

131 FERC ¶ 61,069
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C.

Docket Nos. ER09-701-002
ER09-701-003
ER09-701-004

ORDER ON REHEARING, CLARIFICATION, AND COMPLIANCE

(Issued April 23, 2010)

1. In this order, we address a request for clarification and rehearing of the Commission's initial order issued in this proceeding on September 14, 2009.¹ We also address a compliance filing submitted by the applicant, PJM Interconnection, L.L.C. (PJM). For the reasons discussed below, we deny rehearing of the September 14 Order, and grant, in part, and deny, in part, clarification. We also accept, in part, and reject, in part, PJM's compliance filing.

Background

2. In a filing submitted February 10, 2009, PJM proposed to revise the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (PJM Operating Agreement) and the PJM Open Access Transmission Tariff (PJM OATT), to clarify the effect of state regulatory actions regarding retail customer authorization to participate in PJM's demand side response programs, including participation in PJM's economic and emergency load response programs and reliability pricing model (RPM) auctions (collectively, Demand Response Programs). PJM stated that its proposed tariff changes were designed to provide clarity regarding the right of a retail regulatory authority to prohibit participation of a retail customer in PJM's Demand Response Programs, consistent with demand response guidelines issued by the Commission in Order No. 719.² Specifically PJM proposed to: (i) define the term "relevant electric retail

¹ *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,238 (2009) (September 14 Order).

² *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g*, Order No. 719-A,
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regulatory authority;” (ii) clarify that PJM’s Demand Response Programs are subject to an opt-out allowance; and (iii) set forth the obligations applicable to an electric distribution company or load serving entity that seeks to assert, during the Demand Response Program registration process, that a state law or regulation bars retail customer participation. PJM also proposed changes to the registration procedures applicable to these programs.

3. In the September 14 Order, the Commission accepted PJM’s proposed tariff changes, subject to conditions. Among other things, the Commission required PJM to submit a compliance filing addressing: (i) the ability of a retail regulatory authority to condition end-use customer eligibility in PJM’s Demand Response Programs;³ (ii) implementation of retail regulatory authority determinations by PJM; and (iii) PJM’s obligations to make website postings addressing any such determination.

Discussion

A. Requests for Clarification and Rehearing

4. The Indiana Utility Regulatory Commission (Indiana Commission) seeks clarification and rehearing of the September 14 Order. For the reasons discussed below, we deny rehearing and grant, in part, and deny, in part, clarification.

1. Arguments Presented

5. The Indiana Commission requests clarification that the date from which PJM must recognize the Indiana Commission’s authority over retail customer participation in PJM’s RPM capacity auction is, at a minimum, February 25, 2009, the date on which the Indiana Commission issued an order addressing the rights of Indiana retail customers to participate.

6. With respect to the Commission’s statement, in the September 14 Order, that PJM “should not be required to disclose customer-specific confidential or proprietary information regarding demand response participation,”⁴ the Indiana Commission requests clarification that the September 14 Order does not impinge in any way on Section 18.17.4 of PJM’s Operating Agreement, a provision that allows for the release of certain

74 Fed. Reg. 37,776 (Jul. 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009), *reh’g denied*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

³ September 14 Order, 128 FERC ¶ 61,238 at P 22.

⁴ *Id.* P 45

confidential information.⁵ The Indiana Commission asserts that in order for a retail regulatory authority to enforce its own laws and regulations, it is essential that it have the ability to obtain the necessary information to determine if violations have occurred and the extent of any such violations.

7. Finally, the Indiana Commission asserts as error the September 14 Order's acceptance of PJM's requirement placing the duty of an eligibility representation on the electric distribution company or load serving entity, not on the aggregator of retail customers. The Indiana Commission asserts that the aggregator of retail customers should be given this responsibility because such a policy would ensure that the aggregator is aware of the customer eligibility requirements of the retail regulatory authority will therefore be in a position (and should be required to) provide such information to the customers it is aggregating.

2. Commission Determination

8. We grant, in part, and deny, in part, clarification of the September 14 Order. First, we disagree that the September 14 Order is ambiguous or otherwise requires clarification regarding the date from which PJM must recognize the Indiana Commission's authority over retail customer participation in PJM's RPM capacity auction. The September 14 Order required PJM to submit a compliance filing, including tariff revisions, recognizing a retail regulatory authority's ability to condition demand response participation, consistent with Order No. 719-A.⁶ The Commission therefore declined to address the Indiana Commission's request that PJM adopt specific language recognizing this right, subject to the Indiana Commission's right to renew this issue following PJM's submission of its compliance filing (a filing we address below).

9. The Indiana Commission also seeks clarification regarding the Commission's statement, in the September 14 Order, that PJM should not be required to disclose customer-specific confidential or proprietary information regarding demand response participation. The Indiana Commission asserts that this statement should not be read to limit its access to confidential material supplied by PJM to the Indiana Commission, pursuant to Section 18.17.4 of the PJM Operating Agreement. We grant this clarification. The context applicable to the Commission's discussion of confidential and proprietary information, in the September 14 Order, concerned the proposed unqualified

⁵ Section 18.17.4 addresses the disclosure of confidential information to an "Authorized Commission" subject to certain conditions and requirements, including the submission to the Commission of a certification and submission to PJM of an information request.

⁶ September 14 Order, 128 FERC ¶ 61,238 at P 22.

and unrestricted public dissemination of customer specific information, including the ongoing manner and extent to which any such customer may participate in PJM's Demand Response Programs. Our statement, in this regard, cannot be read to affect any rights of a state commission to obtain information under the PJM Operating Agreement.

10. Finally, we deny the Indiana Commission's request for rehearing regarding the September 14 Order's acceptance of PJM's requirement placing the duty of an eligibility representation on the electric distribution company or load serving entity, and not on the aggregator of retail customers. The Commission, in the September 14 Order, found that PJM's proposal to rely on the retail utility was consistent with its prior tariff and was just and reasonable. The Indiana Commission's argument in favor of placing this responsibility on the aggregator of retail customers was also considered and rejected by the Commission in the September 14 Order. The Commission noted that in Order No. 719, the Commission granted RTOs and ISOs substantial flexibility to develop procedures with respect to this issue.⁷

11. We are not persuaded to reconsider this authorization here. While the Indiana Commission asserts that its proposal would ensure that the aggregator is made aware of the customer eligibility requirements of the retail regulatory authority, and provide such information to the customer it is aggregating, PJM's provision is consistent with its previously-approved registration process and the Indiana Commission has not shown that it is unjust or unreasonable. By contrast, shifting the responsibility for an eligibility representation to the aggregator of retail customers would require the implementation of a new, parallel process that could confuse, complicate, or delay registrations. In addition, we find PJM's existing procedure to be just and reasonable, given that the retail utility is subject to the authority of the retail regulator. Given this direct regulatory nexus, we are satisfied that the retail regulatory authority will be able to exercise its full regulatory authority over the retail utility, as it deems appropriate.

B. PJM's Compliance Filings

12. On November 20, 2009, as supplemented on December 8, 2009, PJM submitted a compliance filing in response to the September 14 Order. PJM states that its compliance filing addresses, in part, the requirements of Order No. 719-A.⁸ PJM requests an

⁷ *Id.* P 49 (citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 158. *See also* Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 155 (noting that the Commission, in Order No. 719, had "not require[d] a retail electric regulatory authority to make any showing or take any action in compliance with this rule.").

⁸ Specifically, PJM cites to P 60 and P 69 of Order No. 719-A, wherein the Commission required that: (i) RTOs and ISOs not accept bids from aggregators of retail
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effective date of August 28, 2009, the effective date of Order No. 719-A. Except as otherwise noted below, we accept PJM's compliance filing, effective as of the date requested by PJM. We also require PJM to make an additional compliance filing within 45 days of the date of this order.

1. Notices and Responsive Pleadings

13. Notices of PJM's compliance filings were published in the *Federal Register*, 74 Fed. Reg. 66,069 and 66,633 (2009), with comments, protests and/or interventions due on or before December 11, 2009 and December 29, 2009, respectively. A notice of intervention and timely-filed motions to intervene were submitted by the Pennsylvania Public Utility Commission (Pennsylvania Commission), ViridityEnergy, Inc. (Viridity), and Allegheny Electric Cooperative, Inc. (AEC). Comments and protests were submitted by AEC; American Municipal Power, Inc. (AMP); Indiana Office of Utility Consumer Counselor (Indiana Consumer Counselor); American Electric Power Service Corporation (AEP); the American Public Power Association and the National Rural Electric Cooperative Association (APPA, *et al.*); the Indiana Utility Regulatory Commission (Indiana Commission); and the Demand Response Alliance.⁹ Answers to protests were submitted on December 23, 2009, by APPA, *et al.*,¹⁰ on December 28, 2009, by PJM, and on January 11, 2010, by the Indiana Commission.

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R.

customers that aggregate the demand response of the customers of utilities that distributed four million MWh or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits participation; and (ii) required RTOs and ISOs to address the means by which an affected load serving entity will be notified when load served by that entity is enrolled to participate (and the expected level of that participation) as a demand response resource. Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 60, 69.

⁹ The Demand Response Alliance is comprised of the following entities: CPower, Inc., Converge Inc., EnergyConnect, Inc., Energy Curtailment Specialists, Inc., EnerNoc, Inc., Viridity, and Wal-Mart Stores East, LP.

¹⁰ In their answer, APPA, *et al.* is joined by the following intervenors: AEC, AEP, the Borough of Chambersburg, Pennsylvania, Indiana Municipal Power Agency, the North Carolina Electric Membership Corporation, and Old Dominion Electric Cooperative.

§ 385.213(a)(2) (2009), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the above-noted answers because they have provided information that assisted us in our decision-making process.

2. PJM's Obligation To Honor Eligibility Determinations Made by Retail Regulatory Authorities

15. In the September 14 Order, the Commission required PJM to submit revised tariff language recognizing a retail regulatory authority's ability to condition the eligibility of retail customers to participate in PJM's Demand Response Programs, consistent with the Commission's findings in Order No. 719-A.¹¹

a. PJM's Proposal

16. PJM states that its proposed tariff changes recognize the retail regulatory authority's ability to either prohibit or condition an end-use customer's participation in PJM's Demand Response Programs. PJM also proposes revised tariff language addressing the requirements of Order No. 719-A, in this context, including the rights and obligations of end-use customers of electric distribution companies and load serving entities that distributed: (i) more than four million MWh in the previous fiscal year; and (ii) four million MWh or less in the previous fiscal year.

17. PJM states that when a registration application is submitted for an area served by an electric distribution company providing more than four million MWh of service and no evidence is submitted indicating that the retail regulatory authority prohibits or conditions participation, the registration will be accepted. PJM states that, by contrast, when a registration application is submitted for an area served by an electric distribution company providing four million MWh of service or less, the registration will not be accepted, absent the submission of evidence demonstrating that the retail regulatory authority has authorized an end-use customer's right to participate.

18. PJM states that its proposed tariff revisions make it the responsibility of electric distribution companies, or load serving entities, to verify whether a load response registration is subject to laws or regulations of the retail regulatory authority.¹² PJM adds

¹¹ September 14 Order, 128 FERC ¶ 61,238 at P 22.

¹² When an electric distribution company or load serving entity seeks to notify PJM that the laws or regulations of the retail regulatory authority prohibit or condition an end-use customer's right to participate in PJM's Demand Response Programs, the proffering entity must provide, within a ten business day review period, either: (i) an order, resolution, or ordinance of the retail regulatory authority addressing that right; (ii) an opinion of the retail regulatory authority's legal counsel attesting to the existence

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that because, under Order No. 719-A, an RTO is not obligated to interpret any such law or regulation, PJM proposes to delete its existing tariff language authorizing PJM to seek additional clarification from the retail regulatory authority in the event an electric distribution company, or load serving entity, submits evidence that raises an ambiguity regarding an end-use customer's rights to participate.

19. Finally, PJM states that if a dispute arises about whether a retail customer or curtailment service provider has met the conditions placed on participation by the retail regulatory authority, then that customer or provider can take this dispute to the Commission for determination.

b. Protests and Comments

20. The Indiana Commission objects to PJM's statement that a curtailment service provider, in the case of a dispute about its rights to participate in PJM's Demand Response Programs, may present the issue to the Commission. The Indiana Commission asserts that PJM's proposal would place the Commission in the position of interpreting state or local laws, orders and regulations and that any such disputes should be resolved by the applicable retail regulatory authority.

21. The Indiana Commission also argues that the burden of proof for compliance with any conditions placed on retail customer participation in PJM's Demand Response Programs should be on the entity registering with PJM, not on the retail utility. The Indiana Commission asserts that it is the former that profits from participation and that this entity has the legal duty to comply with all applicable conditions.

22. The Demand Response Alliance argues that PJM's proposal should make clear that, in individual cases, the Commission will review and, if necessary, correct restrictions on demand response eligibility imposed by retail regulatory authorities, to the extent these restrictions are unduly discriminatory, or otherwise unjust and unreasonable. The Demand Response Alliance further argues that PJM's proposal should make clear that particular restrictions applicable to curtailment service providers, including exclusivity requirements, will be scrutinized closely by the Commission to assure that any such restrictions do not permit, or otherwise promote, market manipulation. The Demand Response Alliance adds that any such restrictions should also be investigated by the PJM market monitor.

of a regulation or law addressing that right; or (iii) an opinion of the state attorney general, on behalf of retail regulatory authority, addressing that right.

c. **Commission Determination**

23. We will accept PJM's compliance filing as it relates to eligibility determinations. PJM's proposed revisions appropriately recognize the right of a retail regulatory authority to condition the eligibility of retail customers to participate in PJM's Demand Response Programs.

24. We reject the argument raised by the Indiana Commission concerning PJM's statement that disputes regarding the rights of curtailment service providers may be presented to this Commission. First, PJM has removed language from its tariff regarding its right to review the status of state laws regarding eligibility, consistent with our earlier determination that an "RTO or ISO should not be in the position of interpreting the laws or regulations of a relevant electric retail regulatory authority."¹³ Additionally, we agree with PJM's statements (in both its compliance filing and December 28, 2009 answer) that to the extent a curtailment service provider disagrees with an eligibility representation made to PJM by the electric distribution company or load serving entity, the curtailment service provider can bring that dispute to either this Commission or the relevant retail regulatory authority, as appropriate.¹⁴

25. We also reject the Indiana Commission's argument that the burden of proof for compliance in PJM's Demand Response Programs should be on the entity registering with PJM, not on the retail utility. The Indiana Commission's argument does not suggest that PJM's compliance filing fails to satisfy the requirements of the September 14 Order. The September 14 Order, moreover, addressed the Indiana Commission's argument regarding the evidentiary requirement placed on electric distribution companies and load serving entities.¹⁵ The Indiana Commission, as noted above, sought rehearing on this issue, which we have now addressed on the merits and have rejected.¹⁶

26. Finally, we deny the Demand Response Alliance's request that the Commission review and, if necessary, "correct" certain retail regulatory authority rulings or orders as they relate to PJM. The Commission has thoroughly addressed "the role of states and others to decide the eligibility of retail customers to provide demand response," and we

¹³ Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 158, n. 212.

¹⁴ See PJM answer at p. 5; see also PJM compliance filing at p. 8.

¹⁵ September 14 Order, 128 FERC ¶ 61,238 at P 46-50 (noting that, under Order No. 719, RTOs and ISOs will be granted "substantial flexibility" as it relates to this issue).

¹⁶ See *supra* P 10.

will not otherwise elaborate on the Commission's detailed discussion of this issue in Order No. 719-A.¹⁷

3. Implementation Timelines Applicable to an Eligibility Prohibition or Condition

27. The September 14 Order required PJM to submit tariff language expressly addressing how retail regulatory authority prohibitions will affect existing regulations and/or commitments made by PJM's market participants.¹⁸ Specifically, the September 14 Order required PJM to memorialize in its tariff its understanding that PJM will terminate the registration status of a Demand Response Program participant upon receipt of evidence of a retail regulatory authority prohibition or condition applicable to the participant's right to register; however, for PJM's RPM markets, termination will apply prospectively only by precluding affected resources from offering capacity in auctions that are conducted subsequent to the effective date of the prohibition or condition.¹⁹

28. The Commission found that the reliability-centered purpose for which the RPM tariff construct was established could be undermined if policies adopted by a retail regulatory authority to restrict the eligibility of demand response to participate in the RPM market were implemented in a manner that requires changes to the results of completed RPM auctions. The September 14 Order therefore found that a capacity resource should be permitted to fulfill its RPM capacity obligation in the delivery year for which its bid cleared and receive compensation for that performance.²⁰

a. PJM's Proposal

29. PJM's compliance filing includes revised tariff language recognizing the September 14 Order's implementation requirements regarding retail regulatory authority eligibility determinations that affect RPM commitments. PJM states, however, that in implementing this requirement it must also work within the two-tier construct set forth in Order No. 719-A, specifically, within the carve-out allowance applicable to small utilities that distributed four million MWh, or less, in the previous fiscal year.²¹

¹⁷ Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 42-55.

¹⁸ September 14 Order, 128 FERC ¶ 61,238 at P 25.

¹⁹ *Id.* P 36.

²⁰ *Id.* P 35.

²¹ PJM Compliance Filing at 5 (citing Order No. 719-A, FERC Stats. & Regs.

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30. According to PJM, the key difference between the registration procedures applicable to small utilities and those applicable to large utilities (those that distributed more than four million MWh in the previous fiscal year) is the action that PJM takes at the end of the ten-day review period following PJM's informing an electric distribution company or load serving entity of a registration in its territory. When a registration occurs in an area served by a large utility and no evidence is presented to PJM indicating that the retail regulatory authority prohibits or conditions such end-user activity, the registration will be accepted and processed by PJM. In contrast, the registration of a customer of a small utility will not be processed until proof is provided within the established deadlines that the retail regulatory authority has "opted in" to the program.²² Accordingly, PJM states that, consistent with Order No. 719's small utility "opt-in" approach, existing registrations of end-use customers in small utility territories will be automatically terminated unless, within ten business days, PJM receives appropriate documentation from the electric distribution company or load serving entity.

31. With respect to RPM, PJM's November 20 compliance filing proposed, in small utility territories, to allow curtailment service providers to register end-use customer sites to meet their RPM obligations without retail regulatory approval, provided that: (i) the customer has a signed contract in place prior to the cleared RPM bid date; and (ii) the cleared RPM bid date is prior to the effective date of Order No. 719-A (August 28, 2009).²³ PJM proposed to allow curtailment service providers in large utility territories to register end-use customer sites to meet their RPM obligations, and to do so even when a retail regulatory prohibition has been promulgated after the auction, provided that: (i) the customer contract date is before the cleared RPM bid date; and (ii) the cleared RPM bid date is before the effective date of the retail regulatory authority order that prohibits customer participation.²⁴

b. Protests and Comments

32. The Demand Response Alliance argues that PJM's proposal to terminate active registrations for RPM demand response participants and to restrict new registrations violates Commission policy regarding market participation rights. The Demand Response Alliance adds that PJM's proposal will harm market participants by

¶ 31,292 at P 60).

²² PJM, in its compliance filing, contends that these registration procedures are consistent with the "opt-in" and "opt-out" approach as described in Order No. 719-A. *Id.*

²³ For reasons discussed below, PJM, in its answer, modifies this proposal.

²⁴ PJM, in its answer, also proposes to modify this proposal.

unreasonably terminating registrations of otherwise eligible participants unless their utility (a third party otherwise uninterested in whether the participant remains registered) takes immediate action to notify PJM.

33. The Demand Response Alliance also objects to PJM's proposal obligating PJM to automatically terminate registrations in its Demand Response Program, in the case of the small utility opt-out scenario described above, unless PJM receives appropriate documentation within ten business days from each utility that the retail regulatory authority has permitted the end-use customer to participate. The Demand Response Alliance asserts that the practical effect of this requirement is to inappropriately place the small utility in the role of PJM's gatekeeper. The Demand Response Alliance argues that such a policy violates the requirement of Order No. 719 regarding maximizing market access. The Demand Response Alliance adds that the relevant utilities have no incentive to research, evaluate, and report on applicable laws and regulations.

34. Therefore, the Demand Response Alliance recommends that the Commission require PJM to modify its tariff to add curtailment service providers to the categories of entities allowed to provide evidence that the retail regulatory authority in question permits participation.

35. The Demand Response Alliance also objects to the RPM-related tariff revisions proposed in PJM's November 20 compliance filing to the extent they would require curtailment service providers to execute contracts with end-use customers three years in advance of any actual demand response performance.²⁵ The Demand Response Alliance urges the Commission to require PJM to modify its proposed requirements for registration approval such that any contract signed prior to the delivery year in question (not just those signed three years in advance) and prior to the retail regulatory authority action is sufficient to qualify such an end-use customer to participate in PJM's Demand Response Programs.

36. The Indiana Commission objects to PJM's proposed effective date of August 28, 2009 as it would apply to RPM commitments. The Indiana Commission notes that this date would allow retail customer participation in the PJM RPM capacity auction held in May 2009 for the 2012-2013 delivery year, even if such participation was precluded by an earlier ruling issued by the Indiana Commission on February 25, 2009.

37. The Indiana Commission asserts that the effective date applicable to PJM's filing should take account of the legal requirements in place in Indiana prior to August 28, 2009. The Indiana Commission states that, while it appreciates the potential

²⁵ PJM's existing RPM protocols do not require that customers allocated to a demand resource be signed to a contract as of the date of the RPM auction.

complexities associated with unwinding a capacity auction, PJM's May 2009 RPM auction was conducted following the issuance of an Indiana Commission order expressly conditioning participation in the capacity auction on prior approval by the Indiana Commission.

38. AMP proposes an editorial revision to the proposed tariff language addressing registrations submitted prior to August 28, 2009. AMP notes that under PJM's proposed language, registrations submitted prior to August 28, 2009 for load management participation in the 2009-2010 delivery year "will remain effective."²⁶ AMP proposes to add at the end of that sentence: "for that Delivery Year."

c. PJM's Answer and Proposed Modifications to Its Compliance Filing

39. In its answer, PJM notes that RPM bids are based on transmission zones, or sub-zones, in which one or more retail regulatory scheme may apply to one or more electric distribution company or load serving entity. PJM notes that, under these circumstances, it may not know the identity of the end-use customer that will fulfill the RPM commitment until that customer has been registered to participate. PJM adds that a curtailment service provider may bid into an RPM auction based only on planned or existing resources with no end-use customer contract in place at the time the bid clears the RPM auction. However, such a contract must be in effect when the curtailment service provider registration is submitted to PJM.

40. PJM asserts that, consistent with the "opt-in" approach established by Order No. 719-A, curtailment service providers operating in small utility territories cannot reasonably expect that they will be able to participate in PJM's RPM auction absent advance authorization from the relevant electric retail regulatory authority. PJM states that the only exception to this rule, under the terms of its initial proposed revisions, was for curtailment service providers that had: (i) cleared RPM bids prior to the effective date of Order No. 719-A, and (ii) executed contracts with the applicable end users at the time the demand resource cleared the auction.

41. PJM is concerned, however, that some demand resources in small utility territories may be wrongly excluded from participation absent an exception for curtailment service providers that have: (i) cleared a bid in the RPM auction; and (ii) contracted with the end-use customer prior to August 28, 2009 (the effective date of Order No. 719-A). Accordingly, PJM states that, if ordered to do so, it will make an additional compliance filing memorializing in its tariff that, in small utility territories, the customer contract effective date must be prior to August 28, 2009 (rather than prior to the

²⁶ See, e.g., PJM OATT at proposed Second Revised First Revised Sheet No. 419.

auction date) for bids that cleared the RPM Base Residual Auction prior to August 28, 2009.²⁷

42. PJM states that, on the other hand, under Order No. 719-A a curtailment service provider may participate in an RPM auction with the expectation that it will be allowed to register end-use customers in a large utility service territory, unless the relevant retail regulatory authority has previously issued an order, ordinance or resolution that prohibits end-use customer participation. PJM explains that its initial proposed revisions allowed registration of an end-use customer in the face of the retail prohibition under the following condition: (i) the customer contract date is before the cleared RPM bid date; and (ii) the cleared RPM bid date is before the effective date of the retail regulatory authority order prohibiting participation.

43. However, PJM notes that there may be an unintended consequence attributable to its proposal in those cases where a curtailment service provider has cleared a bid in the RPM auction and contracted with the end-use customer after the auction but prior to the retail regulatory authority prohibition on end-use customer participation. Specifically, PJM states that some demand resources could be wrongly excluded from participation if an exception were not granted for curtailment service providers under these circumstances. Accordingly, PJM states that, if ordered to do so, it will make an additional compliance filing clarifying, in its tariff, that in large utility territories the customer contract effective date must be before: (i) the retail regulatory authority order that prohibits end-use customer participation; or (ii) August 28, 2009 (the Order No. 719-A effective date).²⁸

²⁷ PJM states that its revised tariff language would state, in relevant part, at new Original Sheet No. 146.03:

For end-use customers of an electric distribution company that distributed 4 million MWh or less in the previous fiscal year: . . . ii. If the electric distribution company or Load Serving Entity denies the end-use customer's Demand Resource . . . registration before June 1 of the applicable Delivery Year and the Curtailment Service Provider does not provide evidence to [PJM] before June 1 of the applicable Delivery Year demonstrating that the Curtailment Service Provider had an executed contract with the end-use customer for Demand Resource participation before August 28, 2009 for bids that cleared prior to August 28, 2009, then the existing end-use customer's registration for Demand Resource participation shall be deemed to be terminated for the applicable Delivery Year[.]

²⁸ PJM states that its revised tariff language would state, in relevant part, at new (continued...)

44. PJM states that, as clarified, if a retail regulatory authority has issued an order, resolution or ordinance that prohibits end-use customer participation before the Order No. 719-A effective date, then the end-use customer in both small and large utility territories may still participate if, and only if, the end-use customer has an executed contract in place with the curtailment service provider prior to the Order No. 719-A effective date. PJM states that if a retail regulatory authority prohibits end-use customer participation in the future, but the curtailment service provider already cleared an RPM auction and contracted with the end-use customer prior to such prohibition, then the end-use customer may still participate in the relevant delivery year.

45. Finally, PJM agrees that it would be appropriate to adopt the revised language proposed by AMP.

d. Additional Answers

46. The Indiana Commission asserts that PJM's additional proposed tariff revisions, as set forth in its answer, remain deficient with respect to the requirements of the September 14 Order. The Indiana Commission argues that PJM's proposal would still allow continued participation by Indiana end-use customers who have not complied with the Indiana Commission's February 25, 2009 order regarding their right to

Original Sheet Nos. 146.01 and 146.02:

For end-use customers of an electric distribution company that distributed more than 4 million MWh in the previous fiscal year: ii. If evidence provided by an electric distribution company or Load Serving Entity to [PJM] indicates that a Relevant Electric Retail Regulatory Authority law or regulation prohibits or conditions . . . the end-use customer's participation and is received by [PJM] before June 1 of the applicable Delivery Year and the Curtailment Service Provider does not provide supporting documentation to [PJM] before June 1 of the applicable Delivery Year demonstrating that the Curtailment Service Provider had an executed contract with the end-use customer for Demand Resource participation before the effective date of the Relevant Electric Retail Regulatory Authority law or regulation prohibiting or conditioning the end-use customer's participation of the Curtailment Service Provider had a executed contract with the end-use customer for Demand Response participation before August 28, 2009 for bids that cleared prior to August 28, 2009 then the existing end-use customer's registration for Demand Resource participation shall be deemed to be terminated for the applicable Delivery Year[.]

participate – an order issued prior to May 2009 base residual auction. The Indiana Commission argues that while, under PJM’s proposal, participation would be allowed so long as the customer has an executed contract in place prior to August 28, 2009, both the registration deadline and the 2009 RPM base residual auction occurred more than two months after the Indiana Commission eligibility order. The Indiana Commission argues that, under the September 14 Order, PJM should not be permitted to accept or keep in place registrations by Indiana end-use customers that have not complied with the Indiana Commission’s requirement that these customers obtain Indiana Commission approval prior to participation.

e. Commission Determination

47. PJM’s compliance proposal, as modified in its answer, relies on the effective date of the contract between a curtailment service provider and an end-use customer to determine whether a retail regulatory authority prohibition will bar demand response participation in a delivery year. That is, if an end-use customer contract is in place before the effective date of a retail regulatory prohibition, the curtailment service provider whose bid cleared the base residual auction will be permitted to provide demand response in the delivery year and otherwise held to the rules that apply to the RPM process.

48. For base residual auctions that take place after August 28, 2009, that is, for all future base residual auctions, we accept PJM’s proposal, as modified in its answer. We find this proposal to be an acceptable balancing of the Commission’s dual directives to PJM to respect retail regulatory authority policies and to preserve the reliability-centered purpose of RPM. We further find that this proposed approach appropriately addresses the concerns raised by the Demand Response Alliance regarding this matter. Accordingly, we direct PJM to memorialize its commitment in appropriate tariff language, to be submitted in its compliance filing.

49. There remains, however, the question of how to handle the unique timing issue presented by PJM’s May 2009 base residual auction for the 2012-2013 delivery year. The auction took place *after* the Indiana Commission had issued an order precluding end-use customer participation in PJM’s Demand Response Programs absent case-by-case authorization by the Indiana Commission, but *before* both the effective date of Order No. 719-A (August 28, 2009) and the issuance of the September 14 Order. The Indiana Commission argues that, pursuant to the clear language of the September 14 Order, PJM should not have accepted, or should have terminated, any registrations by Indiana end-use customers that had not obtained approval from the Indiana Commission before participating in PJM’s May 2009 base residual auction. The Demand Response Alliance, on the other hand, requests that the Commission order PJM to honor all curtailment service provider commitments arising from the May 2009 auction irrespective of whether the commitment is evidence by a contractual commitment.

50. PJM proposes, in response, that if a retail regulatory authority precluded end-use customer participation in PJM's Demand Response Programs before the PJM tariff effective date of August 28, 2009, as did the Indiana Commission, then the end-use customer may still deliver demand response in the delivery year if, and only if, the end-use customer had an executed contract with the curtailment service provider prior to August 28, 2009. In other words, any curtailment service provider whose bid cleared the May auction, but who did not have an executed contract with an end-use customer in place on or before August 28, 2009, cannot provide demand response in the 2012-2013 delivery year. Conversely, any curtailment service provider whose bid cleared the May 2009 auction and who had a contract in place by August 28, 2009 will be permitted to provide demand response in the delivery year, regardless of the retail regulatory authority policy in existence at the time of the auction. If a retail regulatory authority prohibits end-use customer participation at some point in the future, the same rules apply to the May 2009 auction as apply to future auctions. That is, if the curtailment service provider has contracted with the end-use customer prior to the prohibition, the end-use customer may still participate.

51. We deny the protests contesting PJM's proposed effective date of August 28, 2009. PJM made its initial tariff filing, in this proceeding, on February 9, 2009, requesting an April 13, 2009 effective date for its proposed tariff revisions. However, on June 2, 2009, PJM amended its filing to request that the Commission defer action on PJM's initial filing until sixty days after issuance of the Commission's order addressing the rehearing requests of Order No. 719 on the issue of how laws or regulations of a retail regulatory authority are considered by RTOs and curtailment service providers seeking to register customers in RTO demand response programs. PJM further stated that, as a result of its requested deferral, its existing tariff provisions would remain in effect. Accordingly, we find that it is reasonable for PJM to make its tariff revisions effective August 28, 2009, the date of the Commission's issuance of Order No. 719-A. Any issues relating to the May 2009 RPM auction, including the rights and obligations of auction participants, are beyond the scope this proceeding, which is instead focused on tariff provisions whose effectiveness post-dates that auction.

52. The Demand Response Alliance objects to PJM's compliance proposal, to the extent it would recognize a retail regulatory authority prohibition on certain end-use customer participation in May 2009 RPM auction. The Demand Response Alliance also seeks clarification as to their members' status with respect to this auction. As stated above, PJM's compliance revisions will become effective August 28, 2009. Accordingly, we reject PJM's proposed tariff provisions to the extent they seek to apply, by their terms, to auctions pre-dating their effective date.²⁹ We also direct PJM, in its compliance

²⁹ Any issues relating to the May 2009 RPM auction are beyond the scope of this compliance proceeding.

filing, to refile the applicable effective date for its tariff revisions, to make clear, as necessary that these provisions will not apply prior to August 28, 2009.

53. Finally, we will reject the Demand Response Alliance's recommendation that we order PJM to modify its tariff to add curtailment service providers to the categories of entities allowed to provide evidence to PJM regarding retail regulatory authority determinations. In response to the concerns expressed by the Demand Response Alliance in this regard, however, we note that PJM's compliance filing provides that upon the registration of an end-use customer with PJM by a curtailment service provider, PJM will notify the relevant electric distribution company or load serving entity and request verification regarding that load's eligibility to participate. Therefore, an electric distribution company or load serving entity could not simply fail to provide verification to PJM. Further, if the curtailment service provider objects to the response provided by the electric distribution company or load serving entity, PJM also correctly notes (as we discuss above) that the curtailment service provider can bring that dispute to either this Commission or the relevant retail regulatory authority, as appropriate.³⁰ This process should address any concerns that electric distribution companies or load serving entities will unreasonably block the participation of curtailment service providers in service territories where they are allowed to participate in PJM's Demand Response Programs.

4. PJM's Transparency Obligations

54. The September 14 Order required PJM to commit to post on its website a list of retail regulatory authorities that prohibit retail participation in PJM's Demand Response Programs, and to provide annual updates on Demand Response Program information to PJM's Markets and Reliability Committee.³¹

a. PJM's Proposal

55. PJM proposes to revise its tariff to clarify its obligation to post, on its website, a report of demand response activity and to provide a summary thereof to the PJM Markets and Reliability Committee on an annual basis. PJM states that as it receives evidence of retail regulatory prohibitions or conditions, it will be required to post on its website a list of those retail regulatory authorities that prohibit or condition retail customer participation in PJM Demand Response Programs.

³⁰ *See supra* P 24.

³¹ September 14 Order, 128 FERC ¶ 61,238 at P 45.

b. Protests and Comments

56. The Indiana Commission asserts that, while PJM's website includes Indiana on its list of retail regulatory authorities that prohibit or condition retail customer participation in PJM's programs, the website information is outdated, excludes the information necessary for an Indiana retail customer to be able to participate, and does not refer to the Indiana Commission's February 25, 2009 order or the fact that Indiana Commission pre-approval is required. The Indiana Commission adds that PJM's proposed tariff language fails to state what information PJM will be required to post to its website, or who is responsible for the accuracy and timeliness of that information.

57. The Demand Response Alliance requests that PJM be required to provide reasonable detail on its website regarding the basis for and types of restrictions and conditions on demand response participation communicated to it by retail regulatory authorities. The Demand Response Alliance asserts that such information should be accessible to all market participants and the Commission in a form that permits all parties to assess, without ambiguity, the availability of demand response opportunities in any particular retail regulatory authority footprint.³²

58. The Demand Response Alliance argues that because this information is already provided to PJM in sufficient detail to avoid ambiguity, there should be no added burden on the retail regulatory authority in having PJM make such information public in sufficient detail to permit the Commission, the PJM market monitor, and interested participants to understand the grounds for and extent of any restrictions.³³ The Demand Response Alliance asserts that such a requirement is consistent with Order No. 719's

³² The Demand Response Alliance states, for example, that currently, of the 37 retail regulatory authority actions identified on PJM's website, 14 of these entries simply indicate that action has been taken and there is no indication as to what conditions, if any, have been imposed, making it difficult for potential participants to determine if the intent was to establish unrestricted or conditioned retail customer eligibility.

³³ The Demand Response Alliance recommends the following revision to section 1.5A.11.b, as shown in italics:

As PJM receives evidence pursuant to Section 1.5A.3, PJM will post on its website a list of those Relevant Electricity Retail Regulatory Authorities that prohibit or condition retail participation in PJM Economic Load Response Program. PJM will include a list of specified conditions for retail customer participation for each [relevant electric retail regulatory authority], and all materials provided by the [relevant electric retail regulatory authority] explaining the basis for and origins of such restrictions or conditions.

holding that retail regulatory authorities must provide clear information regarding conditions or restrictions.

c. PJM's Answer

59. PJM states that, to address the concerns raised by the Indiana Commission regarding the accuracy and reliability of its postings, PJM will amend its currently posted list to include a reference to any evidence cited by the electric distribution company, or load serving entity, in support of its representation regarding the retail regulatory authority's eligibility determination.³⁴ PJM states that it will also eliminate any contact information.

d. Additional Answers

60. The Indiana Commission asserts that PJM should be required to post on its website the information of which it has knowledge. The Indiana Commission asserts that, applying this standard, PJM should be required to post information regarding the Indiana Commission's eligibility guidelines, as issued in IURC Cause No. 43566, an Indiana Commission investigation in which PJM was a participant. The Indiana Commission states that the amendment proposed in PJM's answer is acceptable to it.

e. Commission Determination

61. We accept PJM's compliance filing, as amended by the commitment it makes in its answer, regarding PJM's website and transparency obligations. We also direct PJM to include the appropriate tariff language in its compliance filing, as it relates to this commitment. In making publicly available the information relied upon by electric distribution companies and load serving entities to establish a retail regulatory prohibition, PJM will help ensure the completeness and accuracy of the information posted on its website. In doing so, it will comply with the requirement of the September 14 Order to timely post on its website a list of retail regulatory authorities who prohibit retail participation in PJM's Demand Response Programs. We find it reasonable for PJM to post information provided by the retail regulatory authority, but will not require PJM, as requested by the Demand Response Alliance, to make its own determination of what state regulatory law requires.³⁵

³⁴ The Indiana Commission notes, in its answer, that PJM has made this promised amendment and that the PJM website now includes reference to the Indiana Commission order issued February 25, 2009, regarding eligibility guidelines applicable to PJM's Demand Response Programs.

³⁵ See Order No. 719, FERC Stats. & Regs. ¶ 31,281 at n.78 (“[t]he RTO or ISO
(continued...)”)

5. Miscellaneous Issues

62. AMP proposes several minor editorial revisions to the tariff provisions included in PJM's compliance filing regarding customer registration in the Emergency Load Response Program.³⁶ As proposed by AMP (and as shown in italics here), PJM's registration provisions would provide that "[t]o extent that a completed . . . Registration Form is submitted . . . with ten or fewer business days remaining prior to the applicable . . . registration deadline . . . [,] then the registration *will* [not "may"] be rejected . . . *unless* [not "if"] the electric distribution company or Load Serving Entity *has* [not "has not"] verified the registration prior to the registration deadline."

63. AEC also proposes a number of minor editorial revisions to PJM's compliance filing, namely: (i) the replacement of the word "will" with "shall" at section 1.5A.3.01; (ii) the replacement of "conditioning" with "so conditioning" at section 1.5A.3, subsection (1)(a)(ii); and (iii) the replacement of "will be deemed to be terminated" with "shall be terminated" at section 1.5A.3.01. AEC also proposes to add, at a new subsection (1)(a)(iii) to section 1.5A.3 of PJM's economic load response program, the following clarification:

Upon the receipt [of] a response from the electric distribution company or Load Serving Entity within the referenced ten business day period that the load to be reduced is subject to other contractual obligations or to laws or regulations of the Relevant Electric Retail Regulatory Authority that expressly prohibit or condition (which condition the electric distribution company or Load Serving Entity asserts has not been satisfied), the end-use customer's participation in PJM's Economic Load Response Program, the Office of the Interconnection shall reject the registration.

64. Finally, AEC proposes to add the phrase "which condition the electric distribution company or Load Serving Entity asserts has not been satisfied" to the provisions addressing the submission of a notice of a retail regulatory authority eligibility condition, consistent with PJM's use of this qualifier elsewhere in its tariff.

may specify certain requirements [for demand response participation in wholesale markets], such as . . . certification that participation is not precluded by the relevant electric retail regulatory authority. The RTO or ISO should not be in the position of interpreting the laws or regulations of a relevant electric retail regulatory authority.").

³⁶ PJM OATT at proposed Sheet No. 418 and PJM Operating Agreement at Sheet No. 146.

a. PJM's Answer

65. PJM agrees that it would be appropriate to adopt AMP's proposed revised language. However, PJM asserts that several of AEC's proposed changes (specifically, the proposal to replace "will" with "shall" and replace "conditioning" with "so conditioning," in the provisions identified above) do not change the meaning of the language.

66. PJM also objects to AEC's proposed changes replacing "will be deemed to be terminated" with "shall be terminated," at section 1.5A.3.01 of PJM's economic load response regulations. PJM states that, in these provisions, it specifically chose the phrases "will be deemed terminated" and "shall be deemed terminated" over the language "shall be immediately terminated" and "shall be terminated" because, given the inherent administrative delay in the PJM system, the actual act of terminating the registrations is not automatic. PJM states that, as such, it is appropriate to make clear in its tariff that registrations will be "deemed" terminated at the time specified, even though the actual termination of the registration itself may not take place for several more days.

67. PJM also characterizes as unnecessary and possibly confusing AEC's proposed clarification at new subsection (1)(a)(iii) to section 1.5A.3 of PJM's economic load response program. However, PJM states that upon Commission direction, PJM will add language to the end of its existing proposed subsection (a)(1) clarifying that where the electric distribution company or load serving entity asserts that there is a law or regulation of a retail regulatory authority prohibiting or conditioning participation, and where the electric distribution company or load serving entity provides evidence of same within the ten business day review period, PJM shall deem the registration to be terminated.

68. Finally, PJM agrees that it would be appropriate to adopt AEC's proposed qualifier ("which condition the electric distribution company or Load Serving Entity asserts has not been satisfied"). However, PJM recommends that this clarification be implemented in a way that will not be overly-repetitive.

b. Commission Determination

69. We accept PJM's compliance filing, subject to the submission of an additional compliance filing incorporating into PJM's tariff those clarifications and editorial revisions proposed by AMP and AEC to which PJM agrees. We will not require PJM to make the additional revisions AEC proposes to which PJM has not consented, because such changes are not required by the September 14 Order.

The Commission orders:

(A) Rehearing of the September 14 Order is hereby denied, as discussed in the body of this order.

(B) Clarification of the September 14 Order is hereby granted, in part, and denied, in part, as discussed in the body of this order.

(C) PJM's compliance filing is hereby accepted, in part, and rejected, in part, subject to the submission of a further compliance filing within 45 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.