § 385.713(d) (2012).

[42] *Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152, at P 15 (2010) (*PATH*) (citing *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,548 & n.64 (1994) (holding that "[t]he Commission generally will not consider new evidence on rehearing, as we cannot resolve issues finally and with any efficiency if parties attempt to have us chase a moving target.")).

B. Substantive Matters

1. Whether Complainants' IBTs satisfy the requirement of section 1.7.10 that they "contemplate the physical transfer of energy" in order to be reported to PJM

a. Complaint Order

22. In the Complaint Order, the Commission denied the Complaint, finding that Complainants' IBTs did not satisfy the requirement of section 1.7.10 that they "contemplate the physical transfer of energy" in order to be reported to PJM pursuant to that section of the Tariff, and therefore it was appropriate for PJM to retroactively bill Complainants for deviation charges for the period July 2009 to July 2011.

23. The Commission found that the meaning of section 1.7.10 is discernible when viewed in the context of the reasons for deviation charges and for permitting them to be avoided.[43] The Commission stated that, while the phrases "for the physical transfer of energy" or "contemplate the physical transfer of energy" are not defined elsewhere in the Tariff, these phrases indicate that, to be properly reported under section 1.7.10, the IBTs must have the potential for a physical transfer of energy to offset the deviation created by transactions in the day-ahead market because this potential is the basis for not charging deviation charges under section 1.7.10. In contrast, the Commission found that Complainants' IBTs do not represent electric energy that is available to offset real-time imbalances, but merely represent a transfer of financial liabilities, with no intent or prospect of a physical transfer of electric energy.[44]

24. The Commission found that PJM and the Market Monitor persuasively explained why Complainants' IBTs do not contemplate the physical transfer of energy. The Commission stated that Complainants have no capability to handle physical performance, as neither DC Energy nor DCE Mid-Atlantic owns generation resources, is an LSE, or acted as a marketer-intermediary by contracting with entities owning generation or having load-serving or other physical obligations. The Commission also explained that "[a]t no point did Complainants acquire title to physical energy, incur any network transmission charges, or make any reservations for point to point transmission capacity."[45] The Commission stated that Complainants' IBTs settled financially and

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[43] Complaint Order, 138 FERC ¶ 61,165 at P 66.

[44] *Id*. P 67.

[45] *Id*. P 69.

were intended to settle financially. The Commission disagreed with Complainants that eScheduling of Complainants' IBTs results in PJM transferring the real-time market energy from the seller to the buyer, explaining that the eSchedules tool merely allows market participants to report their IBTs to PJM but such reporting does not actually cause PJM to move real-time market energy.[46]

25. The Commission also pointed out that Complainants blur the distinction between virtual transactions (INCs and DECs) and IBTs, which is significant because the physicality requirement is for the IBT, not the INCs and DECs.[47] The Commission explained that virtual transactions are pool transactions that may cause redispatch of generation, but IBTs are "non-pool" transactions that do not affect dispatch.[48] The Commission also disagreed with Complainants' argument that, because of the central counterparty construct, the transfer of power through the eSchedule process is the entirety of the physicality requirement, explaining that the central counterparty construct is irrelevant because PJMSettlement is not a party to "non-pool" IBT transactions.[49]

26. The Commission agreed with Complainants that section 1.7.10 does not explicitly require that market participants pay for transmission service or be either a generator or LSE, but found that "whether transmission capacity was reserved or whether the parties own generation resources or are load serving entities or marketers are factors that are reasonably applied to determine whether a transaction is physical or non-physical in nature."[50] The Commission disagreed with Complainants' interpretation of section 1.7.10, finding that, under Complainants' interpretation, any transaction in the PJM markets would qualify for reporting as a physical transaction simply because PJM markets are physical markets, rendering the physicality requirement meaningless.[51] The Commission explained that it was circular reasoning to say that an IBT is Tariff-compliant simply because Complainants reported it as such by eScheduling the IBT.[52]

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[46] *Id*. P 69.

[47] *Id*. P 73.

[48] *Id*. P 73.

[49] *Id*. P 80.

[50] *Id*. P 70.

[51] *Id*. P 76.

[52] *Id*. P 79.

Likewise, the Commission disagreed with Complainants that their IBTs contemplate the physical transfer of energy because they are in the form of confirmations pursuant to an ISDA Master Agreement and Power Annex.[53]

27. In response to Complainants' argument that their IBTs provided market convergence benefits, the Commission pointed out that any such benefits are irrelevant to the question of whether Complainants violated section 1.7.10 of the Tariff and do not excuse Complainants from paying deviation charges they incurred.[54] The Commission responded to Scylla's argument that Tariff-compliant IBTs do not actually move power by clarifying that Tariff-compliant IBTs are representations of a movement of electric energy.[55]

b. Request for Rehearing

28. Complainants argue on rehearing the Complaint Order established new criteria of "physicality" under section 1.7.10, and that the Commission erroneously concluded that whether transmission, generation, and load serving obligations exist is determinative that their IBTs are not physical.[56] Complainants also argue that the Complaint Order created a new Tariff requirement that IBTs must have the potential for the physical transfer of energy and that the Commission fails to recognize that Complainants would satisfy the requirement by buying and selling energy in the PJM Interchange Energy Market. Similarly, Scylla asserts in its request for rehearing that the Complaint Order implicitly creates a market-participant status requirement of having "actual generation and load" that is "available to remedy imbalances and prevent deviations" that is absent from the PJM Tariff.[57] Complainants state that, to be available to offset a deviation, a generator would have to be operating and would have to not be otherwise offered into the PJM market.[58] Furthermore, Complainants state that eSchedules do not have to be submitted until up to three days after the day of dispatch, so PJM would not know before the dispatch day whether the IBT generators or load had the potential to generate or consume

[53] *Id*. P 81.

[54] *Id*. P 72.

[55] *Id*. P 78.

[56] Complainants' Request for Rehearing at 3-4, 18.

[57] Scylla Request for Rehearing at 12.

[58] Complainants' Request for Rehearing at 52.

energy to offset a deviation, and PJM cannot validate that the Commission's criteria are met.[59]

29. Scylla argues that the Complaint Order relies on a number of assumptions that are inconsistent with the record, including that IBTs must be between two entities and that IBTs must themselves transfer power in real time, while "contemplation" of physical transfer does not mean "directly cause," but only requires that physical transfer may be probable and indirect.[60] Scylla also notes that permitting post-hoc entries of IBTs demonstrates that IBTs do not cause physical transfers of energy and argues that the Commission disregarded its argument that eScheduling completion does not involve the real-time, physical delivery of electricity.[61] Scylla argues that the record shows that Complainants' IBTs converged pricing on the day-ahead and real-time markets, which involves the physical transfer of electricity.[62]

30. Scylla explains that the record established that the reporting of physical IBTs allows IBTs to be used to offset imbalances that would otherwise result from INCs and DECs in the day-ahead market because they represent a transfer of energy occurring outside the PJM market. Scylla argues that this is true regardless of ownership of generation or load.[63] Scylla further argues that the Complaint Order has the effect of preventing any entity other than a dispatchable generator or LSE from participating in IBTs.[64] Scylla asserts that IBTs have no effect on PJM's dispatch and are merely a billing mechanism.[65]

c. Commission Determination

31. As discussed below, we affirm our finding in the Complaint Order that Complainants' IBTs do not satisfy the requirement of section 1.7.10 that they

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[59] *Id*. at 51-52.

[60] Scylla Request for Rehearing at 4-5.

[61] *Id*.

[62] *Id*. at 13.

[63] *Id*. at 8.

[64] *Id*. at 6-7.

[65] *Id*. at 6.

"contemplate the physical transfer of energy" in order to be reported to PJM, and therefore it is appropriate for PJM to retroactively bill Complainants for deviation charges for the period July 2009 to July 2011.[66]

32. As discussed above, INCs and DECs are virtual bids made in the day-ahead market. An accepted INC results in scheduled generation at the specified location, and an accepted DEC results in scheduled load at the specified location.[67] In the PJM energy market, deviations between day-ahead INCs and DECs and real-time generation and load contribute to creating imbalances which are subject to deviation charges. These deviation charges must be assessed because PJM must "make whole" resources by paying them for their actual costs if PJM must alter their day-ahead dispatch schedule in real-time, which can occur whenever expected generation (e.g., a cleared INC) or expected load (e.g., a cleared DEC) does not materialize in the real-time market. These include the costs to startup, ramp-down, ramp-up, or extend run times on schedules or levels to address the imbalances created by the deviations.

33. A market participant can avoid paying deviation charges if it nets out its real-time imbalances by entering into a bilateral contract (such as an IBT) for the purchase or sale of electric energy. Section 1.7.10 of the PJM Tariff permits only some IBTs to be reported to PJM via eSchedules and thereby facilitate avoidance of deviation charges. In order to be reported to PJM, according to section 1.7.10 of the Tariff, an IBT must "contemplate the physical transfer of energy." Market participants are free to engage in IBTs that do not "contemplate the physical transfer of energy," but they cannot report them under section 1.7.10. PJM explains that reporting the IBT serves to represent physical energy injected in real-time to meet the market participant's obligations arising from its cleared INCs and DECs.[68] PJM further explains that the physicality requirement provides a measure of protection that actual generation and load are in fact available to remedy imbalances.[69] Reporting of physical IBTs allows PJM to track which market participant holds title to the energy, which is necessary for PJM's settlement process for the day-ahead and real-time markets.

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[66] Complaint Order, 138 FERC ¶ 61,165 at P 61.

[67] PJM Answer to Complaint at 9.

[68] PJM Dec. 2, 2011 Answer to the Complaint at 7-8, n.9.

[69] *Id*. at 5.

34. Specifically, section 1.7.10 of the Tariff provides that "[i]n addition to transactions in the PJM Interchange Energy Market, Market Participants may enter into bilateral contracts for the purchase or sale of electric energy to or from each other or any other entity, subject to the obligations of Market Participants to make Generation Capacity Resources available for dispatch by the Office of the Interconnection. Such bilateral contracts shall be for the physical transfer of energy to or from a Market Participant and shall be reported to and coordinated with the Office of the Interconnection…."[70] Furthermore, "[b]ilateral contracts that do not contemplate the physical transfer of energy to or from a Market Participant are not subject to this Schedule, shall not be reported to and coordinated with the Office of the Interconnection, and shall not in any way constitute a transaction in the PJM Interchange Energy Market."[71] Thus, section 1.7.10 makes clear that an IBT must "contemplate the physical transfer of energy" in order to be reported to PJM under the Tariff provision.

35. Complainants' financial IBTs differ markedly from the physical IBTs reportable pursuant to section 1.7.10. DC Energy recognized the opportunity to profit from divergences in the day-ahead and real-time flows by creating an affiliate, DCE Mid-Atlantic, so that it could enter into an IBT with DCE Mid-Atlantic and thereby avoid deviation charges. Typically, DCE Mid-Atlantic placed DECs for load missing in the day-ahead market and DC Energy placed INCs for the supply resource missing in the day-ahead market. Sometimes the two affiliates reversed these roles. DC Energy and DCE Mid-Atlantic entered into an IBT with each other for each paired set of virtual transactions. These IBTs between affiliates served no purpose other than to give Complainants a document that they could report to PJM to avoid deviation charges. In contrast, reporting Tariff-compliant IBTs serves to inform PJM of a bilateral arrangement for energy that is placed on the system pursuant to an actual purchase and sale of electric energy outside the pool so that settlement of energy and congestion costs are consistent with the bilateral arrangement.

36. As we found in the Complaint Order and affirm below, Complainants' IBTs do not satisfy the requirement of section 1.7.10 that they "contemplate the physical transfer of energy" and should not have been reported to PJM to avoid deviation charges.[72]

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[70] PJM, OATT, 1.7 General, Section 1.7.10 Other Transactions, § 1.7.10(a)(i), 3.0.0.

[71] *Id*. § 1.7.10(a)(vi).

[72] Our analysis of this term is solely for the purpose of determining whether Complainants' IBTs were eligible to be reported to PJM pursuant to section 1.7.10 of the Tariff in order to avoid deviation charges.

Complainants have failed to identify any aspect of their IBTs that would reasonably be considered to "contemplate the physical transfer of energy." For example, Complainants have no capability to handle physical performance when they contract with each other, as neither DC Energy nor DCE Mid-Atlantic owns generation resources, is an LSE, or acted as a marketer-intermediary by contracting with entities owning generation or having load-serving or other physical obligations.[73] As Complainants admit, without the IBT, DC Energy and DCE Mid-Atlantic would have been subject to deviation charges because they would have to rely on PJM to procure and supply the balancing energy requirement created by DC Energy's and DCE Mid-Atlantic's virtual transactions.[74] Instead, Complainants' IBTs merely represent a transfer of financial liabilities, with no prospect of a physical transfer of electric energy.

37. Complainants' only arguments as to why their IBTs satisfied the physicality requirement of section 1.7.10 were that (1) their virtual transactions caused redispatch, (2) merely scheduling energy results in a physical transfer of energy because of the central counterparty construct, and (3) their IBTs are in the form of an ISDA Master Agreement and Power Annex. The Commission properly dismissed each of these reasons in turn in the Complaint Order. With respect to the first argument, the Commission found, and we affirm here, that it is immaterial whether virtual INCs and DECs result in changes to PJM's dispatch, because the Tariff obligation for physical transfer is a requirement for the IBT itself, and IBTs do not cause redispatch.[75] With respect to the second argument, the Commission appropriately pointed out that it is circular reasoning to say that an IBT is Tariff-compliant simply because Complainants reported it as such by eScheduling the IBT.[76] Furthermore, the central counterparty construct is irrelevant because IBTs are "non-pool" transactions to which PJM's central counterparty, PJMSettlement, is not, in fact, a counterparty. Finally, the fact that Complainants happen to use a standard form agreement that assumes the delivery of electric energy tells us nothing about the true nature of the underlying transaction.[77]

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[73] PJM Dec. 2, 2011 Answer to the Complaint at 3, Market Monitor Protest to the Complaint at 7.

[74] Stevens Affidavit to the Complaint at 5.

[75] Complaint Order, 138 FERC ¶ 61,165 at P 77.

[76] *Id*. P 79.

[77] *Id*. P 81.

Thus, Complainants' arguments do not show that their IBTs satisfy the physicality requirement of section 1.7.10.

38. Furthermore, as stated in the Complaint Order, and reaffirmed here, Complainants' interpretation of section 1.7.10 cannot be correct because under this interpretation any transaction in the PJM markets would qualify for reporting under section 1.7.10 as a physical transaction simply because PJM markets are physical markets.[78] Any eScheduled IBT would automatically be Tariff-compliant because, according to Complainants, simply eScheduling an IBT transforms it into a physical transaction. This interpretation renders the requirement in the Tariff that reported IBTs "contemplate the physical transfer of energy" meaningless.

39. We consider the specific arguments on rehearing below.

40. Contrary to Complainants' contention, the Complaint Order does not establish new, non-Tariff criteria of "physicality" under section 1.7.10.[79] Complainants argue that the Commission erroneously concluded that whether transmission, generation, and load serving obligations exist is determinative that their IBTs are not physical.[80] On the contrary, the Commission acknowledged that "section 1.7.10 does not explicitly require that market participants (i) obtain and pay for transmission service, (ii) be either a generator or load serving entity to be a transacting party, or (iii) be non-affiliates."[81] The Commission simply recognized that "whether transmission capacity was reserved or whether the parties own generation resources or are load serving entities or marketers are factors that are reasonably applied to determine whether a transaction is physical or non-physical in nature."[82] The Commission did not state that these factors were the only factors that might be considered or that they would be conclusive. Rather, the issue before the Commission was whether Complainants carried their burden under FPA section 206 to show that PJM's rebilling of Complainants is improper because Complainants' IBTs satisfied the requirement that they "contemplate the physical transfer of energy" and were properly reported under section 1.7.10 of the Tariff, not to define the

[78] *Id*. P 76.

[79] Complainants' Request for Rehearing at 3-4.

[80] *Id*. at 3-4, 18.

[81] Complaint Order, 138 FERC ¶ 61,165 at P 70.

[82] *Id*.

meaning of "physical" or establish new criteria of physicality. The Commission evaluated Complainants' arguments as to why their IBTs satisfied the physicality requirement of section 1.7.10 and found each of them unpersuasive. The Commission noted that other factors that might reasonably be considered in determining whether a transaction is physical in nature, such as owning generation resources, being LSEs, or acting as a marketer-intermediary by contracting with entities owning generation or having load-serving obligations, were not present in Complainants' transactions. In short, Complainants failed to show any aspect of their transactions that would reasonably satisfy the requirement to "contemplate the physical transfer of energy." In addition, as discussed below, Complainants' claim that simply buying and selling in the PJM Interchange Energy Market means that their IBTs "contemplate the physical transfer of energy" is inconsistent with the Tariff requirement that IBTs reportable under section 1.7.10 have resources that can make energy available for dispatch.

41. Similarly, the Complaint Order did not create a new requirement that actual generation and load be available to remedy imbalances or that real-time power must flow, as Scylla and Complainants assert.[83] As discussed above, the Complaint Order referred to factors that may reasonably be considered in determining whether an IBT is Tariff-compliant, but did not create specific requirements. The PJM Tariff requires that Generation Capacity Resources, including those providing the energy for an IBT, be available for dispatch by PJM, even if such resources do not operate in real-time if they are not selected to run under PJM's Security Constrained Economic Dispatch.[84] However, neither the Tariff nor the Complaint Order requires one-for-one megawatt matching between the physical energy associated with the IBT and real-time injections and withdrawals. Consistent with this approach, section 1.7.10 states that parties to bilateral contracts, including IBTs, "shall use all reasonable efforts, consistent with Good Utility Practice, to limit the megawatt hours of such reported transactions to amounts reflecting the expected load and other physical delivery obligations of the buyer under the bilateral contract."[85] Thus, the Tariff does not require a generator to run as a condition

[83] Scylla Request for Rehearing at 12; Complainants' Request for Rehearing at 50.

[84] "Market Participants may enter into bilateral contracts for the purchase or sale of electric energy to or from each other or any other entity, subject to the obligations of Market Participants to make Generation Capacity Resources available for dispatch by [PJM]." PJM, OATT, 1.7 General, Section 1.7.10 Other Transactions, § 1.7.10(a)(i), 3.0.0.

[85] *Id.* § 1.7.10(a)(iii).

for market participants to report an IBT; but, the Tariff is clear that such a generator must be offered to the market as available for PJM to dispatch.[86]

42. Complainants also argue that the Complaint Order created a new Tariff requirement that IBTs must have the potential for the physical transfer of energy and that the Commission fails to recognize that Complainants would satisfy the requirement by buying and selling energy in the PJM Interchange Energy Market.[87] In the Complaint Order, the Commission explained that the potential to provide a physical transfer of energy to offset a deviation created by transactions in the day-ahead market is the reason certain IBTs are permitted to be reported pursuant to section 1.7.10 and thereby avoid deviation charges, and others are not permitted to be reported. [88] If an IBT is not associated with any potential for physical energy, there is no reason for allowing it to be reported and so avoid deviation charges because the imbalance created by the associated virtual transactions cannot be offset. As discussed above, Complainants' argument that they would satisfy the "contemplate the physical transfer of energy" requirement by buying and selling energy in the PJM Interchange Energy Market is circular. If a party satisfies the physicality requirement with respect to an IBT simply by buying and selling in the PJM Interchange Energy Market, then any eScheduled IBT would automatically be Tariff-compliant. This would render the physicality requirement meaningless.

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[86] Market Sellers owning or controlling the output of a Generation Capacity Resource that was committed in an FRR Capacity Plan, self-supplied, offered and cleared in a Base Residual Auction or Incremental Auction, or designated as replacement capacity, as specified in Attachment DD of the PJM Tariff, and that has not been rendered unavailable by a Generator Planned Outage, a Generator Maintenance Outage, or a Generator Forced Outage shall submit offers for the available capacity of such Generation Capacity Resource, including any portion that is self-scheduled by the Generating Market Buyer. PJM, OATT, 1.10 Scheduling, Section 1.10.1A Day-ahead Energy Market Scheduling, § 1.10.1A(d), 3.0.0.

[87] Complainants' Request for Rehearing at 20.

[88] "In the Real-time Energy Market, Market Participants that deviate from the amounts of energy purchases or sales, or Transmission Customers that deviate from the transmission uses, scheduled in the Day-ahead Energy Market shall be obligated to purchase or sell energy, or pay Transmission Congestion Charges and Transmission Loss Charges, for the amount of the deviations at the applicable Real-time Prices or price differences..." PJM, OATT, 1.10 Scheduling, Section 1.10.1 General, § 1.10.1(c), 3.0.0.

43. In addition, Complainants' interpretation of section 1.7.10 is at odds with the language of the section itself, which indicates that IBTs are expected to have resources that can make energy available for dispatch. Since prior to the 2008 Credit Risk Filing, section 1.7.10 has had an explicit requirement that parties to bilateral contracts reportable to PJM must make generation resources available to PJM.[89] In addition, section 1.7.10(a)(ii) states that "[i]n no event shall the purchase or sale of energy between Market Participants under a bilateral contract constitute a transaction in the PJM Interchange Energy Market." Thus, the Tariff shows that an IBT reportable under section 1.7.10 is expected to have resources that can make energy available for dispatch, not merely the product of buying and selling energy in the PJM Interchange Energy Market.

44. Because we disagree with Complainants' arguments that the Complaint Order has created new criteria for physicality, we find irrelevant their argument that PJM cannot verify the IBTs used to offset imbalances because they are reported in arrears. As we stated above, section 1.7.10 does not require that a specific generator or load support a Tariff-compliant IBT or that PJM must verify eSchedules for IBT parties for actual performance by generation or load in real-time.

45. Scylla contends that the term "contemplate" does not mean "directly cause," but rather "probable or as an end or intention," and therefore Complainants' transactions comply with the Tariff because they converged day-ahead and real-time pricing.[90] Scylla also argues that, if Complainants' actions caused harm rather than a benefit, PJM would have proven it.[91] Scylla's arguments miss the point. As discussed in the Complaint Order, the price convergence benefits claimed by Complainants are unproven and immaterial because any price convergence would be the result of INCs and DECs, not the IBT.[92] And the physicality requirement of section 1.7.10 is a Tariff requirement for the IBT, not for the INCs and DECs.[93] Regardless, as the Commission found in the Complaint Order, any benefits of Complainants' actions are irrelevant to the question of

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[89] PJM, OATT, 1.7 General, Section 1.7.10 Other Transactions, § 1.7.10(a)(i), 3.0.0.

[90] Scylla Request for Rehearing at 13.

[91] *Id*. at 6.

[92] Complaint Order, 138 FERC ¶ 61,165 at P 95.

[93] *Id*. P 77.

whether Complainants violated section 1.7.10 of the Tariff and do not excuse Complainants from paying deviation charges they incurred.[94] Moreover, the harm caused by Complainants' actions is evident from the manner in which deviation charges are allocated according to the Tariff. Because Complainants improperly reported their non-physical IBTs and therefore did not pay an allocated share of the deviation charges issued, other market participants had to pay more than their proper share based on the volume of transactions that occurred.[95]

46. Scylla also argues that the Complaint Order fails to comprehend that an IBT is merely a billing mechanism and has no effect on dispatch.[96] As we found in the Complaint Order, we agree that IBTs themselves do not cause redispatch.[97] However, Scylla is not correct in its assertion that IBTs are merely a billing mechanism. RTOs may perform billing adjustments based on IBTs that have been reported to the RTO; however, IBTs reportable to PJM should also represent an underlying contract contemplating a transfer of energy.[98] Additionally, and contrary to Scylla's suggestion, an IBT is not "merely a billing mechanism" under PJM's Tariff because the IBTs that are reportable under section 1.7.10 are transactions that occur outside the PJM pool, and the charges for energy are not billed or settled by PJM under its Tariff. Parties report the IBT only to address the billing and settlement of congestion and losses rather than the energy. Section 1.7.10 thus explicitly states that "[a]ll payments and related charges for the energy associated with a bilateral contract shall be arranged between the parties to the bilateral contract and shall not be billed or settled by [PJM] or PJMSettlement.[99]

47. Finally, Scylla mistakes the Commission's descriptive summaries of PJM's statements for Commission findings. First, Scylla argues that the Commission's finding

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[94] *Id*. P 72.

[95] *Id*. P 94.

[96] Scylla Request for Rehearing at 6.

[97] Complaint Order, 138 FERC ¶ 61,165 at P 77.

[98] Scylla Request for Rehearing at 7.

[99] PJM, OATT, 1.7 General, Section 1.7.10 Other Transactions, § 1.7.10(a)(iv), 3.0.0.

that IBTs must be between two entities is inconsistent with the record.[100] The Commission made no such finding. In making this allegation, Scylla refers to a section of the order that quotes PJM's statements in the 2008 Credit Risk Filing transmittal letter describing the Tariff amendments, not the Commission's determination.[101] Second, Scylla objects to the Complaint Order's reference to PJM's statement that IBTs themselves transfer power in real time, arguing that it is unsupported and the fact that an IBT can be reported in arrears shows that eScheduling an IBT does not actually cause a transfer of power. Scylla refers to the Commission's summary of PJM's answer, not to the Commission's findings. The Commission made no such finding. In fact, Scylla's position appears consistent with the Commission's rejection of Complainants' argument that the mere eScheduling of an IBT directly causes injections into or withdrawals from the PJM Interchange Energy Market. In the Complaint Order, the Commission found that "[t]he mere reporting of physical IBTs in eSchedules does not in itself move energy, but allows the IBTs to be used to offset deviations or imbalances that would otherwise result from INCs and DECs in the day-ahead market because they represent a transfer of energy occurring outside the PJM market."[102] Furthermore, as Scylla states, the fact that the IBT can be eScheduled one to three days after the flow of power supports that eScheduling an IBT does not actually cause a transfer of power.

2. Whether PJM's course of performance supports a finding that Complainants' IBTs comply with section 1.7.10

a. Complaint Order

48. The Commission concluded that PJM's course of conduct, including acceptance of Complainants' eSchedules over the course of years, does not support a finding that section 1.7.10 permits reporting of Complainants' IBTs. The Complaint Order explained that PJM represented that it was not aware of the nature of the IBTs and is now correcting an error.[103] The Commission noted that PJM passively accepted Complainants' eSchedules without actively evaluating whether they were compliant with section 1.7.10 because Complainants represented that the transactions were Tariff-compliant by clicking

[100] Scylla Request for Rehearing at 4-5 (citing Complaint Order, 138 FERC ¶ 61,165 at P 28).

[101] *Id*. at 4 (citing Complaint Order, 138 FERC ¶ 61,165 at P 4).

[102] Complaint Order, 138 FERC ¶ 61,165 at P 78.

[103] *Id*. P 83.

through a message in eSchedules.[104] The Complaint Order concluded that there was no evidence that PJM acted in any manner other than to properly enforce its Tariff after becoming alerted to a possible Tariff violation.[105]

49. In response to Complainants' assertion that Commission precedent and the filed rate doctrine preclude PJM from reinterpreting Tariff provisions retroactively and that the 2008 Credit Risk Filing did not provide sufficient notice, the Commission found that no party had shown that PJM ever interpreted its Tariff as allowing IBTs like Complainants' to be reported or is now reinterpreting its Tariff.[106] The Commission also found that the 2008 Credit Risk Filing merely clarified the pre-existing physicality requirement and therefore it was inappropriate for Complainants to report their non-physical IBTs either before or after the 2008 Credit Risk Filing.[107] The Commission also disagreed with Complainants that PJM lacks authority to reject eScheduled IBTs.[108] Finally, the Commission did not find that PJM's issuance of a Problem Statement regarding improper use of IBTs meant that PJM's existing Tariff language and rules were unclear, as Scylla asserted.[109]

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[104] *Id.* A "screen shot" of the message was included in Attachment B to the PJM Dec. 2, 2011 Answer to the Complaint. The message states: "Market Participants who wish to use eSchedules to report to PJM a bilateral transaction for the purchase and sale of energy are directed to Section 1.7.10 of Schedule 1 of the PJM Operating Agreement setting forth the terms and conditions associated with the use of eSchedules. Market Participants using eSchedules recognize and hereby confirm that they are representing and reporting to PJM the existence of a bilateral transaction transferring title from seller to buyer. Market Participants acknowledge that PJM is relying on the continuing accuracy of this reporting and representation in calculating appropriate credit responsibilities for respective Market Participants. By logging into the eSchedules application you are confirming your acceptance of this agreement in its entirety. If you do not accept this agreement you should exit the eSchedules application now."

[105] *Id.* P 85.

[106] *Id.*

[107] *Id.* P 86.

[108] *Id.* P 87.

[109] *Id.* P 84.

b. Request for Rehearing

50. Complainants assert that the Commission erred by ignoring course of performance evidence in the face of ambiguity. In particular, Complainants argue that the Commission erred by (1) finding that PJM did not affirmatively indicate that Complainants' proposed use of IBTs was acceptable, when course of performance does not require affirmative approval; (2) finding that PJM was not aware of Complainants' operations and assets, when PJM knew exactly what Complainants were proposing; and (3) finding that PJM's passive acceptance of IBT eSchedules was not sufficient, when passive acceptance is all that is required.[110] Complainants contend that the Stevens Affidavit to their rehearing request identifies several significant and detailed conversations with PJM executives and the Market Monitor before and after the April 2006 Letter and that PJM indicated that the IBTs were Tariff-compliant.[111] Complainants also contend that PJM was well aware that Complainants were not generators or load during these meetings, and that it "defies logic" to find that Complainants proceeded with the transactions without up-front approval.[112]

51. Scylla and Complainants argue that the Commission erred by relying on PJM's use of a screen shot message to find that PJM gave Complainants notice that their IBTs were not compliant because it merely directed market participants to comply with the Tariff and was dated well after the disputed transactions took place.[113] Complainants also argue that the fact that the Tariff is ambiguous is demonstrated by the Complaint Order's adoption of new transaction requirements for IBTs and the disagreement between PJM and the Commission as to when and if the interpretation of the phrase "physical transfer of energy" changed.[114]

52. Scylla and Complainants assert that the Commission erred by finding that PJM did not change its interpretation of acceptable forms of IBTs and by rejecting Complainants'

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[110] Complainants' Request for Rehearing at 58-59.

[111] *Id*. at 27-34.

[112] *Id*. at 36. Complainants note that neither PJM nor the Market Monitor suggested or initiated the Advisory Opinion process when DC Energy approached them regarding its proposed IBTs, and a formal request for an Advisory Opinion is not required. *Id*. at 36-37.

[113] Complainants' Request for Rehearing at 58, Scylla Request for Rehearing at 5.

[114] Complainants' Request for Rehearing at 54.

reliance on PJM-issued materials and communications with PJM.[115] Scylla and Complainants argue that the Commission did not adequately address Complainants' reasonable reliance on (1) PJM's December 20, 2005 "Balancing Operating Reserve Examples" presentation (December 2005 Presentation), which described IBTs as a PJM-approved method to avoid deviation charges associated with virtual transactions; (2) PJM's 2005 "Internal Transactions: eSchedules" training video (Training Video), in which the trainer describes IBTs as financial transactions; and (3) PJM's presentation to the September 15, 2008 Credit Risk Management Steering Committee (Credit Risk Committee Presentation), in which the presenter stated that "parties may continue to notify PJM of 'internal bilateral' financial transactions via eSchedules."[116]

53. Scylla contends that the Complaint Order does not sufficiently analyze the argument that PJM's efforts to modify the Tariff language at issue, including by issuance of a Problem Statement, reflect actual knowledge by PJM that the provisions are ambiguous.[117] Scylla argues that PJM's efforts were narrowly tailored to the subject matter in dispute in this proceeding and were initiated more than once.

54. Finally, Complainants contend that the Commission erred in failing to recognize that PJM has no authority to retroactively reject eSchedules, asserting that its interpretation ignores the maxim *expressio unius est exclusion alterius* (the expression of one thing is the exclusion of the other).[118]

c. Commission Determination

55. We affirm our finding in the Complaint Order that PJM's course of conduct does not support a finding that section 1.7.10 permits reporting of Complainants' IBTs.

56. As a preliminary matter and as the Commission found in the Complaint Order, section 1.7.10 has always contained a physicality requirement.[119] The 2008 Credit Risk

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[115] Complainants' Request for Rehearing at 20-22, Scylla Request for Rehearing at 15-16.

[116] Complainants' Request for Rehearing at 22, Scylla Request for Rehearing at 17-19.

[117] Scylla Request for Rehearing at 14.

[118] Complainants' Request for Rehearing at 78-79.

[119] Complaint Order, 138 FERC ¶ 61,165 at P 86.

Filing clarified the earlier requirement that only "[b]ilateral arrangements that contemplate the physical transfer of energy to or from a Market Participant shall be reported to and coordinated with the Office of the Interconnection in accordance with this Schedule." The 2008 Credit Risk Filing explained that the revisions made clear that reported transactions would serve to inform PJM "of the identity of the market participant that holds title to the energy that is being placed on the system."[120] The transmittal to the 2008 Credit Risk Filing also explained: "Market participants are of course free to enter into bilateral transactions of a financial, as opposed to physical nature, without needing to inform PJM of such transactions. Such transactions, options and swaps for instance, that might be arranged under an ISDA Master contract, do not implicate PJM's scheduling, dispatch or settlement process in any manner. Unlike transactions requiring physical delivery, they are handled entirely outside of PJM."[121]

57. As we found in the Complaint Order, no party has shown that PJM ever interpreted its Tariff as allowing transactions like Complainants' IBTs to be reported under section 1.7.10. Complainants contend that the fact that PJM accepted their eSchedules over the course of years shows that their transactions satisfied the Tariff. However, PJM represents that it was not aware of the non-physical nature of Complainants' IBTs until June 2011, and that it passively accepted Complainants' eSchedules without actively evaluating whether they were compliant with section 1.7.10, noting that Complainants represented that the transactions were compliant with section 1.7.10 by clicking through a message in eSchedules.[122] As discussed below, Complainants fail to demonstrate that PJM was, in fact, aware of the non-physical nature of Complainants' IBTs submitted to PJM for the purpose of reducing the expected deviation charges associated with their virtual transactions, such that later rejecting their eSchedules would amount to a change in policy rather than a correction of prior errors. In addition, as discussed below, the training materials and presentations cited by Complainants do not support their claim that PJM changed its interpretation of section 1.7.10.

58. On rehearing, Complainants assert that the Commission erred by finding that PJM was unaware of the nature of Complainants' IBTs until 2011 and that PJM did not affirmatively approve eScheduling of the DC Companies' proposed IBTs, claiming that

[120] PJM Answer to Complaint at 13 (citing 2008 Credit Risk Filing at 10).

[121] 2008 Credit Risk Filing at 10 n.13.

[122] Complaint Order, 138 FERC ¶ 61,165 at P 83.

PJM "knew exactly what DC Companies were proposing."[123] Complainants cite testimony filed both prior to and subsequent to their request for rehearing that describe discussions between PJM staff and Complainants.[124] As discussed above, we will not accept the new evidence of PJM's course of conduct, including additional details of conversations between Complainants and PJM staff, provided by Complainants on rehearing. We reject this new evidence because the Commission generally does not permit parties to introduce new evidence for the first time on rehearing.[125]

59. The evidence that we do consider, which was submitted prior to Complainants' request for rehearing, fails to show that PJM knew the financial nature of Complainants' IBTs or that PJM ever interpreted its Tariff as allowing transactions like Complainants' IBTs to be reported under section 1.7.10. Complainants do not cite to any communication with PJM in which they made clear to PJM the details of the transactions that PJM argues makes the transactions non-Tariff compliant. For example, the April 2006 Letter did not lay out the specifics of the transactions in detail nor make clear that Complainants would be relying on the act of eScheduling a non-physical IBT in order to satisfy the physicality requirement of section 1.7.10. Specifically, the letter did not explain Complainants' view that their use of non-physical IBTs would be consistent with the applicable netting rules involving INC and DEC positions and internal sales and purchases that PJM described in its December 2005 Presentation. In fact, the letter makes no mention at all of the physicality requirements in section 1.7.10 of the Tariff.

60. Complainants also list a series of discussions in which Complainants allege that PJM participated and did not raise specific concerns with Complainants' activity.[126] However, Complainants fail to show that PJM was, in fact, fully aware of the financial nature of Complainants' IBTs during these discussions. Because it is not clear that PJM was fully aware of the nature of the IBTs, then PJM's acceptance of the non-physical IBTs over the years does not support a claim that PJM affirmatively found them to be Tariff-compliant. Furthermore, we are not persuaded by Complainants' argument that PJM was fully aware of the financial nature of their IBTs simply because PJM was

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[123] Complainants' Request for Rehearing at 27-28, 59.

[124] *Id.* at 27-28.

[125] *See supra* note 40 and accompanying text (citing *PATH*, 133 FERC ¶ 61,152 at P 15).

[126] Second Stevens Affidavit to the Complaint at 7-8.

generally familiar with Complainants; the fact that PJM knew that Complainants did not own generation or serve load is not persuasive because Complainants could have made arrangements to obtain generation or serve load.

61. Complainants alternatively argue that PJM only needed to give passive, rather than affirmative, acceptance of Complainants' IBT eSchedules for the Commission to find that PJM's course of conduct indicated that the IBTs were Tariff-compliant. Complainants contend that all that is required to show course of performance in this case is that PJM (1) had knowledge of the performance, (2) had the opportunity to object, and (3) did not object.[127] However, Complainants fail to show that PJM had knowledge of the financial nature of Complainants' IBTs and therefore considered these IBTs to be Tariff-compliant. PJM noted to the contrary that, by clicking through a message in eSchedules, Complainants represented that the transactions were compliant IBTs under section 1.7.10. PJM explained that it did not affirmatively evaluate whether they were indeed compliant with section 1.7.10 at the time of eScheduling, and it was not aware of the true nature of Complainants' IBTs until 2011. The fact that PJM may have accepted Complainants' IBTs for five years thus does not demonstrate that the IBTs were considered Tariff-compliant because it is not clear that PJM knew the nature of Complainants' IBTs such that it knowingly accepted them.

62. Complainants' assertion that it "defies logic" to find that they proceeded with transactions without up-front approval because it would have been "economically irrational" is also unpersuasive.[128] Complainants received the tangible benefit of avoiding tens of millions of dollars in deviation charges by proceeding with their transactions despite the risk of possible noncompliance with the Tariff. We observe that nowhere do Complainants cite to a clear statement by PJM that IBTs like Complainants' were Tariff-compliant.

63. Scylla and Complainants also argue that the Commission erred by relying on PJM's use of a screen shot message to find that PJM gave Complainants notice that their IBTs were not compliant, because it merely directed market participants to comply with the Tariff and was dated after the transactions took place. Scylla and Complainants misinterpret the Complaint Order. The Commission did not find that the screen shot message constituted notice to Complainants. Rather, the Commission noted that PJM explained that market participants submitting eSchedules have to click through a screen

[127] Complainants' Request for Rehearing at 58-59.

[128] *Id*. at 36.

shot message referring them to section 1.7.10, which supports PJM's representation that it did not have a practice of looking behind market participants' representations.[129]

64. On rehearing, Complainants and Scylla assert that the Commission ignored the December 2005 Presentation, Training Video, and Credit Risk Committee presentation, which indicate that PJM views IBTs like Complainants' as Tariff-compliant.[130] In the Complaint Order, the Commission addressed Complainants' argument by finding that no party has shown that PJM ever interpreted its Tariff to allow the reporting of transactions like Complainants' or that PJM is now reinterpreting its Tariff.[131] In addition, the Commission found that "the IBT examples upon which Complainants claim reliance do not contain any statement that they apply to non-physical transactions," and Complainants "relied on their own interpretations of examples in PJM's training materials, rather than any statement or indication by PJM that transactions like Complainants' would be treated comparably to such examples."[132] While Complainants and Scylla again point to these non-Tariff sources in alleging that PJM permitted reporting of financial IBTs, the Tariff requirement that the IBTs "contemplate the physical transfer of energy" remains and the referenced materials fail to show that PJM previously permitted reporting of financial IBTs like Complainants'.

65. As a preliminary matter, it is important to recall that there are different types of IBTs. Under section 1.7.10 of the Tariff, some IBTs can be reported to PJM via eSchedules and some cannot. An IBT that "contemplate[s] the physical transfer of energy" can be reported to PJM via eSchedules pursuant to section 1.7.10 of the Tariff. Such an IBT would be able to avoid deviation charges because it would be able to offset an associated imbalance created by virtual transactions in the day-ahead market. Market participants are free to engage in other IBTs that do not "contemplate the physical transfer of energy," but they cannot report those IBTs under section 1.7.10.

66. In claiming that the December 2005 Presentation shows that PJM viewed Complainants' IBTs as Tariff-compliant, Complainants and Scylla confuse references to non-Tariff compliant IBTs with Tariff-compliant ones. Complainants and Scylla assert

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[129] Complaint Order, 138 FERC ¶ 61,165 at P 83.

[130] Complainants' Request for Rehearing at 21-25; Scylla's Request for Rehearing at 17-20.

[131] Complaint Order, 138 FERC ¶ 61,165 at P 85.

[132] *Id*. P 100.

that the December 2005 Presentation describes IBTs as a PJM-approved method to avoid deviation charges associated with virtual transactions.[133] While it is true that the December 2005 Presentation states that real-time bilateral purchases and sales can offset deviation charges associated with INCs and DECs in certain scenarios, it does not state that financial IBTs like Complainants', which have no prospect of a physical transfer of energy, can be eScheduled. Instead, it refers to Tariff-compliant bilateral transactions by describing eScheduled bilateral contracts (which would not include financial IBTs) as alternatives to real-time demand and supply and to real-time imports and exports, which are of a physical nature. Furthermore, in examples contained within the December 2005 Presentation, the energy contemplated by the bilateral transaction is physical (e.g., via references to real-time imports and exports of energy and making available real-time load as alternative ways to avoid deviation charges in the applicable supply and demand deviation charge "buckets") and thus PJM can describe it as a way a participant may avoid deviation charges. [134] Moreover, the December 2005 Presentation makes no explicit references to IBTs as being of a financial nature.

67. Similarly, Complainants and Scylla confuse Tariff-compliant and non-Tariff compliant IBTs in discussing the Training Video. The parts of the Training Video cited by Complainants and Scylla do not show that financial IBTs can be reported to PJM under section 1.7.10. For example, while Complainants and Scylla cite the trainer's statement in slide 3 that IBTs "are sometimes considered financial transactions meaning the actual megawatts will shift from the buyer to the seller based on the eSchedule bilateral transaction," this slide is silent as to the important question: whether a financial

[133] Scylla Request for Rehearing at 17; Complainants' Request for Rehearing at 22.

[134] The December 2005 Presentation explains how deviation charges are applied to three separate "buckets:" "demand," "supply," and generator deviations. Slide 3 explains that "demand" is evaluated separately from "supply," while generation is evaluated on an individual basis. For example, slide 8 states that, in order to avoid deviation charges associated with a cleared 40 MW DEC in the "demand bucket," the market participant would need 40 MW of "demand" in real-time to offset the "demand" that cleared in the day-ahead market, such as: (i) an export to outside of PJM; (ii) real-time load within PJM; or (iii) a bilateral sale via eSchedules. In addition, slide 13 states that in order to avoid deviation charges associated with a cleared 30 MW INC in the "supply bucket," the market participant would need 30 MW of "supply" in real-time to offset the "supply" that cleared in the day-ahead market, such as: (i) an import from outside PJM or (ii) a bilateral purchase via eSchedules. The emphasis is on transactions of a physical nature, not of a financial nature.

IBT can satisfy section 1.7.10 and can be used to offset deviation charges. The statement that IBTs are "sometimes" considered to be financial transactions is consistent with the fact that there are, as noted above, different types of IBTs, some which "contemplate the physical transfer of energy" and can be reported to PJM pursuant to section 1.7.10, and some which are not and thus cannot be reported. In fact, slide 3 goes on to explain that IBT Buyers are typically network transmission customers when the source differs from the sink, a physical concept. Similarly, Complainants and Scylla assert that the trainer refers in slide 8 to the "financial responsibility for those megawatts," but he also explains that "the megawatts are shifted from the buyer to the seller," a concept consistent with the physical transfer of energy. In slide 13, the trainer's statement that "this [IBT] is a financial shift of the responsibility of who is getting charged or credit for those megawatts" is not inconsistent with the financial settlement associated with a physical, Tariff-compliant IBT. Further, the first bullet of slide 13 explicitly says "[u]sed for all internal bilateral *energy* transactions" (emphasis added), indicating that the trainer is not discussing financial IBTs on this slide. Finally, the trainer's statement with respect to slide 13 that IBTs "specified with day-ahead pricing" will be "applied to the balancing market…with a zero deviation" says nothing about whether a financial IBT can offset deviations associated with virtual transactions because this refers to IBTs in the day-ahead market, not in the real-time market like the Complainants' IBTs.

68. Moreover, a series of slides in the Training Video—slides not mentioned by Complainants or Scylla—demonstrate how virtual transactions can be used in conjunction with the netting of deviation charges associated with real-time, physical IBTs, not financial IBTs. Slides 41-44 are entitled "Real-Time Transaction Example – Settlements" and depict two transactions: (1) an eScheduled IBT sinking at the Western Hub and (2) an EES Export Transaction sourcing at the Western Hub. In slide 41, which depicts an IBT sale to a buyer at the Western Hub, the diagram explicitly states that the IBT Seller "is a generator source." In addition, the IBT Buyer in slide 41 is depicted as conducting a further transaction by exporting the energy acquired at the Western Hub to an external party via an EES Export Transaction, another type of physical bilateral transaction. Likewise, slide 42 explicitly refers to the IBT Buyer's "generation" at the sink and the IBT Seller's "load" as the source, and slide 43 describes the IBT Buyer as the "transmission customer." Furthermore, slide 42 states that the "Buyer and Seller pay Balancing Operating Reserves charges if not hedged in the day-ahead market," suggesting that a physical IBT entered in the real-time market would be subject to deviation charges unless, for example, the IBT parties enter into offsetting virtual transactions in the day-ahead market. Finally, slide 43 describes the transmission customer (the IBT Buyer) as paying a Firm or Non-firm Transmission Service charge and a Point-to-Point Transmission Losses charge, again indicators of the physical transfer of energy for the further transaction with the IBT.

69. Complainants and Scylla also cite the statement in the Credit Risk Committee Presentation that "parties may continue to notify PJM of 'internal bilateral' financial transactions via eSchedules" for this proposition.[135] We are not persuaded, however, that the Credit Risk Committee Presentation shows that PJM viewed financial IBTs as being able to be reported pursuant to section 1.7.10. First, it is misleading to rely on the Credit Risk Committee Presentation to draw conclusions about PJM's interpretation of the Tariff because it describes an element of a stakeholder proposal that was never proposed by PJM nor accepted by the Commission. This proposal to "provide a billing service for the portion of the swap transaction that is settled at LMP prices, if requested by the parties to the IBT via an eSchedule," was a preliminary proposal presented to stakeholders prior to the Members Committee and did not result in adoption by PJM. Second, it is unclear what the presenter means by "continue to notify," and the presentation does not provide any further explanation. This phrase might not even refer to the Tariff provision at issue in this proceeding. And nowhere in the Credit Risk Committee Presentation does it say that financial IBTs satisfy the requirements of section 1.7.10 or that they can be used to avoid deviation charges.

70. Thus, we reaffirm our finding that no party has shown that PJM ever interpreted its Tariff as allowing transactions like Complainants' IBTs to be reported under section 1.7.10. Accordingly, rebilling of Complainants does not violate the filed rate doctrine or the rule against retroactive ratemaking. In sum, we reject Complainants' contention that PJM's course of conduct shows that PJM changed its interpretation of section 1.7.10.

71. Complainants contend that the fact that the Tariff is ambiguous is evident by the disagreement between PJM and the Commission as to when and if the interpretation of the phrase "physical transfer of energy" changed.[136] Specifically, Complainants argue that, while the Commission concludes that PJM interpreted its Tariff both before and after the 2008 Credit Risk Filing as prohibiting reporting of IBTs like Complainants', PJM did not consider DC Companies' IBTs prior to the 2008 Credit Risk Filing to be problematic. As discussed above, Complainants' claim that PJM's interpretation of section 1.7.10 changed is unsupported and therefore there is no "disagreement" between PJM and the Commission that demonstrates ambiguity. PJM represents that it did not object to Complainants' IBTs prior to July 2011 because it was not aware of the nature of Complainants' transactions and notified Complainants shortly after the error had been

[135] Scylla Request for Rehearing at 19-20; Complainants' Request for Rehearing at 24-25.

[136] Complainants' Request for Rehearing at 54-57.

discovered. PJM itself explained in the 2008 Credit Risk Filing that the filing was submitted to "clarify that such agreed bilateral transactions are for the physical transfer of energy," which was a requirement that existed in the prior version of the Tariff.

72. Complainants also argue that the ambiguity of section 1.7.10 is demonstrated by the Complaint Order's efforts to articulate how hub transactions are Tariff-compliant and statements in the Credit Risk Committee presentation that market participants can notify PJM of financial IBTs. These examples do not show that section 1.7.10 is ambiguous. The Credit Risk Committee presentation pertains to a proposal that was not adopted by PJM and is therefore not informative about PJM's interpretation of the Tariff and, as discussed below, Complainants' transactions differ markedly from other hub transactions.

73. Scylla asserts that the Commission fails to sufficiently consider that PJM's ongoing proposals to modify section 1.7.10, including issuance of a Problem Statement, show that the Tariff provision is ambiguous.[137] Scylla argues that PJM's actions were narrowly-tailored to the subject matter in dispute in this proceeding and occurred more than once. The Commission responded directly to Scylla's point in the Complaint Order, however, by finding that the "decision by PJM to explore possible improvements to its Tariff and rules regarding IBTs does not necessarily reflect upon the clarity or ambiguity of the existing rules, but merely reflects PJM's recognition that certain market participants have used IBTs in a manner that might not have been previously anticipated."[138] We reaffirm that finding. The fact that an RTO or ISO is considering amending its Tariff does not mean that the Tariff is ambiguous. RTOs and ISOs seek to make Tariff amendments for a variety of reasons, including to improve the Tariff prospectively or to address a circumstance not previously considered. Furthermore, it makes no difference if PJM's efforts are narrowly-tailored or if PJM considered modifications on multiple occasions because this does not change the underlying fact that PJM's efforts to modify the Tariff are not, in and of themselves, evidence of ambiguity.

74. Finally, we affirm our finding that section 1.7.10(a)(v) does not prohibit PJM from rejecting Complainants' eScheduled IBTs. As the Commission explained in the Complaint Order, section 1.7.10(a)(v) refers to an obligation of PJM to reject and terminate eSchedules in the narrow circumstance of a defaulting member only. It therefore does not contain any language that refers to PJM's authority with respect to eSchedules in other circumstances, nor does it refer to any prohibition on PJM's rejection or termination of eSchedules. Complainants reference to the maxim *expressio unius est*

[137] Scylla Request for Rehearing at 14-15.

[138] Complaint Order, 138 FERC ¶ 61,165 at P 84.

exclusion alterius (the expression of one thing is the exclusion of the other) is misplaced. Complainants' interpretation of the maxim would have the dubious result that any matter not referenced would be prohibited—a result we cannot countenance here. The circumstances at issue here are not implicated by section 1.7.10(a)(v) because they are distinct from the circumstances to which that provision refers.

3. Whether PJM's plan to rebill Complainants amounts to undue discrimination

a. Complaint Order

75. In the Complaint Order, the Commission concluded that PJM's plan to rebill did not amount to undue discrimination. In response to Complainants' assertion that their transactions are fundamentally identical to other IBTs that PJM deems acceptable, including the PJM Example IBT and Western Hub Example IBT, the Commission found that these examples contain elements that distinguish them from Complainants' IBTs.[139] The Commission also dismissed Complainants' claim that the use of IBTs like Complainants' is widespread, stating that Complainants did not present any evidence that there are market participants engaged in such behavior beyond the five market participants identified by PJM.[140]

76. In response to Complainants' argument that PJM's reference to their IBTs as "financial swaps" creates regulatory uncertainty, the Commission stated that PJM's characterization of Complainants' IBTs is not determinative of their regulatory status.[141]

b. Request for Rehearing

77. Complainants assert that the Commission erred in holding that Complainants' IBTs are different than any hub IBTs or other IBTs where the parties are not generators or load at the IBT location.[142] Complainants assert that their IBTs are no different from hub IBTs because they buy and sell power from and to PJMSettlement in the PJM Interchange Energy Market, and a Western Hub IBT is simply an IBT that is conducted

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[139] *Id.* P 89.

[140] *Id.* P 91.

[141] *Id.* P 74.

[142] Complainants' Request for Rehearing at 37-38.

wholly at the Western Hub.[143] Complainants and Scylla argue that there are a very large number of IBT parties who are power marketers and do not own any generation and do not serve load.[144]

78. Complainants and Scylla argue that the Commission's statement that "the source of energy cannot be the PJM Interchange Energy Market" contradicts the plain language of the Tariff and invalidates all hub IBTs because the only source of energy in hub IBTs is the PJM Interchange Energy Market.[145] Complainants contend that the Commission's new, non-Tariff test is unduly discriminatory because, if this test is applied to any hub IBT, the IBT would not pass. Complainants explain that they cannot reserve transmission for their IBTs because the hub is not a physical location.[146]

79. Scylla states that the Tariff makes clear that purchases in the PJM Interchange Energy Market establish rights to physical energy and title because section 1.7.9 of the Tariff provides that market participants may purchase spot market energy from PJMSettlement to supply an export transaction.[147] Scylla also states that the Complaint Order failed to recognize that the Commission has directed that virtual transactions be treated the same as physical transactions.[148]

80. Complainants state that it is illogical that the Tariff provides spot market backup to bilateral transactions but that market participants cannot rely on the market as the primary source as well.[149] Complainants also argue that the Commission should reverse

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[143] Complainants include in their request for rehearing their own diagram of a Western Hub IBT that depicts one power marketer purchasing spot energy from the PJM Interchange Energy Market at Western Hub and then selling that energy to another power marketer at Western Hub, who in turn sells that energy to the PJM Interchange Energy Market at the Western Hub. *Id*. at 2.

[144] Complainants' Request for Rehearing at 43; Scylla Request for Rehearing at 9.

[145] Complainants' Request for Rehearing at 47-50.

[146] *Id*.

[147] Complainants' Request for Rehearing at 48-49; Scylla Request for Rehearing at 9.

[148] Scylla Request for Rehearing at 7, 11.

[149] Complainants' Request for Rehearing at 47, n.129.

its finding that Complainants' IBTs cannot handle physical performance because Complainants are power marketers with the ability to buy for resale physical energy from PJMSettlement in the PJM Interchange Energy Market and from other market participant counterparties through bilateral agreements and imports.[150]

81. Finally, Complainants argue that the Commission erred by rejecting Complainants' argument regarding jurisdiction over IBTs, asserting that, since an IBT is the only way a forward transaction can physically be undertaken in an RTO, if such a transaction cannot be eScheduled, it cannot exist as a Commission jurisdictional forward sale as it cannot be delivered to its delivery point.[151]

c. Commission Determination

82. As discussed below, we reaffirm our finding that Complainants fail to demonstrate that the IBTs that are the subject of the Complaint are similarly situated to Tariff-compliant IBTs, such that it is unduly discriminatory to rebill them for avoided deviation charges.[152]

83. On rehearing, Complainants reiterate that their transactions are functionally identical to other IBTs that PJM deems acceptable, including the Western Hub Example IBT contained in the "Clarification of Internal Bilateral Transactions" document,[153] rendering PJM's plan to rebill Complainants unduly discriminatory. As we found in the Complaint Order, and reaffirm here, Complainants' IBTs are distinguishable from the IBTs depicted in the Western Hub Example IBT. While Complainants claim that the Western Hub Example IBT shows a financial IBT between a non-generator and a non-LSE, like Complainants' IBTs, the Western Hub Example IBT refers explicitly to a generator as one of the parties. Specifically, the Western Hub Example IBT states that the Western Hub IBT is between a "Seller and a non-LSE-Buyer," and "Seller" is defined earlier in the document in multiple places as "a generator." Thus, the Western Hub Example IBT does not show the types of parties that Complainants claim and depict in their own diagram. Furthermore, as we found in the Complaint Order, the example

[150] *Id.* at 46.

[151] *Id.* at 79-80.

[152] Complaint Order, 138 FERC ¶ 61,165 at P 90.

[153] Attachment H to the Complaint.

explicitly refers to the transfer of title to energy by seller to buyer, making it clear that a physical transfer is assumed.[154]

84. Complainants also argue that the Commission erred by stating in paragraph 89 of the Complaint Order that "the source of energy cannot be the PJM Interchange Energy Market," claiming that this would render all hub IBTs non-Tariff compliant. Complainants read this statement out of context. The cited statement refers specifically to the Western Hub Example IBT discussed in that paragraph and applies the word "source" in a different manner than Complainants allege. As discussed above, the Western Hub Example IBT refers explicitly to an IBT between a generator and a non-LSE Buyer, not between two power marketers as Complainants allege and depict in their own diagram; the "Seller" in the Western Hub Example IBT is defined as "a generator," thereby explicitly referencing the supply of energy. Thus, the example does not show that merely buying and selling in the PJM Interchange Energy Market satisfies the physicality requirement. We recognize that clearly there is no physical generation or load located at the Western Hub, since it is a pricing point for an aggregation of buses and hubs, and therefore the energy will come through the PJM Interchange Energy Market, i.e., hub IBTs will "source" or "sink" from the PJM Interchange Energy Market. However, this does not mean that merely buying and selling in the PJM Interchange Energy Market satisfies the physicality requirement. As discussed above, this is a circular argument that renders the physicality requirement of section 1.7.10 meaningless because any eScheduled IBT would be reportable under 1.7.10. Complainants' IBTs differ dramatically from the Western Hub Example IBT, as Complainants do not claim to either be a generator or contract with a generator for energy.

85. The Commission, thus, did not create a new, non-Tariff "physicality" test that no hub IBT would meet. The Commission did not find that using the PJM Interchange Energy Market as the "source" or "sink" of a hub IBT would render the IBT non-Tariff compliant and thereby "invalidate all of the hub IBTs."[155] As discussed above, the Commission has not created any non-Tariff test requiring transmission service or other characteristics, and the Complaint Order specifically recognized that "section 1.7.10 does not explicitly require that market participants (i) obtain and pay for transmission service, (ii) be either a generator or LSE to be a transacting party, or (iii) be non-affiliates."[156] Rather, the Commission found that "whether transmission capacity was reserved or whether the parties own generation resources or are load serving entities or marketers are

[154] Complaint Order, 138 FERC ¶ 61,165 at P 89.

[155] Complainants' Request for Rehearing at 47.

[156] Complaint Order, 138 FERC ¶ 61,165 at P 70.

factors that are reasonably applied to determine whether a transaction is physical or non-physical in nature."[157] The Commission did not state that these factors were the only factors that might be considered or that they would be conclusive.

86. As further discussed below, Complainants fail to demonstrate that the IBTs that are the subject of the Complaint are similarly situated to Tariff compliant IBTs, such that it is unduly discriminatory to rebill them for avoided deviation charges. Complainants assert that PJM's plan to rebill Complainants is unduly discriminatory because their hub IBTs are no different from those of other market participants because they buy and sell power from PJMSettlement in the PJM Interchange Energy Market. Complainants contend that the act of eScheduling an IBT permits them to acquire title to the energy sourced from and sunk into the PJM Interchange Energy Market. In fact, Complainants' statements highlight the differences between their IBTs and Tariff compliant IBTs.

87. First, Complainants argue that "in sophisticated central markets like that operated by PJM, merely scheduling energy results in a physical transfer of energy"[158] and therefore claim that the physicality requirement is entirely satisfied by eScheduling the IBT.[159] As discussed above, however, simply eScheduling an IBT does not make the IBT compliant with section 1.7.10. As we found in the Complaint Order, and as have reaffirmed in this order, "[i]t is circular reasoning to say that an IBT is Tariff-compliant simply because Complainants reported it as such by eScheduling the IBT."[160] The fact that a market participant chooses to report an IBT to PJM through eSchedules says nothing about whether, as the Tariff requires, the IBT "contemplate[s] the physical transfer of energy." EScheduling serves to alert PJM, sometimes after the fact, of a transfer of energy outside the PJM pool, and does not actually cause a transfer of energy. The IBT nevertheless must satisfy section 1.7.10 in order for market participants to be able to report it to PJM under eSchedules, not the other way around. Furthermore, interpreting section 1.7.10 as Complainants do renders the physicality requirement meaningless because any transaction in the PJM markets would qualify for reporting

[157] *Id.*

[158] Complaint at 29.

[159] Stevens Affidavit to the Complaint at 34.

[160] Compliant Order, 138 FERC ¶ 61,165 at P 79.

under section 1.7.10 as a physical transaction simply because PJM markets are physical markets.[161]

88. Second, Complainants are mistaken that they acquire title to physical energy from PJMSettlement by eScheduling hub IBTs. IBTs, as explained above, are "non-pool" transactions to which PJMSettlement is not a counterparty, and therefore Complainants do not receive title to physical energy through PJMSettlement. PJMSettlement is only counterparty for pool transactions.[162] The mere act of reporting their IBTs in eSchedules does not somehow convert them from "non-pool" to pool transactions.[163] In contrast to Complainants' IBTs, the title transfer for a Tariff-compliant IBT occurs outside of PJM, without PJMSettlement ever taking title. The energy from a physical IBT continues to settle outside of PJM and thus, there are neither credit requirements for the IBT parties on the energy portion of the IBT nor are defaults socialized to other market participants. In sum, as discussed above, Complainants' IBTs are distinguishable from the IBTs of other market participants that are eligible for reporting under section 1.7.10, and therefore PJM's plan to rebill Complainants is not unduly discriminatory.

89. Complainants also argue generally that they are similarly situated to other market participants that use IBTs, like power marketers. Complainants state that there are a large number of IBT parties who rely on the PJM Interchange Energy Market for purchases and do not own any generation and do not serve any load.[164] On the basis of Complainants' properly-filed pleadings, we find that Complainants fail to show that they are being treated in an unduly discriminatory manner with respect to other IBT parties. Complainants refer broadly to "other market participants" and the use of "hub IBTs" but Complainants do not describe or refer to specific transactions in which these market participants have reported their IBTs to PJM pursuant to section 1.7.10 and been allowed to avoid deviation charges. Complainants fail to provide details of these other market participants' transactions that show that they are similarly situated and therefore have

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[161] *Id*. P 76.

[162] "PJMSettlement shall be the Counterparty to the purchases and sales of energy that clear the Day-ahead Energy Market and the Real-time Energy Market; provided that PJMSettlement shall not be a contracting party to bilateral transactions between Market Participants or with respect to a Generating Market Buyer's self-schedule or self-supply of its generation resources up to that Generating Market Buyer's Equivalent Load." PJM, OATT, 1.10 Scheduling, Section 1.10.1 General, § 1.10.1(a), 3.0.0.

[163] Complaint Order, 138 FERC ¶ 61,165 at P 80.

[164] Complainants' Request for Rehearing at 43.

been unduly discriminated against. For example, while Complainants state that these other market participants do not own generation and do not serve any load, they may have contracted with other market participants with physical obligations for the transfer of physical energy. In addition, as discussed above, the Western Hub Example IBT is distinguished from Complainants' IBTs, and Complainants do not show how these "other hub IBTs" would be similarly situated to theirs.

90. Complainants and Scylla assert that section 1.7.9 of the Tariff shows that Complainants' IBTs are Tariff compliant because the IBTs receive title to energy by purchasing in the PJM Interchange Energy Market.[165] Complainants' ability to source energy (and title) from the PJM Interchange Energy Market for an export under section 1.7.9 does not mean, however, that the same can be done for bilateral transactions under section 1.7.10. Section 1.7.9 explicitly states that a "purchase of Spot Market Energy by an External Market Buyer shall be delivered to a bus or buses at the electrical boundaries of the PJM Region…using Point-to-Point Transmission Service paid for by the External Market Buyer."[166] Because they use transmission, these export transactions under section 1.7.9 will, by definition, be physical transactions. In contrast, IBTs can, or as relevant here cannot, satisfy the physicality requirement of 1.7.10. As discussed above, merely eScheduling an IBT does not give title to physical energy. Unlike export transactions under 1.7.9, financial IBTs like Complainants' IBTs do not involve a transfer of title through PJMSettlement.

91. In addition, contrary to Complainants' assertion, the fact that the Tariff permits market participants to rely on Spot Market Backup[167] in situations where the seller under a bilateral contract defaults does not mean that a market participant can rely on the mere existence of the PJM Interchange Energy Market to satisfy the physicality requirement of section 1.7.10.[168] This argument, if accepted, would effectively do away with the physicality requirement as explained above. Under section 1.7.10(b), "Market

[165] Complainants' Request for Rehearing at 48-49; Scylla Request for Rehearing at 9-10.

[166] PJM, OATT, 1.7 General, Section 1.7.9 Delivery to an External Market Buyer, § 1.7.9, 3.0.0.

[167] Spot Market Backup shall mean the purchase of energy from, or the delivery of energy to, the PJM Interchange Energy Market in quantities sufficient to complete the delivery or receipt obligations of a bilateral contract that has been curtailed or interrupted for any reason. PJM, OATT, 1.3 Definitions, Section 1.3.32 Spot Market Backup, 3.0.0.

[168] Complainants' Request for Rehearing at 47, n.129.

Participants shall have Spot Market Backup with respect to all bilateral transactions *that contemplate the physical transfer of energy* to or from a Market Participant, that are not dynamically scheduled pursuant to Section 1.12 and that are curtailed or interrupted for any reason…."[169] As specifically referenced in section 1.7.10(b), the requirement that the IBT "contemplate the physical transfer of energy" applies to Spot Market Backup as well. Moreover, the fact that the Tariff provides for Spot Market Backup under certain limited conditions, such as the curtailment or interruption of a bilateral transaction, does not mean that the physicality requirement of section 1.7.10 can be satisfied by simply eScheduling the IBT. Section 1.7.10(b) refers to limited circumstances, such as a default by the IBT Seller.

92. In addition, while it is true that transmission service cannot be used for certain IBTs, including hub IBTs, the Commission did not find that market participants must reserve transmission capacity to support the IBT as a requirement to meet section 1.7.10. However, we note that for a Tariff-compliant IBT at the Western Hub further transactions conducted by an IBT Buyer who is an LSE typically would, in fact, involve the LSE reserving transmission service in order to serve its customers. For example, Example 2 of the Clarification of Internal Bilateral Transactions document indicates that, for a Western Hub IBT between a Seller and an LSE (Buyer), after the transfer of title to the energy under the IBT, an "LSE Buyer would be responsible for the delivery of energy from the Western Hub to its load (e.g. via network transmission service)."[170]

93. Scylla argues that the Complaint Order failed to recognize that the Commission "has directed that virtual transactions be treated the same as physical transactions."[171] The referenced cases are inapposite, though. They concern whether Revenue Sufficiency Guaranty (RSG) charges in MISO (deviation charges in MISO) should be allocated to virtual bids and offers. The Commission made no broad statement in those cases, however, that "virtual transactions be treated the same as physical transactions" as Scylla claims; rather, the Commission found that the record indicated that in MISO virtual supply offers contribute to RSG costs, and therefore such costs should be allocated in

[169] PJM, OATT, 1.7 General, Section 1.7.10 Other Transactions, § 1.7.10(b), 3.0.0 (emphasis added).

[170] Attachment H to the Complaint.

[171] Scylla Request for Rehearing at 7, 11 (citing Complaint Order, 138 FERC ¶ 61,165 at P 94; *Ameren Services Co., et al. v. Midwest Indep. Transmission System Operator, Inc.*, 121 FERC ¶ 61,205, at P 81 (2007) (*Ameren*); *Midwest Indep. Transmission System Operator, Inc.*, 115 FERC ¶ 61,108, at P 84 (2008) (*MISO*).

MISO to virtual supply offers (regardless of the identity of the market participant).[172] In PJM, deviation charges are applied to those virtual transactions, like Complainants', that produce imbalances in real-time, regardless of whether the offer is made by a participant with physical load and generation.[173] The issue in the cited cases of which virtual transactions in MISO should be allocated deviation charges does not bear on whether Complainants' real-time IBTs in PJM satisfy an express PJM Tariff requirement that they "contemplate the physical transfer of energy."

94. Complainants assert that the Commission's finding that they cannot handle physical performance must be reversed, because Complainants engage in importing to and exporting from PJM and are power marketers that can buy and sell power from PJMSettlement in the PJM Interchange Energy Market.[174] Whether Complainants, in general, can physically perform or whether they are power marketers that can buy and sell power from PJMSettlement is not at issue. At issue is whether the specific IBTs between DC Energy and DCE Mid-Atlantic that are the subject of the Complaint "contemplate the physical transfer of energy." As discussed above, Complainants have not demonstrated that these IBTs meet this requirement and fail to show that they are being unduly discriminated against because they do not show that they are similarly situated to buyers and sellers that engage in Tariff compliant IBTs. Complainants do not claim to have entered into contracts to procure energy that would offset imbalances caused by their virtual transactions. Instead, Complainants claim that simply eScheduling provides the energy required and that they can obtain title to energy from PJMSettlement. As discussed above, these assumptions are incorrect and show the stark differences between Complainants' IBTs and those of other power marketers.

95. Finally, we disagree with Complainants' assertion that rejecting their IBTs creates jurisdictional issues; Complainants assert that, since an IBT is the only way a forward transaction can physically be undertaken in an RTO and it now appears that Western Hub

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[172] *Ameren*, 121 FERC ¶ 61,205 at P 81 ("[V]irtual supply offers can cause the commitment of resources…and in turn, cause RSG costs—whether the virtual supply offers are made by financial trader market participants (that do not withdraw energy) or other participants with physical load and generation (that do withdraw energy))." In *MISO*, the Commission rejected a proposed tariff provision because it improperly excluded virtual supply offers from the RSG charge calculation. *MISO* 115 FERC ¶ 61,108 at P 84.

[173] PJM, OA, Schedule 1, Section 3.2.3 Operating Reserves, 6.0.0, § 3.2.3(h).

[174] Complainants' Request for Rehearing at 46-47.

forwards cannot be scheduled as IBTs, then such a transaction cannot exist as a Commission-jurisdictional forward sale.[175] We disagree and reiterate our finding that PJM's characterization of Complainants' IBTs as "financial swaps" is not determinative of their regulatory status.[176] As discussed above, the Commission also made no finding that hub IBTs cannot be eScheduled. Furthermore, and importantly, section 1.7.10 does not prohibit parties from engaging in financial IBTs. It merely prohibits such parties from reporting their financial IBTs to PJM via eSchedules, and then from using them to offset deviation charges.

4. Whether the Complainants' alternative requests for waiver and hearing should have been denied

a. Complaint Order

96. The Commission denied Complainants' alternative request for waiver of the Tariff's rebilling requirement for the period July 2009 to July 2011.[177] The Commission found that granting waiver would cause harm to third parties because Complainants did not pay an allocated share of deviation charges, which caused other market participants to pay more than their proper share.[178] The Commission also found that it would not be appropriate for Complainants to avoid deviation charges simply because the transactions may have had unproven market convergence benefits.[179] The Commission disagreed with Complainants that rebilling would create a windfall for market participants.[180] Finally, the Commission found that the cases cited by Complainants[181] for the proposition that the Commission has a policy against retroactive rebilling where the market

[175] *Id*. at 79-80.

[176] Complaint Order, 138 FERC ¶ 61,165 at P 74.

[177] *Id*. P 94.

[178] *Id*.

[179] *Id*. P 95.

[180] *Id*. P 96.

[181] Complaint at 55-59 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113 (2006) (*MISO II*); *PPL EnergyPlus, LLC v. New York Indep. Sys. Operator, Inc.*, 115 FERC ¶ 61,383 (2006) (*PPL*)).

participant relied on an RTO's interpretation of its tariff were distinguishable from the instant case.[182]

b. Request for Rehearing

97. Complainants assert that the Commission erred by rejecting their demonstration that they will suffer significant harm if waiver is not granted.[183] Complainants argue that the Commission incorrectly assumed that granting waiver would cause harm to third parties because Complainants' virtual transactions caused the incurrence of more operating reserve costs than other virtual transactions associated with IBTs. Complainants also argue that the Commission fails to adequately address the fact that a significant percentage of other market participants "avoid" deviation charges and that Complainants' IBTs provided benefits to the market.[184] Scylla also argues that DC Energy showed that its transactions provided benefits to the market and that PJM failed to show that the transactions caused harm.[185] In addition, Scylla contends that the Commission did not adequately address PJMICC's request that market participants not be subject to retroactive billing.[186]

98. Finally, Complainants and Scylla assert that the Commission erred by not following its precedent by imposing deviation charges when Complainants' reasonably relied on PJM's statements.[187] Scylla and Complainants argue that they, in fact, went even farther than market participants in the cited cases to communicate with PJM about the proposed transactions.

99. If the Commission denies rehearing, Complainants request that the Commission order additional procedures to determine the methodology by which PJM will calculate the amount that Complainants should be billed.[188] Complainants also propose that an

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[182] Complaint Order, 138 FERC ¶ 61,165 at PP 99-101.

[183] Complainants' Request for Rehearing at 70-71.

[184] *Id.* at 74-75.

[185] Scylla Request for Rehearing at 5-6.

[186] *Id.* at 6.

[187] Complainants' Request for Rehearing at 64-65; Scylla Request for Rehearing at 15.

[188] Complainants' Request for Rehearing at 81.

appropriate alternative remedy to retroactive billing would be for Complainants to disgorge profit on virtual transactions that would not have occurred had the deviation charges applied at the time and pay deviation charges on any virtual transactions that, in good faith, Complainants determine might still have occurred. Complainants argue that this remedy would balance the equities and prevent a lopsided result where the back-billed amounts would be significantly greater than the value of the series of transactions.

c. Commission Determination

100. In sum, we affirm our finding that Complainants have not demonstrated good cause to grant their request for waiver. As explained in the Complaint Order, because Complainants improperly reported their non-physical IBTs, they did not pay an allocated share of the deviation charges issued.[189] This caused other market participants to pay more than their proper share. Thus, granting waiver, as Complainants request, would harm other market participants by causing them to pay Complainants' share of the charges.

101. Complainants contend that the Commission erred by finding that granting waiver would harm market participants, arguing that the Commission wrongly assumes that Complainants' virtual transactions caused the incurrence of more operating reserve costs than any other virtual transactions associated with Tariff-compliant IBTs.[190] The point, however, is not whether Complainants caused more or less deviations than other transactions. The point is that, according to the Tariff, IBTs must contemplate the physical transfer of energy in order to be reported under section 1.7.10 and so avoid payment of deviation charges. As discussed above, Complainants' IBTs do not contemplate the physical transfer of energy. Accordingly, Complainants' wrongful avoidance of payment of deviation charges caused other market participants to pay more than their fair share. The argument that a significant percentage of other market participants avoid deviation charges is also irrelevant. Whether Complainants should be held to the Tariff's requirement to pay deviation charges bears no relation to the number of other market participants that comply with the Tariff by reporting only Tariff-compliant IBTs.

102. Furthermore, in the Complaint Order, the Commission has already addressed Complainants' argument that their transactions provided convergence benefits that reduced overall deviation charges.[191] The Commission explained that it had found that

[189] Complaint Order, 138 FERC ¶ 61,165 at P 94.

[190] Complainants' Request for Rehearing at 73.

[191] Complaint Order, 138 FERC ¶ 61,165 at P 95.

market participants are responsible for the costs associated with real-time imbalances resulting from day-ahead INCs and DECs, and it would not be appropriate to allow Complainants to avoid these charges simply because their transactions may have had other benefits.[192] In addition, the Commission found that the benefits claimed by Complainants are unproven and immaterial, noting that any price convergence would be the result of Complainants' INCs and DECs, and would have occurred without reporting the IBTs in eSchedules.[193] We affirm these findings here. While Complainants make unsupported claims regarding market benefits provided by their transactions, they also admit on rehearing that they "cannot determine without discovery the extent of the market benefits resulting from the DC Companies' transactions."[194] Any price convergence, in fact, would have been the result of Complainants' virtual transactions, however, not their IBTs, and would have occurred without reporting the IBTs in eSchedules. And even if Complainants demonstrated market benefits from their transactions, Complainants derived an inappropriate benefit—avoiding deviation charges—from their failure to comply with the Tariff's requirements, and any alleged ancillary benefits to the market from this failure are not relevant to the Tariff issue at hand.

103. Complainants contend that the Commission should have granted their request for waiver because they showed that they would otherwise suffer disproportionate harm.[195] Complainants explain that the Commission failed to recognize testimony showing that requiring Complainants to pay deviation charges would result in liability greatly exceeding the profits Complainants derived from the transactions.[196] Such a comparison is beside the point. Regardless of whether Complainants profited greatly from the transactions or hardly at all, Complainants avoided paying deviation charges that they otherwise would have paid under the Tariff, causing other market participants to pay what should have been Complainants' share, effectively to "pick up the slack." It is thus appropriate that they now be required to pay the deviation charges that they are required by the Tariff to pay.

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[192] *Id.* (citing *PJM Interconnection, LLC*, 125 FERC ¶ 61,244, at P 37 (2008)).

[193] *Id.*

[194] Complainants' Request for Rehearing at 75.

[195] *Id.* at 70.

[196] *Id.*

104. Complainants also contend that the Commission did not adequately address the evidence in the Stevens Affidavit to the Complaint that rebilling would create significant liabilities for Complainants and could impact the ability of DC Energy to provide liquidity in the PJM wholesale market.[197] The Commission has already addressed Complainants' point by finding that Complainants had not shown that rebilling would cause them disproportionate harm.[198] We affirm that finding. As noted in the Complaint Order, any impacts on Complainants' positions are the consequences of Complainants' business decision to engage in the transactions at issue and then to report to PJM what they are not entitled by the Tariff to report. Complainants may, as they claim, incur liabilities in the millions of dollars, but this is a result of receiving the financial benefits of wrongly avoiding deviation charges for years by reporting IBTs that should not have been reported. Furthermore, Complainants have not shown that rebilling would indeed have significant negative effects on the market that we should consider in ordering rebilling.

105. Scylla also argues that the Commission did not adequately address PJMICC's arguments against rebilling. In its comments to the Complaint, PJMICC took no position with respect to the validity of the Complaint, and conditioned that "*if the Commission finds that DC Energy's interpretation of an ambiguous tariff provision was reasonable*, neither DC Energy (nor any other similarly situated market participant) should be exposed to retroactive billing adjustments."[199] In addition, PJMICC specified that its "position is limited to instances when a market participant reasonably relies on its interpretation of an ambiguous tariff provision. By contrast, when a market participant is found to have violated a tariff provision…the Commission should undertake all efforts to remedy any harm to customers."[200] Thus, PJMICC specified that its argument against rebilling would only apply in limited circumstances. The Commission, though, made no finding that the Tariff was ambiguous or that DC Energy's interpretation was reasonable. In fact, the Commission found affirmatively that DC Energy had violated the Tariff by reporting IBTs that did not "contemplate the physical transfer of energy." Thus, ordering rebilling is actually consistent with PJMICC's comments. Nevertheless, the Commission acknowledged PJMICC's underlying concern regarding the risk of participating in organized markets by explaining that "the billing adjustments at issue here involve only a

[197] *Id.* at 71.

[198] Complaint Order, 138 FERC ¶ 61,165 at P 98.

[199] PJMICC Comments at 3 (emphasis added).

[200] *Id.*

few entities and are limited to a two year rebilling period and therefore should have a limited effect, if any, on any perceived risk of participating in the PJM markets."[201]

106. Complainants claim that the Commission was wrong in asserting that rebilling would affect only five parties because the Complaint Order's findings necessitates review of and rebilling of many transactions, including hub transactions.[202] As discussed above, PJM has only identified a few entities that have engaged in the behavior that is the subject of the Complaint. And contrary to Complainants' claims, the Complaint Order did not create any new requirements that would implicate additional parties based on other behaviors.

107. Complainants reiterate that they acted in good faith, and Complainants and Scylla assert that the Commission erred by declining to apply its policy against retroactive billing when a market participant engages in transactions based on reasonable reliance on an RTO's statements.[203] Complainants and Scylla claim that PJM's statements were more formal than the case examples and therefore the Commission's policy against retroactive billing should apply.[204] The point is not the level of formality of the media; the point is whether a statement interpreting the Tariff was made. In each of the cited cases,[205] the RTO made an explicit statement interpreting the Tariff in a manner that conflicted with a subsequent interpretation. Here, as discussed above, Complainants do not refer to any statement by PJM finding that their transactions were Tariff-compliant. Thus, our finding in the Complaint Order was not a reversal of existing Commission precedent.

108. Complainants and Scylla also claim that Complainants' vetting of the statements was more thorough than the case examples.[206] Whether the market participant relies on the representation without question or vets the representation was not at issue in the cited

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[201] Complaint Order, 138 FERC ¶ 61,165 at P 98.

[202] Complainants' Request for Rehearing at 72.

[203] *Id*. at 62.

[204] Complainants' Request for Rehearing at 64-65; Scylla Request for Rehearing at 15.

[205] *MISO II*, 117 FERC ¶ 61,113; *PPL*, 115 FERC ¶ 61,383.

[206] Complainants' Request for Rehearing at 64-65; Scylla Request for Rehearing at 15.

cases. In any case, this does not affect our finding because Complainants fail to identify a statement by PJM that their transactions were Tariff-compliant in the first place. Likewise, Complainants' comparison of the number of parties involved and the time period for rebilling in the cited cases is irrelevant for this reason as well.

109. With respect to Complainants' claims that the restriction of the time period to two-years does not mean that the Complaint Order is fair, and that the Commission had no basis to conclude that the billing adjustments at issue only involve a few entities. While PJM represented that it had identified a total of five entities that reported non-compliant IBTs like Complainants',[207] PJM may discover, through an unduly discriminatory application of section 1.7.10, that additional parties engaged in behavior like Complainants'. The Commission, however, merely noted that the relatively few entities identified by PJM and the two-year rebilling period would likely mean that there would be a limited effect, if any, on any perceived risk asserted by Complainants of participating in the PJM markets.[208] And as discussed above, Complainants have not identified any IBT parties that are similarly situated to Complainants and that have been permitted to report their IBTs and thereby avoid deviation charges, such that Complainants have been treated in an unduly discriminatory manner.

110. The Commission declines to adopt Complainants' proposed alternative remedy of disgorging profits and paying deviation charges that Complainants determine might still have occurred. Complainants' alternative remedy involving disgorgement of Complainants' profits is not appropriate because it does not remedy the overpayment of deviation charges by other market participants that occurred as a result of Complainants' actions. And as Complainants assert elsewhere in their request for rehearing, profits from their plan were small relative to avoided deviation charges.[209] We also do not find it necessary to order additional formal procedures to determine the methodology by which PJM will calculate the amount that Complainants should be billed; we are not convinced that PJM's recalculation of deviation charges requires any such procedures.

[207] PJM Jan. 3, 2012 Answer at 4.

[208] Complaint Order, 138 FERC ¶ 61,165 at P 98.

[209] Complainants' Request for Rehearing at 11, 36.

The Commission orders:

The requests for rehearing are hereby denied.

By the Commission. Chairman Wellinghoff is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.